Competition law in the European Communities

Volume IA
Rules applicable to undertakings

Situation at 30 June 1994

EUROPEAN COMMISSION
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EUROPEAN COMMISSION

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CONTENTS

Foreword

Competition law and policy is steadily increasing in importance in the world of today. As State barriers to trade fall, it is evermore necessary to ensure that companies may operate in conditions of fair and healthy competition. The Community has an important role to play in creating a level playing-field for economic operators.

To this aim, a certain number of rules have been adopted. The publication of these rules should help ensure their observance, at the same time contributing towards transparency.

It is with this in mind that we intend to publish three volumes containing the relevant legal provisions, which are presented in a consolidated form in order to facilitate their utilization.

This volume contains the competition rules applicable to undertakings in force as of 30 June 1994. A second volume, to be published at a later date, will contain the rules applicable in the context of the control of State aids. Finally, a third volume will give an overview of competition rules applicable in the international context which are of relevance for the Community.

These volumes will be accompanied by publications which give a comprehensive overview of the functioning of the different systems. In this way we hope to provide guidance to all persons interested in these matters.

Karel Van Miert

A — Competition rules applying to undertakings in the EC and ECSC Treaties

Articles 85 to 91 of the EC Treaty

Article 85

1. The following shall be prohibited 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, and in particular those which:

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

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

(c) share markets or sources of supply;

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

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

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

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

— any agreement or category of agreements between undertakings;

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

— any concerted practice or category of concerted practices;

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

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

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

Article 86

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

Such abuse may, in particular, consist in:

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

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

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

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

Article 87

1. Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.

If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86;

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

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

Article 88

Until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86.

Article 89

1. Without prejudice to Article 88, the Commission shall, as soon as it takes up its duties, ensure the application of the principles laid down in Articles 85 and 86. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

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

Article 90

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94.

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

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

Article 91

1. If during the transitional period, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised within the common market, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State to take protective measures, the conditions and details of which the Commission shall determine.

2. As soon as this Treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, on reimportation, be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect. The Commission shall lay down appropriate rules for the application of this paragraph.

Articles 65 and 66 of the ECSC Treaty

Article 65 [1,2,3]

1. All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending:

(a) to fix or determine prices;

(b) to restrict or control production, technical development or investment;

(c) to share markets, products, customers or sources of supply.

2. However, the High Authority shall authorize specialization agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds that:

(a) such specialization or such joint-buying or selling will make for a substantial improvement in the production or distribution of those products;

(b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose; and

(c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market.

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[1] **Documents concerning the accession**
Article 156
Agreements, decisions and concerted practices in existence at the time of accession which come within the scope of Article 65 of the ECSC Treaty by reason of accession must be notified to the Commission within three months of accession. Only agreements and decisions which have been notified shall remain provisionally in force until a decision has been taken by the Commission.
(OJ L 73, 27.3.1972, p. 45).

[2] **Documents concerning the accession of the Hellenic Republic**
Article 148
Agreements, decisions and concerted practices in existence at the time of the accession of the Hellenic Republic which come within the scope of Article 65 of the ECSC Treaty by reason of this accession must be notified to the Commission within three months of accession. Only agreements and decisions which have been notified shall remain provisionally in force until a decision has been taken by the Commission.
(OJ L 291, 19.11.1979, p. 50).

[3] **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**
Article 398
Agreements, decisions and concerted practices in existence at the time of accession which come within the scope of Article 65 of the ECSC Treaty by reason of the accession must be notified to the Commission within three months of accession. Only agreements and decisions which have been notified shall remain provisionally in force until a decision has been taken by the Commission.
(OJ L 302, 15.11.1985, p. 138).

If the High Authority finds that certain agreements are strictly analogous in nature and effect to those referred to above, having particular regard to the fact that this paragraph applies to distributive undertakings, it shall authorize them also when satisfied that they meet the same requirements.

Authorizations may be granted subject to specified conditions and for limited periods. In such cases the High Authority shall renew an authorization once or several times if it finds that the requirements of subparagraphs (a) to (c) are still met at the time of renewal.

The High Authority shall revoke or amend an authorization if it finds that as a result of a change in circumstances the agreement no longer meets these requirements, or that the actual results of the agreement or of the application thereof are contrary to the requirements for its authorization.

Decisions granting, renewing, amending, refusing or revoking an authorization shall be published together with the reasons therefor; the restrictions imposed by the second paragraph of Article 47 shall not apply thereto.

3. The High Authority may, as provided in Article 47, obtain any information needed for the application of this Article, either by making a special request to the parties concerned or by means of regulations stating the kinds of agreement, decision or practice which must be communicated to it.

4. Any agreement or decision prohibited by paragraph 1 of this Article shall be automatically void and may not be relied upon before any court or tribunal in the Member States.

The High Authority shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any such agreement or decision is compatible with this Article.

5. On any undertaking which has entered into an agreement which is automatically void, or has enforced or attempted to enforce, by arbitration, penalty, boycott or any other means, an agreement or decision which is automatically void or an agreement for which authorization has been refused or revoked, or has obtained an authorization by means of information which it knew to be false or misleading, or has engaged in practices prohibited by paragraph 1 of this Article, the High Authority may impose fines or periodic penalty payments not exceeding twice the turnover on the products which were the subject of the agreement, decision or practice prohibited by this Article; if, however, the purpose of the agreement, decision or practice is to restrict production, technical development or investment, this maximum may be raised to 10% of the annual turnover of the undertakings in question in the case of fines, and 20% of the daily turnover in the case of periodic penalty payments.

Article 66

1. Any transaction shall require the prior authorization of the High Authority, subject to the provisions of paragraph 3 of this Article, if it has in itself the direct or indirect effect of bringing about within the territories referred to in the first paragraph of Article 79, as a result of action by any person or undertaking or group of persons or undertakings, a concentration between undertakings at least one of which is covered by Article 80, whether the transaction concerns a single product or a number of different products, and whether it is

effected by merger, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control. For the purpose of applying these provisions, the High Authority shall, by regulations made after consulting the Council, define what constitutes control of an undertaking.

2. The High Authority shall grant the authorization referred to in the preceding paragraph if it finds that the proposed transaction will not give to the persons or undertakings concerned the power, in respect of the product or products within its jurisdiction:

— to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or

— to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

In assessing whether this is so, the High Authority shall, in accordance with the principle of non-discrimination laid down in Article 4(b), take account of the size of like undertakings in the Community, to the extent it considers justified in order to avoid or correct disadvantages resulting from unequal competitive conditions.

The High Authority may make its authorization subject to any conditions which it considers appropriate for the purposes of this paragraph.

Before ruling on a transaction concerning undertakings at least one of which is not subject to Article 80, the High Authority shall obtain the comments of the governments concerned.

3. The High Authority shall exempt from the requirement of prior authorization such classes of transactions as it finds should, in view of the size of the assets or undertakings concerned, taken in conjunction with the kind of concentration to be effected, be deemed to meet the requirements of paragraph 2. Regulations made to this effect, with the assent of the Council, shall also lay down the conditions governing such exemption.

4. Without prejudice to the application of Article 47 to undertakings within its jurisdiction, the High Authority may, either by regulations made after consultation with the Council stating the kind of transaction to be communicated to it or by a special request under these regulations to the parties concerned, obtain from the natural or legal persons who have acquired or regrouped or are intending to acquire or regroup the rights or assets in question any information needed for the application of this Article concerning transactions liable to produce the effect referred to in paragraph 1.

5. If a concentration should occur which the High Authority finds has been effected contrary to the provisions of paragraph 1 but which nevertheless meets the requirements of paragraph 2, the High Authority shall make its approval of that concentration subject to payment by the persons who have acquired or regrouped the rights or assets in question of the fine provided for in the second subparagraph of paragraph 6; the amount of the fine shall not be less than half of the maximum determined in that subparagraph should it be clear that authorization ought to have been applied for. If the fine is not paid, the High Authority shall take the steps hereinafter provided for in respect of concentrations found to be unlawful.

If a concentration should occur which the High Authority finds cannot fulfil the general or specific conditions to which an authorization under paragraph 2 would be subject, the High Authority shall, by means of a reasoned decision, declare the concentration unlawful and, after giving the parties concerned the opportunity to submit their comments, shall order separation of the undertakings or assets improperly concentrated or cessation of joint control, and any other measures which it considers appropriate to return the undertakings or assets in question to independent operation and restore normal conditions of competition. Any person directly concerned may institute proceedings against such decisions, as provided in Article 33. By way of derogation from Article 33, the Court shall have unlimited jurisdiction to assess whether the transaction effected is a concentration within the meaning of paragraph 1 and of regulations made in application thereof. The institution of proceedings shall have suspensory effect. Proceedings may not be instituted until the measures provided for above have been ordered, unless the High Authority agrees to the institution of separate proceedings against the decision declaring the transaction unlawful.

The High Authority may at any time, unless the third paragraph of Article 39 is applied, take or cause to be taken such interim measures of protection as it may consider necessary to safeguard the interests of competing undertakings and of third parties, and to forestall any step which might hinder the implementation of its decisions. Unless the Court decides otherwise, proceedings shall not have suspensory effect in respect of such interim measures.

The High Authority shall allow the parties concerned a reasonable period in which to comply with its decisions, on expiration of which it may impose daily penalty payments not exceeding one tenth of 1% of the value of the rights or assets in question.

Furthermore, if the parties concerned do not fulfil their obligations, the High Authority shall itself take steps to implement its decision; it may in particular suspend the exercise, in undertakings within its jurisdiction, of the rights attached to the assets acquired irregularly, obtain the appointment by the judicial authorities of a receiver of such assets, organize the forced sale of such assets subject to the protection of the legitimate interests of their owners, and annul with respect to natural or legal persons who have acquired the rights or assets in question through the unlawful transaction, the acts, decisions, resolutions or proceedings of the supervisory and managing bodies or undertakings over which control has been obtained irregularly.

The High Authority is also empowered to make such recommendations to the Member States concerned as may be necessary to ensure that the measures provided for in the preceding subparagraphs are implemented under their own law.

In the exercise of its powers, the High Authority shall take account of the rights of third parties which have been acquired in good faith.

6. The High Authority may impose fines not exceeding:

— 3% of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 4;

— 10% of the value of the assets acquired or regrouped, on natural or legal persons who have evaded the obligations laid down in paragraph 1; this maximum shall be increased by one twenty-fourth for each month which elapses after the end of the 12th month following

completion of the transaction until the High Authority establishes that there has been an infringement;

— 10% of the value of the assets acquired or regrouped or to be acquired or regrouped, on natural or legal persons who have obtained or attempted to obtain authorization under paragraph 2 by means of false or misleading information;

— 15% of the value of the assets acquired or regrouped, on undertakings within its jurisdiction which have engaged in or been party to transactions contrary to the provisions of this Article.

Persons fined under this paragraph may appeal to the Court as provided in Article 36.

7. If the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used. If these recommendations are not implemented satisfactorily within a reasonable time, the High Authority shall, by decisions taken in consultation with the government concerned, determine the prices and conditions of sale to be applied by the undertaking in question or draw up production or delivery programmes with which it must comply, subject to liability to the penalties provided for in Articles 58, 59 and 64.

Article 136 of the Act of Accession of Denmark, Ireland and the United Kingdom

Article 136

1. If, before 31 December 1977, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised between the Community as originally constituted and the new Member States or between the new Member States themselves, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State or States to take protective measures, the conditions and details of which the Commission shall determine.

2. For the application of this Article to the products listed in Annex II to the EEC Treaty, the Commission shall evaluate all relevant factors, in particular the level of prices at which these products are imported into the market in question from elsewhere, account being taken of the provisions of the EEC Treaty relating to agriculture in particular Article 39.

Article 131 of the Act of Accession of Greece

Article 131

1. If before the expiry of the period of application of the transitional measures laid down under this Act for each case the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised between the Community as at present constituted and Greece, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State or States to take protective measures, the conditions and details of which the Commission shall determine.

2. For the application of this Article, to the products listed in Annex II to the EEC Treaty, the Commission shall evaluate all relevant factors, in particular the level of prices at which these products are imported into the market in question from elsewhere, account being taken of the provisions of the EEC Treaty relating to agriculture and in particular Article 39 thereof.

Article 380 of the Act of Accession of Spain and Portugal

Article 380

1. If, before the expiry of the period of application of the transitional measures laid down under this Act for each case, the Commission, on application by a Member State or by any other interested party and in accordance with rules of procedure to be adopted upon accession by the Council acting by a qualified majority on an proposal from the Commission, finds that dumping is being practised between the Community as at present constituted and the new Member States or between the new Member States, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State or States to take protective measures, the conditions and details of which the Commission shall determine.

2. For the application of this Article to the products listed in Annex II to the EEC Treaty, the Commission shall evaluate all relevant factors, in particular the level of prices at which these products are imported into the market in question from elsewhere, account being taken of the provisions of the EEC Treaty relating to agriculture and in particular Article 39.

3. The measures adopted before accession under Regulation (EEC) No 2176/84 and Decision 2177/84/ECSC with regard to the new Member States, and those adopted before accession under the anti-dumping legislation of the new Member States with regard to the Community as at present constituted, shall remain provisionally in force and shall be re-examined by the Commission which shall decide whether to amend or repeal them. Such amendment or repeal shall be implemented by the Commission or the national authorities concerned, as the case may be. Proceedings instituted before accession in Spain, Portugal or in the Community as at present constituted shall be pursued in accordance with the provisions of paragraph 1.

B — Council and Commission Regulations, Directives, Decisions and Notices relating to the application of the EC and ECSC competition rules applying to undertakings

I — General procedural rules

COUNCIL REGULATION No 17[1] OF 6 FEBRUARY 1962

First Regulation implementing Articles 85 and 86 of the Treaty amended by Regulation No 59,[2] by Regulation No 118/63/EEC[3] and by Regulation (EEC) No 2822/71[4]

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the European Parliament,

Whereas, in order to establish a system ensuring that competition shall not be distorted in the common market, it is necessary to provide for balanced application of Articles 85 and 86 in a uniform manner in the Member States;

Whereas in establishing the rules for applying Article 85(3) account must be taken of the need to ensure effective supervision and to simplify administration to the greatest possible extent;

Whereas it is accordingly necessary to make it obligatory, as a general principle, for undertakings which seek application of Article 85(3) to notify to the Commission their agreements, decisions and concerted practices;

Whereas, on the one hand, such agreements, decisions and concerted practices are probably very numerous and cannot therefore all be examined at the same time and, on the other hand, some of them have special features which may make them less prejudicial to the development of the common market;

Whereas there is consequently a need to make more flexible arrangements for the time being in respect of certain categories of agreement, decisions and concerted practices without prejudging their validity under Article 85;

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[1] OJ 13, 21.2.1962, p. 204 (Special Edition 1959-62, p. 87).
[2] OJ 58, 10.7.1962, p. 1655 (Special Edition 1959-62, p. 249).
[3] OJ 162, 7.11.1963, p. 2696 (Special Edition 1963-64, p. 55).
[4] OJ L 285, 29.12.1971, p. 49 (Special Edition 1971 (III), p. 1035).

Whereas it may be in the interest of undertakings to know whether any agreements, decisions or practices to which they are party, or propose to become party, may lead to action on the part of the Commission pursuant to Article 85(1) or Article 86;

Whereas, in order to secure uniform application of Articles 85 and 86 in the common market, rules must be made under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for applying those Articles;

Whereas for this purpose the Commission must have the cooperation of the competent authorities of the Member States and be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations as are necessary to bring to light any agreement, decision or concerted practice prohibited by Article 85(1) or any abuse of a dominant position prohibited by Article 86;

Whereas in order to carry out its duty of ensuring that the provisions of the Treaty are applied the Commission must be empowered to address to undertakings or associations of undertakings recommendations and decisions for the purpose of bringing to an end infringements of Articles 85 and 86;

Whereas compliance with Articles 85 and 86 and the fulfilment of obligations imposed on undertakings and associations of undertakings under this Regulation must be enforceable by means of fines and periodic penalty payments;

Whereas undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand, and it must be ensured that wide publicity is given to decisions taken;

Whereas all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice under the conditions specified in the Treaty; whereas it is moreover desirable to confer upon the Court of Justice, pursuant to Article 172, unlimited jurisdiction in respect of decisions under which the Commission imposes fines or periodic penalty payments;

Whereas this Regulation may enter into force without prejudice to any other provisions that may hereafter be adopted pursuant to Article 87,

HAS ADOPTED THIS REGULATION:

Article 1

Basic provision

Without prejudice to Articles 6, 7 and 23 of this Regulation, agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty and the abuse of a dominant position in the market, within the meaning of Article 86 of the Treaty, shall be prohibited, no prior decision to that effect being required.

Article 2

Negative clearance

Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the 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.

Article 3

Termination of infringements

1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

3. Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

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.

Article 5

Notification of existing agreements, decisions and practices

1. Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty which are in existence at the date of entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) shall be notified to the Commission before 1 November 1962. However, notwithstanding the foregoing provisions, any agreements, decisions and concerted practices to which not more than two undertakings are party shall be notified before 1 February 1963.

2. Paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4(2); these may be notified to the Commission.

Article 6

Decisions pursuant to Article 85(3)

1. Whenever the Commission takes a decision pursuant to Article 85(3) of the Treaty, it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.

2. The second sentence of paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4(2) and Article 5(2), nor to those falling within Article 5(1) which have been notified within the time limit specified in Article 5(1).

Article 7

Special provisions for existing agreements, decisions and practices

1. Where agreements, decisions and concerted practices in existence at the date of entry into force of this Regulation and notified within the time limits specified in Article 5(1) do not

satisfy the requirements of Article 85(3) of the Treaty and the undertakings or associations of undertakings concerned cease to give effect to them or modify them in such a manner that they no longer fall within the prohibition contained in Article 85(1) or that they satisfy the requirements of Article 85(3), the prohibition contained in Article 85(1) shall apply only for a period fixed by the Commission. A decision by the Commission pursuant to the foregoing sentence shall not apply as against undertakings and associations of undertakings which did not expressly consent to the notification.

2. Paragraph 1 shall apply to agreements, decisions and concerted practices falling within Article 4(2) which are in existence at the date of entry into force of this Regulation if they are notified before 1 January 1967.

Article 8

Duration and revocation of decisions under Article 85(3)

1. A decision in application of Article 85(3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto.

2. A decision may on application be renewed if the requirements of Article 85(3) of the Treaty continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision;

(b) where the parties commit a breach of any obligation attached to the decision;

(c) where the decision is based on incorrect information or was induced by deceit;

(d) where the parties abuse the exemption from the provisions of Article 85(1) of the Treaty granted to them by the decision.

In cases to which subparagraphs (b), (c) or (d) apply, the decision may be revoked with retroactive effect.

Article 9

Powers

1. Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty.

2. The Commission shall have power to apply Article 85(1) and Article 86 of the Treaty; this power may be exercised notwithstanding that the time limits specified in Article 5(1) and in Article 7(2) relating to notification have not expired.

3. As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5(1) and in Article 7(2) relating to notification have not expired.

Article 10

Liaison with the authorities of the Member States

1. The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85(3).

2. The Commission shall carry out the procedure set out in paragraph 1 in close and constant liaison with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure.

3. An Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article 85(3) of the Treaty.

4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies. Each Member State shall appoint an official to represent it who, if prevented from attending, may be replaced by another official.

5. The consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than 14 days after dispatch of the notice convening it. The notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

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.

Article 12

Inquiry into sectors of the economy

1. If in any sector of the economy the trend of trade between Member States, price movements, inflexibility of prices or other circumstances suggest that in the economic sector concerned competition is being restricted or distorted within the common market, the Commission may decide to conduct a general inquiry into that economic sector and in the course thereof may request undertakings in the sector concerned 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.

2. The Commission may in particular request every undertaking or association of undertakings in the economic sector concerned to communicate to it all agreements, decisions and concerted practices which are exempt from notification by virtue of Article 4(2) and Article 5(2).

3. When making inquiries pursuant to paragraph 2, the Commission shall also request undertakings or groups of undertakings whose size suggests that they occupy a dominant position within the common market or a substantial part thereof to supply to the Commission such particulars of the structure of the undertakings and of their behaviour as are requisite to an appraisal of their position in the light of Article 86 of the Treaty.

4. Article 10(3) to (6) and Articles 11, 13 and 14 shall apply correspondingly.

Article 13

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 14(1), or which it has ordered by decision pursuant to Article 14(3). The officials of the competent authorities of the Member States responsible for conducting these investigations

shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, the officials of the Commission may assist the officials of such authority in carrying out their duties.

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.

Article 15

Fines

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently:

(a) they supply incorrect or misleading information in an application pursuant to Article 2 or in a notification pursuant to Articles 4 or 5; or

(b) they supply incorrect information in response to a request made pursuant to Article 11(3) or (5) or to Article 12, or do not supply information within the time limit fixed by a decision taken under Article 11(5); or

(c) they produce the required books or other business records in incomplete form during investigations under Articles 13 or 14, or refuse to submit to an investigation ordered by decision issued in implementation of Article 14(3).

2. The Commission may by 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 the 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.

3. Article 10(3) to (6) shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

5. The fines provided for in paragraph 2(a) 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 agreements, decisions or concerted practices in existence at the date of entry into force of this Regulation, provided that notification was effected within the time limits specified in Article 5(1) and Article 7(2).

6. Paragraph 5 shall not have effect where the Commission has informed the hundertakings 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.

Article 16

Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1 000 units of account per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Articles 85 or 86 of the Treaty, in accordance with a decision taken pursuant to Article 3 of this Regulation;

(b) to refrain from any act prohibited under Article 8(3);

(c) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(5);

(d) to submit to an investigation which it has ordered by decision taken pursuant to Article 14(3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 10(3) to (6) shall apply.

Article 17

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 17 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 18

Unit of account

For the purposes of applying Articles 15 to 17 the unit of account shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 19

Hearing of the parties and of third persons

1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85(3) of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20

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.

Article 21

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 22

Special provisions

1. The Commission shall submit to the Council proposals for making certain categories of agreement, decision and concerted practice falling within Article 4(2) or Article 5(2) compulsorily notifiable under Articles 4 or 5.

2. Within one year from the date of entry into force of this Regulation, the Council shall examine, on a proposal from the Commission, what special provisions might be made for exempting from the provisions of this Regulation agreements, decisions and concerted practices falling within Article 4(2) or Article 5(2).

Article 23

Transitional provisions applicable to decisions of authorities of the Member States

1. Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty to which, before the entry into force of this Regulation, the competent authority of a Member State has declared Article 85(1) to be inapplicable pursuant to Article 85(3) shall not be subject to compulsory notification under Article 5. The decision of the competent authority of the Member State shall be deemed to be a decision within the meaning of

Article 6; it shall cease to be valid upon expiration of the period fixed by such authority but in any event not more than three years after the entry into force of this Regulation. Article 8(3) shall apply.

2. Applications for renewal of decisions of the kind described in paragraph 1 shall be decided upon by the Commission in accordance with Article 8(2).

Article 24

Implementing provisions

The Commission shall have power to adopt implementing provisions concerning the form, content and other details of applications pursuant to Articles 2 and 3, and of notifications pursuant to Articles 4 and 5, and concerning hearings pursuant to Article 19(1) and (2).

This Regulation shall be binding in its entirety and directly applicable in all Member States.[1,2]

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[1] **Documents concerning the accession**
Article 25
1. As regards agreements, decisions and concerted practices to which Article 85 of the Treaty applies by virtue of accession, the date of accession shall be substituted for the date of entry into force of this Regulation in every place where reference is made in this Regulation to this latter date.
2. Agreements, decisions and concerted practices existing at the date of accession to which Article 85 of the Treaty applies by virtue of accession shall be notified pursuant to Article 5(1) or Article 7(1) and (2) within six months from the date of accession.
3. Fines under Article 15(2)(a) shall not be imposed in respect of any act prior to notification of the agreements, decisions and practices to which paragraph 2 applies and which have been notified within the period therein specified.
4. New Member States shall take the measures referred to in Article 14(6) within six months from the date of accession after consulting the Commission.
(OJ L 73, 27.3.1972, p. 92).

[2] **Documents concerning the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic**
The following paragraph is added to Article 25:
'5. The provisions of paragraphs 1 to 4 above still apply in the same way in the case of the accession of the Hellenic Republic, the Kingdom of Spain and of the Portuguese Republic.'
(OJ L 302, 15.11.1985, p. 165).

COMMISSION REGULATION No 27[1] OF 3 MAY 1962

First Regulation implementing Council Regulation No 17 of 6 February 1962
Amended by Regulation (EEC) No 1133/68[2] of 26 July 1968,
by Regulation (EEC) No 1699/75[3] of 2 July 1975,
by Regulation (EEC) No 2526/85[4] of 5 August 1985
and by Commission Regulation (EC) No 3666/93 of 15 December 1993[5]
(Form, content and other details concerning applications and notifications)

THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the provisions of the Treaty establishing the European Economic Community, and in particular Articles 87 and 155 thereof,

Having regard to Article 24 of Council Regulation No 17 of 6 February 1962 (first Regulation implementing Articles 85 and 86 of the Treaty),

Whereas under Article 24 of Council Regulation No 17 the Commission is authorized to adopt implementing provisions concerning the form, content and other details of applications under Articles 2 and 3 and of notifications under Articles 4 and 5 of that Regulation;

Whereas the submission of such applications and notifications may have important legal consequences for each of the undertakings which is party to an agreement, decision or concerted practice; whereas every undertaking should accordingly have the right to submit an application or a notification to the Commission; whereas, furthermore, an undertaking exercising this right must inform the other undertakings which are parties to the agreement, decision or concerted practice, in order to enable them to protect their interests;

Whereas it is for the undertakings and associations of undertakings to transmit to the Commission information as to facts and circumstances in support of applications under Article 2 and of notifications under Articles 4 and 5;

Whereas it is desirable to prescribe forms for use in applications for negative clearance relating to implementation of Article 85(1) and for notifications relating to implementation of Article 85(3) of the Treaty in order to simplify and accelerate consideration by the competent departments, in the interests of all concerned,

HAS ADOPTED THIS REGULATION:

Article 1

Persons entitled to submit applications and notifications

1. Any undertaking which is party to agreements, decisions or practices of the kind described in Articles 85 and 86 of the Treaty may submit an application under Article 2 or a

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[1] OJ 35, 10.5.1962, p. 1118 (Special Edition 1959-62, p. 132).
[2] OJ L 189, 1.8.1968, p. 1 (Special Edition 1968 II, p. 400).
[3] OJ L 172, 3.7.1975, p. 11.
[4] OJ L 240, 7.9.1985, p. 1.
[5] OJ L 336, 31.12.1993, p. 1.

notification under Articles 4 and 5 of Regulation No 17. Where the application or notification is submitted by some, but not all, of the undertakings concerned, they shall give notice to the others.

2. Where applications and notifications under Articles 2, 3(1), 3(2)(b), 4 and 5 of Regulation No 17 are signed by representatives of undertakings or associations of undertakings, or natural or legal persons such representatives shall produce written proof that they are authorized to act.

3. Where a joint application or notification is submitted a joint representative should be appointed.

Article 2

Submission of applications and notifications

1. Fifteen copies of each application and notification shall be submitted to the Commission.[1]

2. The supporting documents shall be either original or copies; copies must be certified as true copies of the original.

3. Applications and notifications shall be in one of the official languages of the Community. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation in one of the official languages shall be attached.

4. Where applications and notifications are made pursuant to Articles 53 and 54 of the Agreement on the European Economic Area, they may also be in one of the official languages of the EFTA States or the working language of the EFTA surveillance Authority.

Article 3

Effective date of submission of applications and registrations

The date of submission of an application or notification shall be the date on which it is received by the Commission. Where, however, the application or notification is sent by registered post, it shall be deemed to have been received on the date shown on the postmark of the place of posting.

Article 4

Content of applications and notifications

1. Applications under Article 2 of Regulation No 17 relating to the applicability of Article 85(1) of the Treaty and notifications under Article 4 or Article 5(2) of Regulation No 17 shall be submitted on Form A/B, in the manner prescribed on the form and in the Complementary Note thereto, as shown in the Annex to this Regulation.

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[1] Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic. (OJ L 302, 15.11.1985, p. 166).

2. Applications and notifications shall contain the information asked for in Form A/B and the Complementary Note.

3. Several participating undertakings may submit an application or notification on a single form.

4. Applications under Article 2 of Regulation No 17 relating to the applicability of Article 86 of the Treaty shall contain a full statement of the facts, specifying, in particular, the practice concerned and the position of the undertaking or undertakings within the common market or a substantial part thereof in regard to products or services to which the practice relates. Form A/B may be used.

Article 5

Transitional provisions

1. Applications and notifications submitted prior to the date of entry into force of this Regulation otherwise than on the prescribed forms shall be deemed to comply with Article 4 of this Regulation.

2. The Commission may require a duly completed form to be submitted to it within such time as it shall appoint. In that event, applications and notifications shall be treated as properly made only if the forms are submitted within the prescribed period and in accordance with the provisions of this Regulation.

Article 6

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

ANNEX

NB: This form must be accompanied by an Annex containing the information specified in the attached Complementary note.

The form and the Annex must be supplied in 15 copies (two for the Commission, one for each Member State and one for the EFTA Surveillance Authority). Supply three copies of any relevant agreement and one copy of other supporting documents.

Please do not forget to complete the 'Acknowledgement of receipt' annexed.

If space is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM A/B

TO THE EUROPEAN COMMISSION

Directorate-General for Competition,
rue de la Loi 200
B-1049 Brussels.

A.1. Application for negative clearance pursuant to Article 2 of Council Regulation No 17, as well as Article 53(1) or of Article 54 of the Agreement on the European Economic Area[1].

B.1. Notification of an agreement, decision or concerted practice pursuant to Article 4 (or 5) of Council Regulation No 17 with a view to obtaining exemption pursuant to Article 85(3) of the Treaty establishing the European Community, including notifications claiming benefit of an opposition procedure; as well as Article 53(3) of the EEA Agreement.

Identity of the parties

1. *Identity of applicant/notifier*

Full name and address, telephone, telex and facsimile numbers, and brief description[2] of the undertaking(s) or association(s) of undertakings submitting the application or notification.

For partnerships, sole traders or any other unincorporated body trading under a business name, give, also, the name, forename(s) and address of the proprietor(s) or partner(s).

Where an application or notification is submitted on behalf of some other person (or is submitted by more than one person) the name, address and position of the repre-

[1] Hereinafter referred to as 'the EEA Agreement'.
[2] For example: 'motor vehicle manufacturer', 'computer service bureau', 'conglomerate'.

sentative (or joint representative) must be given, together with proof of his authority to act. Where an application or notification is submitted by or on behalf of more than one person they should appoint a joint representative (Article 1(2) and (3) of Commission Regulation No 27).

2. *Identity of any other parties*

Full name and address and brief description of any other parties to the agreement, decision or concerted practice (hereinafter referred to as 'the arrangements').

State what steps have been taken to inform these other parties of this application or notification.

(This information is not necessary in respect of standard contracts which an undertaking submitting the application or notification has concluded or intends to conclude with a number of parties (e.g. a contract appointing dealers).

Purpose of this application/notification (see Complementary note)

(Please answer yes or no to the questions.)

Are you asking for negative clearance alone? (See Complementary note — Section V, end of first paragraph — for the consequence of such a request.)

Are you applying for negative clearance, and also notifying the arrangements to obtain an exemption in case the Commission does not grant negative clearance?

Are you only notifying the arrangements in order to obtain an exemption?

Do you claim that this application may benefit from an opposition procedure? (See Complementary note — Sections IV, V, VII and VIII and Annex II.) If you answer 'yes', please specify the Regulation and Article number on which you are relying.

Would you be satisfied with a comfort letter? (See the end of Section VIII of the Complementary note.)

The undersigned declare that the information given above and in the ... pages annexed hereto is correct to the best of their knowledge and belief, that all estimates are identified as such and are their best estimates of the underlying facts and all the opinions expressed are sincere.

They are aware of the provisions of Article 15(1)(a) of Regulation No 17 (see attached Complementary note).

Place and date: ....

Signatures: ....

....

....

EUROPEAN
COMMISSION

Brussels, ...

Directorate-General for Competition

To

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if the top half is completed in a single copy by the person lodging it.)

Your application for negative clearance dated: .....

Your notification dated: .....

Concerning .....

Your reference: .....

Parties:

1. .....

2. ..... and others

(There is no need to name the other undertakings party to the arrangement.)

(The be completed by the Commission.)

was received on: .....

and registered under No: IV/.....

Please quote the above number in all corespondence.

Address: rue de la Loi 200 B-1049 Brussels.

Telephone: Direct line: 29 ..... Telephone exchange: 299 11 11.

Fax No: 29.....

COMPLEMENTARY NOTE

CONTENTS

Additions or alterations to the information given in the Annexes will be published by the Commission from time to time.

NB: Any undertaking uncertain about how to complete a notification or wishing further explanation may contact the Directorate-General for Competition (DG IV) or the Competition Directorate of the EFTA Surveillance Authority in Brussels. Alternatively, any Commission Information Office (those in the Community and in the EFTA States are listed in Annex III), will be able to obtain guidance or indicate an official in Brussels who speaks the preferred official Community language or official language of one of the EFTA States.[2]

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[1] The texts of Annexes I, II and III are reproduced in OJ L 336, 31.12.1993, pages 16 to 23.

[2] For the purposes of this note, any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the Agreement on the European Economic Area. See the relevant text of the Protocol adjusting the Agreement on the European Economic Area in Annex II to this note, as well as the list in Annex III.

I. Purpose of the EC and EEA competition rules

1. *Purpose of the Community competition rules*

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

Article 85(1) of the Treaty establishing the European Community (the text of Articles 85 and 86 is reproduced in Annex I to this note) prohibits restrictive agreements, decisions or concerned practices which may affect trade between Member States, and Article 85(2) declares agreements and decisions containing such restrictions void (although the European 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 practices 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 (the references to this and all other acts mentioned in this note or relevant to notifications and applications made on Form A/B are listed in Annex II to this note).

2. *Purpose of the EEA competition rules*

The competition rules of the Agreement on the EEA (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 restrictive practices 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 to this note) prohibits restrictive agreements, decisions or concerted practices 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 (although the European Court of Justice has held that if restrictive terms of agreements are severable, only those terms are void); Article 53(3), however, provides for exemption of practices 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.

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

II. Competence of the Commission and of the EFTA surveillance authority to apply the EEA competition rules

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. Notifications and applications relating to restrictive 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 in the sense of the Commission notice of 1986 on agreements of minor importance.[1] Furthermore, all restrictive agreements, decisions or concerted practices affecting trade between one Member State and one or more EFTA States should be notified to the Commission, provided the undertakings concerned achieve more than 67% of their combined EEA-wide turnover within the Community.[2] 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 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 dominance exists only in the Community, or with the EFTA Surveillance Authority, if dominance exists only in the territory of the EFTA States, or a substantial part of it. Only where dominance 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 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.

III. Negative clearance

The purpose of the negative clearance procedure is to allow business ('undertaking') to ascertain whether or not the Commission considers that any of their arrangements or behaviour are prohibited pursuant to Article 85(1) or 86 of the Treaty and/or Article 53(1) or 54 of the EEA Agreement. (It is governed by Article 2 of Regulation No 17.) Clearance takes the form of a decision by the Community certifying that, on the basis of the facts in its possession, there are no grounds pursuant to Article 85(1) or 86 of the Treaty and/or Article 53(1) or 54 of the EEA Agreement for action on its part in respect of the arrangements or behaviour.

Any party may apply for negative clearance, even without the consent (but not without the knowledge) of other parties to arrangements. There would be little point in applying, however, where arrangements or behaviour clearly do not fall within the scope of Article 85(1) or 86 of the Treaty, and/or Article 53(1) or 54 of the EEA Agreement, where

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[1] OJ C 231, 12.9.1986, p. 2.

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

applicable. (In this connection, your attention is drawn to the last paragraph of V below and to Annex II.) Nor is the Commission obliged to give negative clearance — Article 2 of Regulation No 17 states that '... the Commission may certify ...'. The Commission does not usually issue negative clearance decision in cases which, in its opinion, so clearly do not fall within the scope of the prohibition of Article 85(1) of the Treaty and/or Article 53(1) of the EEA Agreement that there is no reasonable doubt for it to resolve by such a decision.

IV. Exemption

The purpose of the procedure for exemption pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement is to allow undertakings to enter into arrangements which, in fact, offer economic advantages but which, without an exemption, would be prohibited pursuant to Article 85(1) of the Treaty and/of Article 53(1) of the EEA Agreement. (It is governed by Articles 4, 6 and 8 of Regulation No 17 and, for new Member States, by Articles 5, 7 and 25; with respect to existing agreements falling under Article 53(1) of the EEA Agreement by virtue of its entry into force, it is governed by Articles 5 to 13 of Protocol 21 to the EEA Agreement.) It takes the form of a decision by the Commission declaring Article 85(1) of the Treaty and/or Article 53(1) of the EEA Agreement to be inapplicable to the arrangements described in the decision. Article 8 of Regulation No 17 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.

Any party may notify arrangements, even without the consent (but not without the knowledge) of other parties.

The Commission has adopted a number of regulations granting exemption to categories of agreements. These group exemptions also apply with respect to the EEA in the form as contained in Annex XIV to the EEA Agreement. Some of these regulations (see Annex II for the latest list) provide that some agreements may benefit by such an 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 pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement and if the benefit of an opposition procedure is claimed in the notification.

A decision granting exemption pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement may have retroactive effect but, with certain exceptions, cannot be made effective earlier than the date of notification (Article 6 of Regulation No 17; see also Article 6 of Protocol 21 to the EEA Agreement). Should the Commission find that notified arrangements are indeed prohibited by Article 85(1) of the Treaty and/or Article 53(1) of the EEA Agreement, and cannot be exempted pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement and, therefore, take a decision condemning them, the parties are nevertheless protected, from the date of notification, against fines for any infringement described in the notification (Article 3 and Article 15(5) and (6) of Regulation No 17).

V. Purpose of the form

The purpose of Form A/B is to allow undertakings, or associations of undertakings, wherever situated, to apply to the Commission for negative clearance for arrangements or behaviour, or to notify such arrangements and apply to have them exempted from the prohibition of Article 85(1) of the Treaty by virtue of Article 85(3) and/or of Article 53(1) of the EEA Agreement by virtue of its Article 53(3). The form allows undertakings applying for negative clearance to notify, at the same time, in order to obtain an exemption. It should be noted that only a notification in order to obtain exemption affords immunity from fines (Article 15(5)).

To be valid, applications for negative clearance in respect of Article 85 of the Treaty and/or Article 53(1) of the EEA Agreement, notifications to obtain an exemption and notifications claiming the benefit of an opposition procedure must be made on Form A/B (by virtue of Article 4 of Regulation No 27). (Undertakings applying for negative clearance for their behaviour in relation to a possible dominant position — Article 86 of the Treaty and/or Article 54 of the EEA Agreement — need not use Form A/B (see Article 4(4) of Regulation No 27), but they are strongly recommended to give all the information requested at X below in order to ensure that their application gives a full statement of the facts.) The applications or notifications made on the Form A/B issued by the EFTA side are equally valid. However, if the arrangements or behaviour concerned solely fall under Article 85 or 86 of the Treaty, i.e. have no EEA relevance whatsoever, it is advisable to use the present form established by the Commission.

Before completing a form, your attention is particularly drawn to the regulations granting block exemption and the notices listed in Annex II — these were published to allow undertakings to judge for themselves, in many cases, whether there was any doubt about their arrangements. This would allow them to avoid the considerable bother and expense, both for themselves and for the Commission, of submitting and examining an application or notification where there is clearly no doubt.

VI. Nature of the form

The form consists of a single sheet calling for the identity of the applicant(s) or notifier(s) and of any other parties. This must be supplemented by further information given under the headings and references detailed below (see X). For preference the paper used should be A4 (21 × 29.7 cm — the same size as the form) but must not be bigger. Leave a margin of at least 25 mm or one inch on the left-hand side of the page and, if you use both sides, on the right-hand side of the reverse.

VII. The need for complete and accurate information

It is important that applicants give all the relevant facts. Although the Commission has the right to seek further information from applicants or third parties, and is obliged to publish a summary of the application before granting negative clearance or exemption pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement, it will usually base its

decision on the information provided by the applicant. Any decision taken on the basis of incomplete information could be without effect in the case of a negative clearance, or voidable in that of an exemption. For the same reason, it is also important to inform the Commission of any material changes to your arrangements made after your application or notification.

Complete information is of particular importance if you are claiming the benefit of a block exemption through an opposition procedure. Such exemption is dependent on the information supplied being complete and in accordance with the facts. If the Commission does not oppose a claim to benefit under this procedure on the basis of the facts in a notification and, subsequently, additional or different facts come to light that could and should have been in the notification, then the benefit of the exemption will be lost, and with retroactive effect. Similarly, there would be little point in claiming the benefit of an opposition procedure with clearly incomplete information, the Commission would be bound either to reject such a notification or oppose exemption in order to allow time for further information to be provided.

Moreover, you should be aware of the provisions of Article 15(1)(a) of Regulation No 17 which reads as follows:

> 'The Commission may by decision impose on undertakings or associations of undertakings fines from 100 to 5 000 units of account[1] where, intentionally or negligently, they supply incorrect or misleading information in an application pursuant to Article 2 or in a notification pursuant to Article 4 or 5.'

The key words here are 'incorrect or misleading information'. However, it often remains a matter of judgment how much detail is relevant; the Commission accepts estimates where accurate information is not readily available in order to facilitate notifications; and the Commission calls for opinions as well as facts.

You should therefore note that the Commission will use these powers only where applicants or notifiers have, intentionally or negligently, provided false information or grossly inaccurate estimates or suppressed readily available information or estimates, or have deliberately expressed false opinions in order to obtain negative clearance or exemption.

VIII. 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. The application or notification might be considered invalid if obviously incomplete or not on the obligatory form.

Further information might be sought from the applicants or from third parties (Article 11 or 14 of Regulation No 17) and suggestions might be made as to amendments to the arrangements that might make them acceptable.

A notification claiming the benefit of an opposition procedure may be opposed by the Commission either because the Commission does not agree that the arrangements should

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[1] The value of the European currency unit (ecu) which has replaced the unit of account, is published daily in the 'C' series of the *Official Journal of the European Communities*.

benefit from a block exemption or to allow for more information to be sought. If the Commission opposes a claim, and unless the Commission subsequently withdraws its opposition, that notification will then be treated as an application for an individual exemption decision.

If, after examination, the Commission intends to grant the application, 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 Member States competent in the matter of restrictive practices and monopolies (Article 10 of Regulation No 17) and attended, where the case falls under the EEA Agreement, by representatives of the EFTA Surveillance Authority and EFTA States who 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 a decision.

Sometimes files are 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 the applicants are satisfied by a less formal letter from the Commission's departments (sometimes called a 'comfort letter') indicating that the arrangements do not call for any action by the Commission, at least in present circumstances. 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 if necessary — if, for example, it were to be asserted that a contract was void pursuant to Article 85(2) of the Treaty and/or Article 53(2) of the EEA Agreement — take an appropriate decision.

IX. Secrecy

Article 214 of the Treaty, Articles 20 and 21 of Regulation No 17, Article 9 of Protocol 23 to the EEA Agreement, Article 122 of the EEA Agreement as well as 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, Member States, the EFTA Surveillance Authority, and EFTA States not to disclose information of the kind covered by the obligation of professional secrecy. On the other hand, Article 19(3) of Regulation No 17 requires the Commission to publish a summary of your application, should it intend to grant it, before taking the relevant decision. In this publication, the Commission shall have regard to the legitimate interest of undertakings in the protection of their business secrets. In this connection, if you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulgeld to other parties, please put all such information in a second Annex with each page clearly marked 'Business Secrets'; in the principal Annex, under any affected heading state 'see second Annex' or 'see also second Annex'; in the second Annex repeat the affected heading(s) and reference(s) and give the information you do not wish to have published, together with your reasons for this. Do not overlook the fact that the Commission may have to publish a summary of your application.

Before publishing an Article 19(3) notice, the Commission will show the undertakings concerned a copy of the proposed text.

X. Further information and headings to be used in the annex to form A/B

The further information is to be given under the following headings and reference numbers. Wherever possible, give exact information. If this is not readily available, give your best estimate, and identify what you give as an estimate. If you believe any detail asked for to be unavailable or irrelevant, please explain why. This may, in particular, be the case if one party is notifying arrangements alone without the cooperation of other parties. Do not overlook the fact that Commission officials are ready to discuss what detail is relevant (see the *nota bene* at the beginning of this Complementary note). An example that might help you is available on request.

1. *Brief description*

Give a brief description of the arrangements or behaviour (nature, purpose, date(s) and duration) — (full details are requested below).

2 *Market*

The nature of the goods or services affected by the arrangements or behaviour (include the heading number according to the Harmonized Commodity Description and Coding System). A brief description of the structure of the market (or markets) for these goods or services — e.g. who sells in it, who buys in it, its geographical extent, the turnover in it, how competive it is, whether it is easy for new suppliers to enter the market, whether there are substitute products. If you are notifying a standard contract (e.g. a contract appointing dealers), say how many you expect to conclude. If you know of any studies of the market, it would be helpful to refer to them.

3. *Fuller details of the party or parties*

3.1. Do any of the parties form part of a group of companies? A group relationship is deemed to exist where a firm:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, the board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs of another.

If the answer is yes, give:

— the name and address of the ultimate parent company,

— a brief description of the business of the group[1] (and, if possible, one copy of the last set of group accounts),

[1] For example: 'motor vehicle manufacturer', 'computer service bureau', 'conglomerate'.

— the name and address of any other company in the group competing in a market affected by the arrangements or in any related market, that is to say any other company competing directly or indirectly with the parties ('relevant associated company').

3.2. The most recently available total, and total EEA-wide turnover of each of the parties and, as the case may be, of the group of which it forms part (it could be helpful also if you could provide one copy of the last set of accounts). The figures and percentage of the EEA-wide total turnover achieved within the Community and within the territory of the EFTA States.

3.3. The sales or turnover of each party in the goods or services affected by the arrangements in the Community, in the territory of the EFTA States, in the EEA territory and worldwide. If the turnover in the Community or in the territory of the EFTA States or in the EEA territory is material (say more than a 5% market share), please also give figures for each Member State and for each EFTA State,[1] and for previous years (in order to show any significant trends), and give each party's sales targets for the future. Provide the same figures for any relevant associated company. (Under this heading, in particular, your best estimate might be all that you can readily supply.)

For the calculation of turnover in the banking and insurance sector see Article 3 of Protocol 22 to the EEA Agreement.

3.4. In relation to the market (or markets) for the goods or services described at 2, give, for each of the sales or turnover figures in 3.3, your estimate of the market share it represents, within the Community, within the territory of the EFTA States, and within the EEA territory as a whole.

3.5. If you have a substantial interest falling short of control (more than 25% but less than 50%) in some other company competing in a market affected by the arrangements, or if some other such company has a substantial interest in yours, give its name and address and brief details.

4. *Full details of the arrangements*

4.1. If the contents are reduced to writing give a brief description of the purpose of the arrangements and attach three copies of the text (except that the technical descriptions often contained in know-how agreements may be omitted; in such cases, however, indicate parts omitted).

If the contents are not, or are only partially, reduced to writing, give a full description.

4.2. Detail any provisions contained in the arrangements 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,

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[1] See list in Annex III.

— purchases from or sales to third parties,

— whether to apply similar terms for the supply of equivalent goods or services,

— whether to offer different goods or services separately or together.

(If you ar claiming the benefit of an opposition procedure, identify particularly in this list the restrictions that exceed those automatically exempted by the relevant regulation.)

4.3. State between which Member States and/or EFTA States[1] trade may be affected by the arrangements, and whether trade between the Community or the EEA territory, and any third countries is affected.

5. *Reasons for negative clearance*

If you are applying for negative clearance state, under the reference:

5.1. Why, i.e. state which provision or effects of the arrangements or behaviour might, in your view, raise questions of compatibility with the Community's and/or 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 arrangements or behaviour that you wish to have resolved by a negative clearance decision.

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

5.2. why the arrangements 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

5.3. why the arrangements 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

5.4. why the arrangements 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.

6. *Reasons for exemption*

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

6.1. the arrangements contribute to improving production or distribution, and/or promoting technical or economic progress;

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

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[1] See list in Annex III.

6.3. all restrictive provisions of the arrangements are indispensable to the attainment of the aims set out under 6.1 (if your are claiming the benefit of an opposition procedure, it is particularly important that you should identify and justify restrictions that exceed those automatically exempted by the relevant regulation); and

6.4. the arrangements do not eliminate competition in respect of a substantial part of the goods or services concerned.

7. *Other information*

7.1. 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 EC or EFTA authorities or courts concerning these or any related arrangements.

7.2. Give any other information presently available that you think might be helpful in allowing the Commission to appreciate whether there are any restrictions contained in the agreement, or any benefits that might justify them.

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

7.4. State, with reasons, the urgency of your application or notification.

XI. Languages

Your are entitled to notify your agreements in any of the official languages of the European Community or of an EFTA State. In order to ensure rapid proceedings, you are, however, invited to use, if possible, in case of 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 notification to the Commission, one of the official languages of the European Community or the working language of the EFTA Surveillance Authority.

ANNEX

This form[1] and the supporting documents should be forwarded in 15 copies together with proof in duplicate of the representative's authority to act.

If the space opposite each question is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM C

TO THE EUROPEAN COMMISSION

Directorate-General for Competition,
rue de la Loi 200
B-1049 Brussels.

Application for initiation of procedure to establish the existence of an infringement of Article 85 or 86 of the Treaty, and/or Article 53 or 54 of the Agreement on the European Economic Area,[2] submitted by natural or legal persons pursuant to Article 3 of Council Regulation No 17.

I. Information regarding parties concerned

1. Name, forenames and address of person submitting the application. If such person is acting as a representative, state also the name and address of his principal; for an undertaking, or association of undertakings or persons, state the name, forenames and address of the proprietors or members; for legal persons, state the name, forenames and address of their legal representatives.

Proof of representative's authority to act must be supplied;

If the application is submitted by a number of persons or on behalf of a number of persons, the information must be given in respect of each applicant or principal.

2. Name and address of persons to whom the application relates.

II. Details of the alleged infringement

Set out in detail, in an Annex, the facts from which, in your opinion, it appears that there is infringement of Article 85 or 86 of the Treaty and/or Article 53 or 54 of the EEA Agreement.

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[1] Applications made by using Form C issued by the Commission and Form C issued by the EFTA side are equally valid.

[2] Hereinafter referred to as 'the EEA Agreement'. Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement.

Indicate in particular:

1. the practices of the undertakings or associations of undertakings to which this application relates which have as their object or effect the prevention, restriction or distortion of competition or constitute an abuse of a dominant position within the common market, within the territory of the EFTA States or within the EEA territory;

2. to what extent trade between Member States, between the Community and one or more EFTA States, or between EFTA States may be affected;

3. the nature of the goods affected by the alleged infringements (include the heading number according to the Harmonized Commodity Description and Coding System).

III. Existence of legitimate interest

Set out — if necessary in an Annex — the grounds on which you claim a legitimate interest in the initiation by the Commission of the procedure provided for in Article 3 of Regulation No 17.

IV. Evidence

1. State the names and addresses of persons able to testify to the facts set out, and in particular of persons affected by the alleged infringement.

2. Submit all documentation relating to or directly connected with the facts set out (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars).

3. Submit statistics or other data relating to the facts set out (and relating, for example, to price trends, formation of prices, terms of transactions, terms of supply or sale, boycotting, discrimination).

4. Where appropriate, give any necessary technical details relating to production, sales, etc., or name experts able to do so.

5. Indicate any other evidence of the existence of the alleged infringement.

V. Indicate all approaches made, and all steps taken, prior to this application, by you or any other person affected by the practice described above, with a view to terminating the alleged infringement (proceedings commenced before national judicial or administrative bodies, stating in particular the reference numbers of the cases and the results thereof).

We, the undersigned, declare that the information given in this form and in the Annexes thereto is given entirely in good faith.

At ....

Signed: ....

....

....

EUROPEAN
COMMISSION

Directorate-General for Competition

Brussels, ...

To

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if the top half is completed in a single copy by the applicant.)

Your application for a finding of infringement of Article 85 or 86 of the Treaty and/or Article 53 or 54 of the EEA Agreement, dated .....

(a) Applicant: .....

.....

(b) Infringing parties: .....

.....

was received on: .....

and registered under No: IV/ .....

Please quote the above number in all correspondence.

Address: rue de la Loi 200
B-1049 Brussels.

Telephone: Direct line: 29 .....
Telephone exchange: 299 11 11.

Fax No: 29.....

COMMISSION REGULATION No 99/63/EEC[1] OF 25 JULY 1963

on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17

THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 155 thereof,

Having regard to Article 24 of Council Regulation No 17[2] of 6 February 1962 (first Regulation implementing Articles 85 and 86 of the Treaty),

Whereas the Commission has power under Article 24 of Council Regulation No 17 to lay down implementing provisions concerning the hearings provided for in Article 19(1) and (2) of that Regulation;

Whereas in most cases the Commission will in the course of its inquiries already be in close touch with the undertakings or associations of undertakings which are the subject thereof and they will accordingly have the opportunity of making known their views regarding the objections raised against them;

Whereas, however, in accordance with Article 19(1) of Regulation No 17 and with the rights of defence, the undertakings and associations of undertakings concerned must have the right on conclusion of the inquiry to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions;

Whereas persons other than the undertakings or associations of undertakings which are the subject of the inquiry may have an interest in being heard; whereas, by the second sentence of Article 19(2) of Regulation No 17, such persons must have the opportunity of being heard if they apply and show that they have a sufficient interest;

Whereas it is desirable to enable persons who pursuant to Article 3(2) of Regulation No 17 have applied for an infringement to be terminated to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for granting the application;

Whereas the various persons entitled to submit comments must do so in writing, both in their own interest and in the interests of good administration, without prejudice to oral procedure where appropriate to supplement the written evidence;

Whereas it is necessary to define the rights of persons who are to be heard, and in particular the conditions upon which they may be represented or assisted and the setting and calculation of time limits;

Whereas the Advisory Committee on Restrictive Practices and Monopolies delivers its opinion on the basis of a preliminary draft decision; whereas it must therefore be consulted concerning a case after the inquiry in respect thereof has been completed; whereas such consultation does not prevent the Commission from re-opening an inquiry if need be,

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[1] OJ 127, 20.8.1963, p. 2268 (Special Edition 1963-64, p. 47).
[2] OJ 13, 21.2.1962, p. 204 (Special Edition 1959-62, p. 87).

HAS ADOPTED THIS REGULATION:

Article 1

Before consulting the Advisory Committee on Restrictive Practices and Monopolies, the Commission shall hold a hearing pursuant to Article 19(1) of Regulation No 17.

Article 2

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.

2. The Commission may inform the parties by giving notice in the *Official Journal of the European Communities*, if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.

3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the objections were notified in the manner provided for in paragraph 1.

4. The Commission shall, when giving notice of objections, fix a time limit up to which the undertakings and associations of undertakings may inform the Commission of their views.

Article 3

1. Undertakings and associations of undertakings shall, within the appointed time limit, make known in writing their views concerning the objections raised against them.

2. They may in their written comments set out all matters relevant to their defence.

3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

Article 4

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

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 or if the Commission proposes to impose on them a fine or periodic penalty payment.

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

Article 8

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

Article 9

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall appear either in person or be represented by legal representatives or by representatives authorized by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorized agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the Protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

Article 10

Without prejudice to Article 2(2), information and summonses from the Commission shall be sent to the addressees by registered letter with acknowledgement of receipt, or shall be delivered by hand against receipt.

Article 11

1. In fixing the time limits provided for in Articles 2, 5 and 6, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. The time limit shall be not less than two weeks; it may be extended.

2. Time limits shall run from the day following receipt of a communication or delivery thereof by hand.

3. Written comments must reach the Commission or, be dispatched by registered letter before expiry of the time limit. Where the time limit would expire on a Sunday or public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating this extension, public holidays shall, in cases where the relevant date is the date of receipt of written comments, be those set out in the Annex to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COUNCIL REGULATION (EEC) No 2988/74 OF 26 NOVEMBER 1974[1]

concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75, 79 and 87 thereof,

Having regard to the proposal from the Commission,

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

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

Whereas under the rules of the European Economic Community relating to transport and competition the Commission has the power to impose fines, penalties and periodic penalty payments on undertakings or associations of undertakings which infringe Community law relating to information or investigation, or to the prohibition on discrimination, restrictive practices and abuse of dominant position; whereas those rules make no provision for any limitation period;

Whereas it is necessary in the interests of legal certainty that the principle of limitation be introduced and that implementing rules be laid down; whereas, for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines or penalties, but also as regards the power to enforce decisions, imposing fines, penalties or periodic penalty payments; whereas such provisions should specify the length of limitation periods, the date on which time starts to run and the events which have the effect of interrupting or suspending the limitation period; whereas in this respect the interests of undertakings and associations of undertakings, on the one hand, and the requirements imposed by administrative practice, on the other hand, should be taken into account;

Whereas this Regulation must apply to the relevant provisions of Regulation No 11 concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79[3] of the Treaty[4] establishing the European Economic Community, of Regulation No 17[5]: first Regulation implementing Articles 85 and 86 of the Treaty and of Council Regulation (EEC) No 1017/68[6] of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway; whereas it must also apply to the relevant provisions of future regulations in the fields of European Economic Community law relating to transport and competition,

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[1] OJ L 319, 29.11.1974, p. 1.
[2] OJ C 129, 11.12.1972, p. 10.
[3] OJ C 89, 23.8.1972, p. 21.
[4] OJ 52, 16.8.1960, p. 1121/60.
[5] OJ 13, 21.2.1962, p. 204/62.
[6] OJ L 175, 23.7.1968, p. 1.

HAS ADOPTED THIS REGULATION:

Article 1

Limitation periods in proceedings

1. The power of the Commission to impose fines or penalties for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying-out of investigations;

(b) five years in the case of all other infringements.

2. Time shall begin to run upon the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run the day on which the infringement ceases.

Article 2

Interruption of the limitation period in proceedings

1. Any action taken by the Commission, or by any Member State, acting at the request of the Commission, for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which have participated in the infringement.

Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission, or by the competent authority of a Member State acting at the request of the Commission; or a Commission decision requiring the requested information;

(b) written authorizations to carry out investigations issued to their officials by the Commission or by the competent authority of any Member State at the request of the Commission; or a Commission decision ordering an investigation;

(c) the commencement of proceedings by the Commission;

(d) notification of the Commission's statement of objections.

2. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

3. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty; that period shall be extended by the time during which limitation is suspended pursuant to Article 3.

Article 3

Suspension of the limitation period in proceedings

The limitation period in proceedings shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

Article 4

Limitation period for the enforcement of sanctions

1. The power of the Commission to enforce decisions imposing fines, penalties, or periodic payments for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

Article 5

Interruption of the limitation period for the enforcement of sanctions

1. The limitation period for the enforcement of sanctions shall be interrupted:

(a) by notification of a decision varying the original amount of the fine, penalty or periodic penalty payments or refusing all application for variation;

(b) by any action of the Commission, or of a Member State at the request of the Commission, for the purpose of enforcing payments, of a fine, penalty or periodic penalty payment.

2. Each interruption shall start time running afresh.

Article 6

Suspension of the limitation period for the enforcement of sanctions

The limitation period for the enforcement of sanctions shall be suspended for so long as:

(a) time to pay is allowed; or

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Communities.

Article 7

Application to transitional cases

This Regulation shall also apply in respect of infringements committed before it enters into force.

Article 8

Entry into force

This Regulation shall enter into force on 1 January 1975.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Commission Decision of 23 November 1990 on the implementation of hearings in connection with procedures for the application of Articles 85 and 86 of the EEC Treaty and Articles 65 and 66 of the ECSC Treaty[1]

Article 1

(1) The hearings foreseen in the provisions implementing Articles 85 and 86 of the EEC Treaty and Articles 65 and 66 of the ECSC Treaty are decided on by the Member of the Commission responsible for competition and conducted by the Hearing Officer.

(2) Implementing provisions in the sense of paragraph (1) are:

(a) Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17;[2]

(b) Regulation (EEC) No 1630/69 of the Commission of 8 August 1969 on the hearings provided for in Article 26(1) and (2) of Council Regulation (EEC) No 1017/68 of 19 July 1968;[3]

(c) Commission Regulation (EEC) No 4260/88 of 16 December 1988 on the communications, complaints and applications and the hearings provided for in Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport;[4]

(d) Commission Regulation (EEC) No 4261/88 of 16 December 1988 on the complaints, applications and hearings provided for in Council Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector;[5]

(e) Article 36(1) of the ECSC Treaty.

(3) Administratively the Hearing Officer shall belong to the Directorate-General for Competition. To ensure his independence in the performance of his duties, he shall have the right of direct access, as defined in Article 6 below, to the Member of the Commission with special responsibility for competition.

(4) Where the Hearing Officer is unable to act, the Director-General, in concert with the Hearing Officer, shall designate another official, who is in the same grade and is not involved in the case in question, to carry out the duties described herein.

Article 2

(1) The Hearing Officer shall ensure that the hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. He

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[1] 'Twentieth Report on Competition Policy' (1990). This text replaces the one published in the Annex to the 'Thirteenth Report on Competition Policy' (1983).
[2] OJ 127, 20.8.1963, p. 2268/63.
[3] OJ L 209, 21.8.1969, p. 11.
[4] OJ L 376, 31.12.1988, p. 1.
[5] OJ L 376, 31.12.1988, p. 10.

shall seek to ensure in particular 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.

(2) In performing his duties he shall see to it that the rights of the defence are respected, while taking account of the need for effective application of the competition rules in accordance with the regulations in force and the principles laid down by the Court of Justice.

Article 3

(1) Where appropriate in view of the need to ensure that the hearing is properly prepared, and particularly that questions of fact are clarified as far as possible, the Hearing Officer may, after consulting the appropriate director, supply in advance to the firms concerned a list of the questions on which he wishes them to explain their point of view.

(2) For this purpose, after consulting the director responsible for investigating the case which is the subject of the hearing, he may hold a meeting with the parties concerned and, where appropriate, the Commission staff, in order to prepare for the hearing itself.

(3) For the same purpose he may ask for prior written notification of the essential contents of the intended statement of persons whom the undertakings concerned have proposed for hearing.

Article 4

(1) After consulting the director responsible, the Hearing Officer shall determine the date, the duration and the place of the hearing, and, where a postponement is requested, he shall decide whether or not to allow it.

(2) He shall be fully responsible for the conduct of the hearing.

(3) In this regard, he shall decide whether fresh documents should be admitted during the hearing, whether persons should be heard and whether the persons concerned should be heard separately or in the presence of other persons summoned to attend.

(4) He shall ensure that the essential content of the statement made by each person heard shall be recorded in minutes which shall be read and approved by that person.

Article 5

The Hearing Officer shall report to the Director-General for Competition on the hearing and the conclusions he draws from it. He may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

Article 6

In performing the duties defined in Article 2 above, the Hearing Officer may, if he deems it appropriate, refer his observations direct to the Member of the Commission with special responsibility for competition, at the time when the preliminary draft decision is submitted to the latter for reference to the Advisory Committee on Restrictive Practices and Dominant Positions.

Article 7

Where appropriate, the Member of the Commission with special responsibility for competition may decide, at the Hearing Officer's request, to attach the Hearing Officer's final report to the draft decision submitted to the Commission, in order to ensure that when it reaches a decision on an individual case it is fully apprised of all relevant information.

II — Block exemptions (Article 85(3) of the EC Treaty)

1. Exclusive dealing agreements

COUNCIL REGULATION No 19/65/EEC[1] OF 2 MARCH 1965

on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof,

Having regard to the proposal from the Commission,

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

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

Whereas Article 85(l) of the Treaty may in accordance with Article 85(3) be declared inapplicable to certain categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85(3);

Whereas the provisions for implementation of Article 85(3) must be adopted by way of regulation pursuant to Article 87;

Whereas in view of the large number of notifications submitted in pursuance of Regulation No 17[4] it is desirable that in order to facilitate the task of the Commission it should be enabled to declare by way of regulation that the provisions of Article 85(1) do not apply to certain categories of agreements and concerted practices;

Whereas it should be laid down under what conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers after sufficient experience has been gained in the light of individual decisions and it becomes possible to define categories of agreements and concerted practices in respect of which the conditions of Article 85(3) may be considered as being fulfilled;

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[1] OJ 36, 6.3.1965, p. 533 (Special Edition 1965-66, p. 35).
[2] OJ 81, 27.5.1964, p. 1275/64.
[3] OJ 197, 30.11.1964, p. 3320/64.
[4] OJ 13, 21.2.1962, p. 204/62 (Regulation No 17 as amended by Regulation No 59) — OJ 58, 10.7.1962, p. 1655/62 — and Regulation No 118/63/EEC — OJ 162, 7.11.1963, p. 2696/63).

Whereas the Commission has indicated by the action it has taken, in particular by Regulation No 153,[1] that there can be no easing of the procedures prescribed by Regulation No 17 in respect of certain types of agreements and concerted practices that are particularly liable to distort competition in the common market;

Whereas under Article 6 of Regulation No 17 the Commission may provide that a decision taken pursuant to Article 85(3) of the Treaty shall apply with retroactive effect; whereas it is desirable that the Commission be also empowered to adopt, by regulation, provisions to the like effect;

Whereas under Article 7 of Regulation No 17 agreements, decisions and concerted practices may, by decision of the Commission, be exempted from prohibition in particular if they are modified in such manner that they satisfy the requirements of Article 85(3); whereas it is desirable that the Commission be enabled to grant like exemption by regulation to such agreements and concerted practices if they are modified in such manner as to fall within a category defined in an exempting regulation;

Whereas, since there can be no exemption if the conditions set out in Article 85(3) are not satisfied, the Commission must have power to lay down by decision the conditions that must be satisfied by an agreement or concerted practice which owing to special circumstances has certain effects incompatible with Article 85(3),

HAS ADOPTED THIS REGULATION:

Article 1

1. Without prejudice to the application of Council Regulation No 17 and in accordance with Article 85(3) of the Treaty the Commission may by regulation declare that Article 85(1) shall not apply to categories of agreements to which only two undertakings are party and:

(a) — whereby one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market; or

— whereby one party agrees with the other to purchase only from that other certain goods for resale; or

— whereby the two undertakings have entered into obligations, as in the two preceding subparagraphs, with each other in respect of exclusive supply and purchase for resale;

(b) which include restrictions imposed in relation to the assignment or use of industrial property rights — in particular of patents, utility models, designs or trade marks — or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or to the application of industrial processes.

2. The Regulation shall define the categories of agreements to which it applies and shall specify in particular:

(a) the restrictions or clauses which must not be contained in the agreements;

(b) the clauses which must be contained in the agreements, or the other conditions which must be satisfied.

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[1] OJ 139, 24.12.1962, p. 2918/62.

3. Paragraphs 1 and 2 shall apply by analogy to categories of concerted practices to which only two undertakings are party.

Article 2

1. A Regulation pursuant to Article 1 shall be made for a specified period.

2. It may be repealed or amended where circumstances have changed with respect to any factor which was basic to its being made; in such case, a period shall be fixed for modification of the agreements and concerted practices to which the earlier Regulation applies.

Article 3

A Regulation pursuant to Article 1 may stipulate that it shall apply with retroactive effect to agreements and concerted practices to which, at the date of entry into force of that Regulation, a decision issued with retroactive effect in pursuance of Article 6 of Regulation No 17 would have applied.

Article 4[1, 2]

1. A Regulation pursuant to Article 1 may stipulate that the prohibition contained in Article 85(1) of the Treaty shall not apply, for such period as shall be fixed by that Regulation,

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[1] **Acts concerning the conditions of accession and the adjustments to the Treaties**
The following is inserted at the end of the first subparagraph of Article 4(1):
'A Regulation pursuant to Article 1 may stipulate that the prohibition contained in Article 85(1) of the Treaty shall not apply, for such period as shall be fixed by that Regulation, to agreements and concerted practices already in existence at the date of accession to which Article 85(3) applies by virtue of accession and which do not satisfy the conditions of Article 85(3), where:'
The following is inserted at the end of Article 4(2):
'Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 of the Treaty applies by virtue of accession and which must be notified before 1 July 1973, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.'
(OJ L 73, 27.3.1972, p. 92 and 93).

[2] **Documents concerning the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic**
In Article 4:
— the following is added to paragraph 1:
'The provisions of the preceding subparagraph shall apply in the same way as in the case of the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic';
— paragraph 2 is supplemented by the following:
'Paragraph 1 shall not apply to agreements and concerted practices to which Article 85(1) of the Treaty applies by virtue of the accession of the Hellenic Republic and which must be notified before 1 July 1981, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.
'Paragraph 1 shall not apply to agreements and concerted practices to which Article 85(1) of the Treaty applies by virtue of the accession of the Kingdom of Spain and of the Portuguese Republic and which must be notified before 1 July 1986, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.'
(OJ L 291, 19.11.1979, p. 94; OJ L 302, 15.11.1985, p. 166).

to agreements and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85(3), where:

— within three months from the entry into force of the Regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the Regulation; and

— the modifications are brought to the notice of the Commission within the time limit fixed by the Regulation.

2. Paragraph 1 shall apply to agreements and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.

3. The benefit of the provisions laid down pursuant to paragraph 1 may not be claimed in actions pending at the date of entry into force of a Regulation adopted pursuant to Article 1; neither may it be relied on as grounds for claims for damages against third parties.

Article 5

Before adopting a regulation, the Commission shall publish a draft thereof and invite all persons concerned to submit their comments within such time limit, being not less than one month, as the Commission shall fix.

Article 6

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

(a) before publishing a draft regulation;

(b) before adopting a regulation.

2. Article 10(5) and (6) of Regulation No 17, relating to consultation with the Advisory Committee, shall apply by analogy, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

Article 7

Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case agreements or concerted practices to which a Regulation adopted pursuant to Article 1 of this Regulation applies have nevertheless certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, it may withdraw the benefit of application of that Regulation and issue a decision in accordance with Articles 6 and 8 of Regulation No 17, without any notification under Article 4(1) of Regulation No 17 being required.

Article 8

The Commission shall, before 1 January 1970, submit to the Council a proposal for a Regulation for such amendment of this Regulation as may prove necessary in the light of experience.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EEC) No 1983/83[1] OF 22 JUNE 1983

on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices[2] as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,[3]

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) Whereas Regulation No 19/65/EEC empowers the Commission to apply Article 85(3) of the Treaty by regulation to certain categories of bilateral exclusive distribution agreements and analogous concerted practices falling within Article 85(1);

(2) Whereas experience to date makes it possible to define a category of agreements and concerted practices which can be regarded as normally satisfying the conditions laid down in Article 85(3);

(3) Whereas exclusive distribution agreements of the category defined in Article 1 of this Regulation may fall within the prohibition contained in Article 85(1) of the Treaty; whereas this will apply only in exceptional cases to exclusive agreements of this kind to which only undertakings from one Member State are party and which concern the resale of goods within that Member State; whereas, however, to the extent that such agreements may affect trade between Member States and also satisfy all the requirements set out in this Regulation there is no reason to withhold from them the benefit of the exemption by category;

(4) Whereas it is not necessary expressly to exclude from the defined category those agreements which do not fulfil the conditions of Article 85(1) of the Treaty;

(5) Whereas exclusive distribution agreements lead in general to an improvement in distribution because the undertaking is able to concentrate its sales activities, does not need to maintain numerous business relations with a larger number of dealers and is able, by dealing with only one dealer, to overcome more easily distribution difficulties in international trade resulting from linguistic, legal and other differences;

(6) Whereas exclusive distribution agreements facilitate the promotion of sales of a product and lead to intensive marketing and to continuity of supplies while at the same time rationalizing distribution; whereas they stimulate competition between the products of differ-

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[1] OJ L 173, 30.6.1983, p. 1; Corrigendum OJ L 281, 13.10.1983, p. 24.
[2] OJ 36, 6.3.1965, p. 533/65.
[3] OJ C 172, 10.7.1982, p. 3.

ent manufacturers; whereas the appointment of an exclusive distributor who will take over sales promotion, customer services and carrying of stocks is often the most effective way, and sometimes indeed the only way, for the manufacturer to enter a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings; whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in the agreements terms providing for the promotion of sales;

(7) Whereas, as a rule, such exclusive distribution agreements also allow consumers a fair share of the resulting benefit as they gain directly from the improvement in distribution, and their economic and supply position is improved as they can obtain products manufactured in particular in other countries more quickly and more easily;

(8) Whereas this Regulation must define the obligations restricting competition which may be included in exclusive distribution agreements; whereas the other restrictions on competition allowed under this Regulation in addition to the exclusive supply obligation produce a clear division of functions between the parties and compel the exclusive distributor to concentrate his sales efforts on the contract goods and the contract territory; whereas they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive distribution; whereas it may be left to the contracting parties to decide which of these obligations they include in their agreements; whereas further restrictive obligations and in particular those which limit the exclusive distributor's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation;

(9) Whereas the exemption by category should be reserved for agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 85(3) of the Treaty;

(10) Whereas it is not possible, in the absence of a case-by-case examination, to consider that adequate improvements in distribution occur where a manufacturer entrusts the distribution of his goods to another manufacturer with whom he is in competition; whereas such agreements should, therefore, be excluded from the exemption by category; whereas certain derogations from this rule in favour of small and medium-sized undertakings can be allowed;

(11) Whereas consumers will be assured of a fair share of the benefits resulting from exclusive distribution only if parallel imports remain possible; whereas agreements relating to goods which the user can obtain only from the exclusive distributor should therefore be excluded from the exemption by category; whereas the parties cannot be allowed to abuse industrial property rights or other rights in order to create absolute territorial protection; whereas this does not prejudice the relationship between competition law and industrial property rights, since the sole object here is to determine the conditions for exemption by category;

(12) Whereas, since competition at the distribution stage is ensured by the possibility of parallel imports, the exclusive distribution agreements covered by this Regulation will not normally afford any possibility of eliminating competition in respect of a substantial part of the products in question; whereas this is also true of agreements that allot to the exclusive distributor a contract territory covering the whole of the common market;

(13) Whereas, in particular cases in which agreements or concerted practices satisfying the requirements of this Regulation nevertheless have effects incompatible with Article 85(3) of the Treaty, the Commission may withdraw the benefit of the exemption by category from the undertakings party to them;

(14) Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may none the less in a particular case where real doubt exists request the Commission to declare whether its agreements comply with this Regulation;

(15) Whereas this Regulation does not affect the applicability of Commission Regulation (EEC) No 3604/82 of 23 December 1982 on the application of Article 85(3) of the Treaty to categories of specialization agreements;[1] whereas it does not exclude the application of Article 86 of the Treaty,

HAS ADOPTED THIS REGULATION:

Article 1

Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party agrees with the other to supply certain goods for resale within the whole or a defined area of the common market only to that other.

Article 2

1. Apart from the obligation referred to in Article 1 no restriction on competition shall be imposed on the supplier other than the obligation not to supply the contract goods to users in the contract territory.

2. No restriction on competition shall be imposed on the exclusive distributor other than:

(a) the obligation not to manufacture or distribute goods which compete with the contract goods;

(b) the obligation to obtain the contract goods for resale only from the other party;

(c) the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch and from maintaining any distribution depot.

3. Article 1 shall apply notwithstanding that the exclusive distributor undertakes all or any of the following obligations:

(a) to purchase complete ranges of goods or minimum quantities;

(b) to sell the contract goods under trade marks, or packed and presented as specified by the other party;

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[1] OJ L 376, 31.12.1982, p. 33.

(c) to take measures for promotion of sales in particular:

— to advertise,

— to maintain a sales network or stock of goods,

— to provide customer and guarantee services,

— to employ staff having specialized or technical training.

Article 3

Article 1 shall not apply where:

(a) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into reciprocal exclusive distribution agreements between themselves in respect of such goods;

(b) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into a non-reciprocal exclusive distribution agreement between themselves in respect of such goods unless at least one of them has a total annual turnover of no more than ECU 100 million;

(c) users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory;

(d) one or both of the parties makes it difficult for intermediaries or users to obtain the contract goods from other dealers inside the common market or, in so far as no alternative source of supply is available there, from outside the common market, in particular where one or both of them:

(1) exercises industrial property rights so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory properly marked or otherwise properly marketed contract goods;

(2) exercises other rights or takes other measures so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory contract goods.

Article 4

1. Article 3(a) and (b) shall also apply where the goods there referred to are manufactured by an undertaking connected with a party to the agreement.

2. Connected undertakings are:

(a) undertakings in which a party to the agreement, directly or indirectly:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs;

(b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers set out in paragraph 2(a) shall be considered to be connected with each of the parties to the agreement.

Article 5

1. For the purpose of Article 3(b), the ecu is the unit of account used for drawing up the budget of the Community pursuant to Articles 207 and 209 of the Treaty.

2. Article 1 shall remain applicable where during any period of two consecutive financial years the total turnover referred to in Article 3(b) is exceeded by no more than 10%.

3. For the purpose of calculating total turnover within the meaning of Article 3(b), the turnovers achieved during the last financial year by the party to the agreement and connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the agreement and its connected undertakings or between its connected undertakings.

Article 6

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, when it finds in a particular case that an agreement which is exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions set out in Article 85(3) of the Treaty, and in particular where:

(a) the contract goods are not subject, in the contract territory, to effective competition from identical goods or goods considered by users as equivalent in view of their characteristics, price and intended use;

(b) access by other suppliers to the different stages of distribution within the contract territory is made difficult to a significant extent;

(c) for reasons other than those referred to in Article 3(c) and (d) it is not possible for intermediaries or users to obtain supplies of the contract goods from dealers outside the contract territory on the terms there customary;

(d) the exclusive distributor:

(1) without any objectively justified reason refuses to supply in the contract territory categories of purchasers who cannot obtain contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale;

(2) sells the contract goods at excessively high prices.

Article 7[1]

In the period 1 July 1983 to 31 December 1986, the prohibition in Article 85(1) of the Treaty shall not apply to agreements which were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.[2]

Article 8

This Regulation shall not apply to agreements entered into for the resale of drinks in premises used for the sale and consumption of drinks or for the resale of petroleum products in service stations.

Article 9

This Regulation shall apply mutatis mutandis to concerted practices of the type defined in Article 1.

Article 10

This Regulation shall enter into force on 1 July 1983.

It shall expire on 31 December 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

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[1] **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**
The following is added to Article 7:
'The provisions of the preceding paragraph shall apply in the same way to agreements which were in force on the date of accession of the Kingdom of Spain and of the Portuguese Republic and which, as a result of accession, fall within the scope of Article 85(1) of the Treaty.'
(OJ L 302, 15.11.1985, p. 166).

[2] OJ 57, 25.3.1967, p. 849/67.

COMMISSION REGULATION (EEC) No 1984/83[1] OF 22 JUNE 1983

on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices,[2] as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,[3]

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

(1) Whereas Regulation No 19/65/EEC empowers the Commission to apply Article 85(3) of the Treaty by regulation to certain categories of bilateral exclusive purchasing agreements entered into for the purpose of the resale of goods and corresponding concerted practices falling within Article 85(1);

(2) Whereas experience to date makes it possible to define three categories of agreements and concerted practices which can be regarded as normally satisfying the conditions laid down in Article 85(3); whereas the first category comprises exclusive purchasing agreements of short and medium duration in all sectors of the economy; whereas the other two categories comprise long-term exclusive purchasing agreements entered into for the resale of beer in premises used for the sale and consumption of drinks (beer-supply agreements) and of petroleum products in filling stations (service-station agreements);

(3) Whereas exclusive purchasing agreements of the categories defined in this Regulation may fall within the prohibition contained in Article 85(1) of the Treaty; whereas this will often be the case with agreements concluded between undertakings from different Member States; whereas an exclusive purchasing agreement to which undertakings from only one Member State are party and which concerns the resale of goods within that Member State may also be caught by the prohibition; whereas this is in particular the case where it is one of a number of similar agreements which together may affect trade between Member States;

(4) Whereas it is not necessary expressly to exclude from the defined categories those agreements which do not fulfil the conditions of Article 85(1) of the Treaty;

(5) Whereas the exclusive purchasing agreements defined in this Regulation lead in general to an improvement in distribution; whereas they enable the supplier to plan the sales of his goods with greater precision and for a longer period and ensure that the reseller's require-

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[1] OJ L 173, 30.6.1983, p. 5; Corrigendum OJ L 281, 13.10.1983, p. 24.
[2] OJ 36, 6.3.1965, p. 533/65.
[3] OJ C 172, 10.7.1982, p. 7.

ments will be met on a regular basis for the duration of the agreement; whereas this allows the parties to limit the risk to them of variations in market conditions and to lower distribution costs;

(6) Whereas such agreements also facilitate the promotion of the sales of a product and lead to intensive marketing because the supplier, in consideration for the exclusive purchasing obligation, is as a rule under an obligation to contribute to the improvement of the structure of the distribution network, the quality of the promotional effort or the sales success; whereas, at the same time, they stimulate competition between the products of different manufacturers; whereas the appointment of several resellers, who are bound to purchase exclusively from the manufacturer and who take over sales promotion, customer services and carrying of stock, is often the most effective way, and sometimes the only way, for the manufacturer to penetrate a market and compete with other manufacturers already present; whereas this is particularly so in the case of small and medium-sized undertakings; whereas it must be left to the contracting parties to decide whether and to what extent they consider it desirable to incorporate in their agreements terms concerning the promotion of sales;

(7) Whereas, as a rule, exclusive purchasing agreements between suppliers and resellers also allow consumers a fair share of the resulting benefit as they gain the advantages of regular supply and are able to obtain the contract goods more quickly and more easily;

(8) Whereas this Regulation must define the obligations restricting competition which may be included in an exclusive purchasing agreement; whereas the other restrictions of competition allowed under this Regulation in addition to the exclusive purchasing obligation lead to a clear division of functions between the parties and compel the reseller to concentrate his sales efforts on the contract goods; whereas they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive purchasing; whereas further restrictive obligations and in particular those which limit the reseller's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation;

(9) Whereas the exemption by category should be reserved for agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 85(3) of the Treaty;

(10) Whereas it is not possible, in the absence of a case-by-case examination, to consider that adequate improvements in distribution occur where a manufacturer imposes an exclusive purchasing obligation with respect to his goods on a manufacturer with whom he is in competition; whereas such agreements should, therefore, be excluded from the exemption by category; whereas certain derogations from this rule in favour of small and medium-sized undertakings can be allowed;

(11) Whereas certain conditions must be attached to the exemption by category so that access by other undertakings to the different stages of distribution can be ensured; whereas, to this end limits must be set to the scope and to the duration of the exclusive purchasing obligation; whereas it appears appropriate as a general rule to grant the benefit of a general exemption from the prohibition on restrictive agreements only to exclusive purchasing agreements which are concluded for a specified product or range of products and for not more than five years;

(12) Whereas, in the case of beer-supply agreements and service-station agreements, different rules should be laid down which take account of the particularities of the markets in question;

(13) Whereas these agreements are generally distinguished by the fact that, on the one hand, the supplier confers on the reseller special commercial or financial advantages by contributing to his financing, granting him or obtaining for him a loan on favourable terms, equipping him with a site or premises for conducting his business, providing him with equipment or fittings, or undertaking other investments for his benefit and that, on the other hand, the reseller enters into a long-term exclusive purchasing obligation which in most cases is accompanied by a ban on dealing in competing products;

(14) Whereas beer-supply and service-station agreements, like the other exclusive purchasing agreements dealt with in this Regulation, normally produce an appreciable improvement in distribution in which consumers are allowed a fair share of the resulting benefit;

(15) Whereas the commercial and financial advantages conferred by the supplier on the reseller make it significantly easier to establish, modernize, maintain and operate premises used for the sale and consumption of drinks and service stations; whereas the exclusive purchasing obligation and the ban on dealing in competing products imposed on the reseller incite the reseller to devote all the resources at his disposal to the sale of the contract goods; whereas such agreements lead to durable cooperation between the parties allowing them to improve or maintain the quality of the contract goods and of the services to the consumer and sales efforts of the reseller; whereas they allow long-term planning of sales and consequently a cost-effective organization of production and distribution; whereas the pressure of competition between products of different makes obliges the undertakings involved to determine the number and character of premises used for the sale and consumption of drinks and service stations, in accordance with the wishes of customers;

(16) Whereas consumers benefit from the improvements described, in particular because they are ensured supplies of goods of satisfactory quality at fair prices and conditions while being able to choose between the products of different manufacturers;

(17) Whereas the advantages produced by beer-supply agreements and service-station agreements cannot otherwise be secured to the same extent and with the same degree of certainty; whereas the exclusive purchasing obligation on the reseller and the non-competition clause imposed on him are essential components of such agreements and thus usually indispensable for the attainment of these advantages; whereas, however, this is true only as long as the reseller's obligation to purchase from the supplier is confined in the case of premises used for the sale and consumption of drinks to beers and other drinks of the types offered by the supplier, and in the case of service stations to petroleum-based fuel for motor vehicles and other petroleum-based fuels; whereas the exclusive purchasing obligation for lubricants and related petroleum-based products can be accepted only on condition that the supplier provides for the reseller or finances the procurement of specific equipment for the carrying-out of lubrication work; whereas this obligation should only relate to products intended for use within the service station;

(18) Whereas in order to maintain the reseller's commercial freedom and to ensure access to the retail level of distribution on the part of other suppliers, not only the scope but also the duration of the exclusive purchasing obligation must be limited; whereas it appears appropriate to allow drinks suppliers a choice between a medium-term exclusive purchasing agreement covering a range of drinks and a long-term exclusive purchasing agreement for beer; whereas it is necessary to provide special rules for those premises used for the sale and consumption of drinks which the supplier lets to the reseller; whereas, in this case, the reseller must have the right to obtain from other undertakings, under the conditions specified in this Regulation, other drinks, except beer, supplied under the agreement or of the same type but bearing a different trade mark; whereas a uniform maximum duration should be provided for service-station agreements, with the exception of tenancy agreements between the supplier and the reseller, which takes account of the long-term character of the relationship between the parties;

(19) Whereas to the extent that Member States provide, by law or administrative measures, for the same upper limit of duration for the exclusive purchasing obligation upon the reseller in service-station agreements as laid down in this Regulation but provide for a permissible duration which varies in proportion to the consideration provided by the supplier or generally provide for a shorter duration than that permitted by this Regulation, such laws or measures are not contrary to the objectives of this Regulation which, in this respect, merely sets an upper limit to the duration of service-station agreements; whereas the application and enforcement of such national laws or measures must therefore be regarded as compatible with the provisions of this Regulation;

(20) Whereas the limitations and conditions provided for in this Regulation are such as to guarantee effective competition on the markets in question; whereas, therefore, the agreements to which the exemption by category applies do not normally enable the participating undertakings to eliminate competition for a substantial part of the products in question;

(21) Whereas, in particular cases in which agreements or concerted practices satisfying the conditions of this Regulation nevertheless have effects incompatible with Article 85(3) of the Treaty, the Commission may withdraw the benefit of the exemption by category from the undertakings party thereto;

(22) Whereas agreements and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may none the less, in a particular case where real doubt exists, request the Commission to declare whether its agreements comply with this Regulation;

(23) Whereas this Regulation does not affect the applicability of Commission Regulation (EEC) No 3604/82 of 23 December 1982 on the application of Article 85(3) of the Treaty to categories of specialization agreements;[1] whereas it does not exclude the application of Article 86 of the Treaty,

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[1] OJ L 376, 31.12.1982, p. 33.

HAS ADOPTED THIS REGULATION:

TITLE I

General provisions

Article 1

Pursuant to Article 85(3) of the Treaty, and subject to the conditions set out in Articles 2 to 5 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, to purchase certain goods specified in the agreement for resale only from the supplier or from a connected undertaking or from another undertaking which the supplier has entrusted with the sale of his goods.

Article 2

1. No other restriction of competition shall be imposed on the supplier than the obligation not to distribute the contract goods or goods which compete with the contract goods in the reseller's principal sales area and at the reseller's level of distribution.

2. Apart from the obligation described in Article 1, no other restriction of competition shall be imposed on the reseller than the obligation not to manufacture or distribute goods which compete with the contract goods.

3. Article 1 shall apply notwithstanding that the reseller undertakes any or all of the following obligations;

(a) to purchase complete ranges of goods;

(b) to purchase minimum quantities of goods which are subject to the exclusive purchasing obligation;

(c) to sell the contract goods under trade marks, or packed and presented as specified by the supplier;

(d) to take measures for the promotion of sales, in particular:

— to advertise,

— to maintain a sales network or stock of goods,

— to provide customer and guarantee services,

— to employ staff having specialized or technical training.

Article 3

Article 1 shall not apply where:

(a) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into reciprocal exclusive purchasing agreements between themselves in respect of such goods;

(b) manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into a non-reciprocal exclusive purchasing agreement between themselves in respect of such goods, unless at least one of them has a total annual turnover of no more than ECU 100 million;

(c) the exclusive purchasing obligation is agreed for more than one type of goods where these are neither by their nature nor according to commercial usage connected to each other;

(d) the agreement is concluded for an indefinite duration or for a period of more than five years.

Article 4

1. Article 3(a) and (b) shall also apply where the goods there referred to are manufactured by an undertaking connected with a party to the agreement.

2. Connected undertakings are:

(a) undertakings in which a party to the agreement, directly or indirectly:

— owns more than half the capital of business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs;

(b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers set out in paragraph 2(a) shall be considered to be connected with each of the parties to the agreement.

Article 5

1. For the purpose of Article 3(b), the ecu is the unit of account used for drawing up the budget of the Community pursuant to Articles 207 and 209 of the Treaty.

2. Article 1 shall remain applicable where during any period of two consecutive financial years the total turnover referred to in Article 3(b) is exceeded by no more than 10%.

3. For the purpose of calculating total turnover within the meaning of Article 3(b), the turnovers achieved during the last financial year by the party to the agreement and connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the agreement and its connected undertakings or between its connected undertakings.

TITLE II

Special provisions for beer-supply agreements

Article 6

1. Pursuant to Article 85(3) of the Treaty, and subject to Articles 7 to 9 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain beers, or certain beers and certain other drinks specified in the agreement for resale in premises used for the sale and consumption of drinks and designated in the agreement.

2. The declaration in paragraph 1 shall also apply where exclusive purchasing obligations of the kind described in paragraph 1 are imposed on the reseller in favour of the supplier by another undertaking which is itself not a supplier.

Article 7

1. Apart from the obligation referred to in Article 6, no restriction on competition shall be imposed on the reseller other than:

(a) the obligation not to sell beers and other drinks which are supplied by other undertakings and which are of the same type as the beers or other drinks supplied under the agreement in the premises designated in the agreement;

(b) the obligation, in the event that the reseller sells in the premises designated in the agreement beers which are supplied by other undertakings and which are of a different type from the beers supplied under the agreement, to sell such beers only in bottles, cans or other small packages, unless the sale of such beers in draught form is customary or is necessary to satisfy a sufficient demand from consumers;

(c) the obligation to advertise goods supplied by other undertakings within or outside the premises designated in the agreement only in proportion to the share of these goods in the total turnover realized in the premises.

2. Beers or other drinks are of different types where they are clearly distinguishable by their composition, appearance or taste.

Article 8

1. Article 6 shall not apply where:

(a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than drinks or for services;

(b) the supplier restricts the freedom of the reseller to obtain from an undertaking of his choice either services or goods for which neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;

(c) the agreement is concluded for an indefinite duration or for a period of more than five years and the exclusive purchasing obligation relates to specified beers and other drinks;

(d) the agreement is concluded for an indefinite duration or for a period of more than 10 years and the exclusive purchasing obligation relates only to specified beers;

(e) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

2. Where the agreement relates to premises which the supplier lets to the reseller or allows the reseller to occupy on some other basis in law or in fact, the following provisions shall also apply:

(a) notwithstanding paragraphs (l)(c) and (d), the exclusive purchasing obligations and bans on dealing in competing products specified in this Title may be imposed on the reseller for the whole period for which the reseller in fact operates the premises;

(b) the agreement must provide for the reseller to have the right to obtain:

— drinks, except beer, supplied under the agreement from other undertakings where these undertakings offer them on more favourable conditions which the supplier does not meet,

— drinks, except beer, which are of the same type as those supplied under the agreement but which bear different trade marks, from other undertakings where the supplier does not offer them.

Article 9

Articles 2(1) and (3), 3(a) and (b), 4 and 5 shall apply *mutatis mutandis.*

TITLE III

Special provisions for service-station agreements

Article 10

Pursuant to Article 85(3) of the Treaty and subject to Articles 11 to 13 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain petroleum-based motor vehicle fuels or certain petroleum-based motor vehicle and other fuels specified in the agreement for resale in a service station designated in the agreement.

Article 11

Apart from the obligation referred to in Article 10, no restriction on competition shall be imposed on the reseller other than:

(a) the obligation not to sell motor-vehicle fuel and other fuels which are supplied by other undertakings in the service station designated in the agreement;

(b) the obligation not to use lubricants or related petroleum-based products which are supplied by other undertakings within the service station designated in the agreement where the supplier or a connected undertaking has made available to the reseller, or financed, a lubrication bay or other motor vehicle lubrication equipment;

(c) the obligation to advertise goods supplied by other undertakings within or outside the service station designated in the agreement only in proportion to the share of these goods in the total turnover realized in the service station;

(d) the obligation to have equipment owned by the supplier or a connected undertaking or financed by the supplier or a connected undertaking serviced by the supplier or an undertaking designated by him.

Article 12

1. Article 10 shall not apply where:

(a) the supplier or a connected undertaking imposes on the reseller exclusive purchasing obligations for goods other than motor vehicle and other fuels or for services, except in the case of the obligations referred to in Article 11(b) and (d);

(b) the supplier restricts the freedom of the reseller to obtain from an undertaking of his choice goods or services for which under the provisions of this Title neither an exclusive purchasing obligation nor a ban on dealing in competing products may be imposed;

(c) the agreement is concluded for an indefinite duration or for a period of more than 10 years;

(d) the supplier obliges the reseller to impose the exclusive purchasing obligation on his successor for a longer period than the reseller would himself remain tied to the supplier.

2. Where the agreement relates to a service station which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, in law or in fact, exclusive purchasing obligations or bans on dealing in competing products specified in this Title may, notwithstanding paragraph 1(c), be imposed on the reseller for the whole period for which the reseller in fact operates the premises.

Article 13

Articles 2(1) and (3), 3(a) and (b), 4 and 5 of this Regulation shall apply *mutatis mutandis*.

TITLE IV

Miscellaneous provisions

Article 14

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, when it finds in a particular case that an agreement which is exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions set out in Article 85(3) of the Treaty, and in particular where:

(a) the contract goods are not subject, in a substantial part of the common market, to effective competition from identical goods or goods considered by users as equivalent in view of their characteristics, price and intended use;

(b) access by other suppliers to the different stages of distribution in a substantial part of the common market is made difficult to a significant extent;

(c) the supplier without any objectively justified reason:

(1) refuses to supply categories of resellers who cannot obtain the contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale;

(2) applies less favourable prices or conditions of sale to resellers bound by an exclusive purchasing obligation as compared with other resellers at the same level of distribution.

Article 15[1]

1. In the period 1 July 1983 to 31 December 1986, the prohibition in Article 85(1) of the Treaty shall not apply to agreements of the kind described in Article 1 which either were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.[2]

2. In the period 1 July 1983 to 31 December 1988, the prohibition in Article 85(1) of the Treaty shall not apply to agreements of the kinds described in Articles 6 and 10 which either were in force on 1 July 1983 or entered into force between 1 July and 31 December 1983 and which satisfy the exemption conditions of Regulation No 67/67/EEC.

3. In the case of agreements of the kinds described in Articles 6 and 10, which were in force on 1 July 1983 and which expire after 31 December 1988, the prohibition in Article 85(1) of the Treaty shall not apply in the period from 1 January 1989 to the expiry of the agreement but at the latest to the expiry of this Regulation to the extent that the supplier releases the reseller, before 1 January 1989, from all obligations which would prevent the application of the exemption under Titles II and III.

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[1] **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**
The following paragraph is added to Article 15:
'4. The provisions of the preceding paragraphs shall apply in the same way to the agreements referred to respectively in those paragraphs, which were in force on the date of accession of the Kingdom of Spain and of the Portuguese Republic and which, as a result of accession, fall within the scope of Article 85(1) of the Treaty.'
(OJ L 302, 15.11.185, p. 166).

[2] OJ 57, 25.3.1967, p. 849/67.

Article 16

This Regulation shall not apply to agreements by which the supplier undertakes with the reseller to supply only to the reseller certain goods for resale, in the whole or in a defined part of the Community, and the reseller undertakes with the supplier to purchase these goods only from the supplier.

Article 17

This Regulation shall not apply where the parties or connected undertakings, for the purpose of resale in one and the same premises used for the sale and consumption of drinks or service station, enter into agreements both of the kind referred to in Title I and of a kind referred to in Titles II or III.

Article 18

This Regulation shall apply *mutatis mutandis* to the categories of concerted practices defined in Articles 1, 6 and 10.

Article 19

This Regulation shall enter into force on 1 July 1983.

It shall expire on 31 December 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Commission Notice[1] concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements

(84/C 101/02)

As amended by Commission Notice 92/C 121/02[2]

I. Introduction

1. Commission Regulation No 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements[3] expired on 30 June 1983 after being in force over 15 years. With Regulations (EEC) No 1983/83 and (EEC) No 1984/83,[4] the Commission has adapted the block exemption of exclusive distribution agreements and exclusive purchasing agreements to the intervening developments in the common market and in Community law. Several of the provisions in the new Regulations are new. A certain amount of interpretative guidance is therefore called for. This will assist undertakings in bringing their agreements into line with the new legal requirements and will also help ensure that the Regulations are applied uniformly in all the Member States.

2. In determining how a given provision is to be applied, one must take into account, in addition to the ordinary meaning of the words used, the intention of the provision as this emerges from the preamble. For further guidance, reference should be made to the principles that have been evolved in the case-law of the Court of Justice of the European Communities and in the Commission's decisions on individual cases.

3. This notice sets out the main considerations which will determine the Commission's view of whether or not an exclusive distribution or purchasing agreement is covered by the block exemption. The notice is without prejudice to the jurisdiction of national courts to apply the Regulations, although it may well be of persuasive authority in proceedings before such courts. Nor does the notice necessarily indicate the interpretation which might be given to the provisions by the Court of Justice.

II. Exclusive distribution and exclusive purchasing agreements (Regulations (EEC) No 1983/83 and (EEC) No 1984/83)

1. *Similarities and differences*

4. Regulations (EEC) No 1983/83 and (EEC) No 1984/83 are both concerned with exclusive agreements between two undertakings for the purpose of the resale of goods. Each deals with a particular type of such agreements. Regulation (EEC) No 1983/83 applies to exclu-

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[1] OJ C 101, 13.4.1984, p. 2. This text replaces the previous text published in OJ C 355, 30.12.1983, p. 7.
[2] OJ C 121, 13.5.1992, p. 2.
[3] OJ 57, 25.3.1967, p. 849/67.
[4] OJ L 173, 30.6.1983, pp. 1 and 5.

sive distribution agreements, Regulation (EEC) No 1984/83 to exclusive purchasing agreements. The distinguishing feature of exclusive distribution agreements is that one party, the supplier, allots to the other, the reseller, a defined territory (the contract territory) on which the reseller has to concentrate his sales effort, and in return undertakes not to supply any other reseller in that territory. In exclusive purchasing agreements, the reseller agrees to purchase the contract goods only from the other party and not from any other supplier. The supplier is entitled to supply other resellers in the same sales area and at the same level of distribution. Unlike an exclusive distributor, the tied reseller is not protected against competition from other resellers who, like himself, receive the contract goods direct from the supplier. On the other hand, he is free of restrictions as to the area over which he may make his sales effort.

5. In keeping with their common starting-point, the Regulations have many provisions that are the same or similar in both Regulations. This is true of the basic provision in Article 1, in which the respective subject-matters of the block exemption, the exclusive supply or purchasing obligation, are defined, and of the exhaustive list of restrictions of competition which may be agreed in addition to the exclusive supply or purchasing obligation (Article 2(1) and (2)), the non-exhaustive enumeration of other obligations which do not prejudice the block exemption (Article 2(3)), the inapplicability of the block exemption in principle to exclusive agreements between competing manufacturers (Articles 3(a) and (b), 4 and 5), the withdrawal of the block exemption in individual cases (Article 6 of Regulation (EEC) No 1983/83 and Article 14 of Regulation (EEC) No 1984/83), the transitional provisions (Article 7 of Regulation (EEC) No 1983/83 and Article 15(1) of Regulation (EEC) No 1984/83), and the inclusion of concerted practices within the scope of the Regulations (Article 9 of Regulation (EEC) No 1983/83 and Article 18 of Regulation (EEC) No 1984/83). In so far as their wording permits, these parallel provisions are to be interpreted in the same way.

6. Different rules are laid down in the Regulations wherever they need to take account of matters which are peculiar to the exclusive distribution agreements or exclusive purchasing agreements respectively. This applies in Regulation (EEC) No 1983/83, to the provisions regarding the obligation on the exclusive distributor not actively to promote sales outside the contract territory (Article 2(2)(c)) and the inapplicability of the block exemption to agreements which give the exclusive distributor absolute territorial protection (Article 3(c) and (d)) and, in Regulation (EEC) No 1984/83, to the provisions limiting the scope and duration of the block exemption for exclusive purchasing agreements in general (Article 3(c) and (d)) and for beer-supply and service-station agreements in particular (Titles II and III).

7. The scope of the two Regulations has been defined so as to avoid any overlap (Article 16 of Regulation (EEC) No 1984/83).

2. *Basic provision*

(Article 1)

8. Both Regulations apply only to agreements entered into for the purpose of the resale of goods to which not more than two undertakings are party.

(a) 'For resale'

9. The notion of resale requires that the goods concerned be disposed of by the purchasing party to others in return for consideration. Agreements on the supply or purchase of goods

which the purchasing party transforms or processes into other goods or uses or consumes in manufacturing other goods are not agreement for resale. The same applies to the supply of components which are combined with other components into a different product. The criterion is that the goods distributed by the reseller are the same as those the other party has supplied to him for that purpose. The economic identity of the goods is not affected if the reseller merely breaks up and packages the goods in smaller quantities, or repackages them, before resale.

10. Where the reseller performs additional operations to improve the quality, durability, appearance or taste of the goods (such as rust-proofing of metals, sterilization of food or the addition of colouring matter or flavourings to drugs), the position will mainly depend on how much value the operation adds to the goods. Only a slight addition in value can be taken not to change the economic identity of the goods. In determining the precise dividing line in individual cases, trade usage in particular must be considered. The Commission applies the same principles to agreements under which the reseller is supplied with a concentrated extract for a drink which he has to dilute with water, pure alcohol or another liquid and to bottle before reselling.

(b) 'Goods'

11. Exclusive agreements for the supply of services rather than the resale of goods are not covered by the Regulations. The block exemption still applies, however, where the reseller provides customer or after-sales services incidentally to the resale of the goods. Nevertheless, a case where the charge for the service is higher than the price of the goods would fall outside the scope of the Regulations.

12. The hiring-out of goods in return for payment comes closer, economically speaking, to a resale of goods than to provision of services. The Commission therefore regards exclusive agreements under which the purchasing party hires out or leases to others the goods supplied to him as covered by the Regulations.

(c) 'Only two undertakings party'

13. To be covered by the block exemption, the exclusive distribution or purchasing agreement must be between only one supplier and one reseller in each case. Several undertakings forming one economic unit count as one undertaking.

14. This limitation on the number of undertakings that may be party relates solely to the individual agreement. A supplier does not lose the benefit of the block exemption if he enters into exclusive distribution or purchasing agreements covering the same goods with several resellers.

15. The supplier may delegate the performance of his contractual obligations to a connected or independent undertaking which he has entrusted with the distribution of his goods, so that the reseller has to purchase the contract goods from the latter undertaking. This principle is expressly mentioned only in Regulation (EEC) No 1984/83 (Articles 1, 6 and 10), because the question of delegation arises mainly in connection with exclusive purchasing agreements. It also applies, however, to exclusive distribution agreements under Regulation (EEC) No 1983/83.

16. The involvement of undertakings other than the contracting parties must be confined to the execution of deliveries. The parties may accept exclusive supply or purchasing obligations only for themselves, and not impose them on third parties, since otherwise more than two undertakings would be party to the agreement. The obligation of the parties to ensure that the obligations they have accepted are respected by connected undertakings is, however, covered by the block exemption.

3. *Other restrictions on competition that are exempted*

(Article 2(1) and (2))

17. Apart from the exclusive supply obligation (Regulation (EEC) No 1983/83) or exclusive purchasing obligation (Regulation (EEC) No 1984/83), obligations defined in Article 1 which must be present if the block exemption is to apply, the only other restrictions of competition that may be agreed by the parties are those set out in Article 2(1) and (2). If they agree on further obligations restrictive of competition, the agreement as a whole is no longer covered by the block exemption and requires individual exemption. For example, an agreement will exceed the bounds of the Regulations if the parties relinquish the possibility of independently determining their prices or conditions of business or undertake to refrain from, or even prevent, cross-border trade, which the Regulations expressly state must not be impeded. Among other clauses which in general are not permissible under the Regulations are those which impede the reseller in his free choice of customers.

18. The obligations restrictive of competition that are exempted may be agreed only for the duration of the agreement. This also applies to restrictions accepted by the supplier or reseller on competing with the other party.

4. *Obligations upon the reseller which do not prejudice the block exemption*

(Article 2 (3))

19. The obligations cited in this provision are examples of clauses which generally do not restrict competition. Undertakings are therefore free to include one, several or all of these obligations in their agreements. However, the obligations may not be formulated or applied in such a way as to take on the character of restrictions of competition that are not permitted. To forestall this danger, Article 2(3)(b) of Regulation (EEC) No 1984/83 expressly allows minimum purchasing obligations only for goods that are subject to an exclusive purchasing obligation.

20. As part of the obligation to take measures for promotion of sales and in particular to maintain a distribution network (Article 2(3)(c) of Regulation (EEC) No 1983/83 and Article 2(3)(d) of Regulation (EEC) No 1984/83), the reseller may be forbidden to supply the contract goods to unsuitable dealers. Such clauses are unobjectionable if admission to the distribution network is based on objective criteria of a qualitative nature relating to the professional qualifications of the owner of the business or his staff or the suitability of his business premises, if the criteria are the same for all potential dealers, and if the criteria are actually applied in a non-discriminatory manner. Distribution systems which do not fulfil these conditions are not covered by the block exemption.

5. *Inapplicability of the block exemption to exclusive agreements between competing manufacturers*

(Articles 3(a) and (b), 4 and 5)

21. The block exemption does not apply if either the parties themselves or undertakings connected with them are manufacturers, manufacture goods belonging to the same product market, and enter into exclusive distribution or purchasing agreements with one another in respect of those goods. Only identical or equivalent goods are regarded as belonging to the same product market. The goods in question must be interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price and intended use of the goods together. In certain cases, however, goods can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed. The above provisions are applicable regardless of whether or not the parties or the undertakings connected with them are based in the Community and whether or not they are already actually in competition with one another in the relevant goods inside or outside the Community.

22. In principle, both reciprocal and non-reciprocal exclusive agreements between competing manufacturers are not covered by the block exemption and are therefore subject to individual scrutiny of their compatibility with Article 85 of the Treaty, but there is an exception for non-reciprocal agreements of the abovementioned kind where one or both of the parties are undertakings with a total annual turnover of no more than ECU 100 million (Article 3(b)). Annual turnover is used as a measure of the economic strength of the undertakings involved. Therefore, the aggregate turnover from goods and services of all types, and not only from the contract goods, is to be taken. Turnover taxes and other turnover-related levies are not included in turnover. Where a party belongs to a group of connected undertakings, the worldwide turnover of the group, excluding intra-group sales (Article 5(3)), is to be used.

23. The total turnover limit can be exceeded during any period of two successive financial years by up to 10% without loss of the block exemption. The block exemption is lost if, at the end of the second financial year, the total turnover over the preceding two years has been over ECU 220 million (Article 5(2)).

6. *Withdrawal of the block exemption in individual cases*

(Article 6 of Regulation (EEC) No 1983/83 and Article 14 of Regulation (EEC) No 1984/83)

24. The situations described are meant as illustrations of the sort of situations in which the Commission can exercise its powers under Article 7 of Council Regulation No 19/65/EEC[1] to withdraw a block exemption. The benefit of the block exemption can only be withdrawn by a decision in an individual case following proceedings under Regulation No 17. Such a decision cannot have retroactive effect. It may be coupled with an individual exemption subject to conditions or obligations or, in an extreme case, with the finding of an infringement and an order to bring it to an end.

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[1] OJ 36, 6.3.1965, p. 533/65.

7. *Transitional provisions*

(Article 7 of Regulation (EEC) No 1983/83 and
Article 15(1) of Regulation (EEC) No 1984/83)

25. Exclusive distribution or exclusive purchasing agreements which were concluded and entered into force before 1 January 1984 continue to be exempted under the provisions of Regulation No 67/67/EEC until 31 December 1986. Should the parties wish to apply such agreements beyond 1 January 1987, they will either have to bring them into line with the provisions of the new Regulations or to notify them to the Commission. Special rules apply in the case of beer-supply and service-station agreements (see paragraphs 64 and 65 below).

8. *Concerted practices*

(Article 9 of Regulation (EEC) No 1983/83 and
Article 18 of Regulation (EEC) No 1984/83)

26. These provisions bring within the scope of the Regulations exclusive distribution and purchasing arrangements which are operated by undertakings but are not the subject of a legally binding agreement.

III. Exclusive distribution agreements (Regulation (EEC) No 1983/83)

1. *Exclusive supply obligation*

(Article 1)

27. The exclusive supply obligation does not prevent the supplier from providing the contract goods to other resellers who afterwards sell them in the exclusive distributor's territory. It makes no difference whether the other dealers concerned are established outside or inside the territory. The supplier is not in breach of his obligation to the exclusive distributor provided that he supplies the resellers who wish to sell the contract goods in the territory only at their request and that the goods are handed over outside the territory. It does not matter whether the reseller takes delivery of the goods himself or through an intermediary, such as a freight forwarder. However, supplies of this nature are only permissible if the reseller and not the supplier pays the transport costs of the goods into the contract territory.

28. The goods supplied to the exclusive distributor must be intended for resale in the contract territory. This basic requirement does not, however, mean that the exclusive distributor cannot sell the contract goods to customers outside his contract territory should he receive orders from them. Under Article 2(2)(c), the supplier can prohibit him only from seeking customers in other areas, but not from supplying them.

29. It would also be incompatible with the Regulation for the exclusive distributor to be restricted to supplying only certain categories of customers (e.g. specialist retailers) in his contract territory and prohibited from supplying other categories (e.g. department stores), which are supplied by other resellers appointed by the supplier for that purpose.

2. *Restriction on competition by the supplier*

(Article 2(1))

30. The restriction on the supplier himself supplying the contract goods to final users in the exclusive distributor's contract territory need not be absolute. Clauses permitting the supplier to supply certain customers in the territory — with or without payment of compensation to the exclusive distributor — are compatible with the block exemption provided the customers in question are not resellers. The supplier remains free to supply the contract goods outside the contract territory to final users based in the territory. In this case the position is the same as for dealers (see paragraph 27 above).

3. *Inapplicability of the block exemption in cases of absolute territorial protection*

(Articles 3(c) and (d))

31. The block exemption cannot be claimed for agreements that give the exclusive distributor absolute territorial protection. If the situation described in Article 3(c) obtains, the parties must ensure either that the contract goods can be sold in the contract territory by parallel importers or that users have a real possibility of obtaining them from undertakings outside the contract territory, if necessary outside the Community, at the prices and on the terms there prevailing. The supplier can represent an alternative source of supply for the purposes of this provision if he is prepared to supply the contract goods on request to final users located in the contract territory.

32. Article 3(d) is chiefly intended to safeguard the freedom of dealers and users to obtain the contract goods in other Member States. Action to impede imports into the Community from third countries will only lead to loss of the block exemption if there are no alternative sources of supply in the Community. This situation can arise especially where the exclusive distributor's contract territory covers the whole or the major part of the Community.

33. The block exemption ceases to apply as from the moment that either of the parties takes measures to impede parallel imports into the contract territory. Agreements in which the supplier undertakes with the exclusive distributor to prevent his other customers from supplying into the contract territory are ineligible for the block exemption from the outset. This is true even if the parties agree only to prevent imports into the Community from third countries. In this case it is immaterial whether or not there are alternative sources of supply in the Community. The inapplicability of the block exemption follows from the mere fact that the agreement contains restrictions on competition which are not covered by Article 2(1).

IV. Exclusive purchasing agreements (Regulation (EEC) No 1984/83)

1. *Structure of the Regulation*

34. Title I of the Regulation contains general provisions for exclusive purchasing agreements and Titles II and III special provisions for beer-supply and service-station agreements. The latter types of agreement are governed exclusively by the special provisions, some of

which (Articles 9 and 13), however, refer to some of the general provisions. Article 17 also excludes the combination of agreements of the kind referred to in Title I with those of the kind referred to in Titles II or III to which the same undertakings or undertakings connected with them are party. To prevent any avoidance of the special provisions for beer-supply and service-station agreements, it is also made clear that the provisions governing the exclusive distribution of goods do not apply to agreements entered into for the resale of drinks on premises used for the sale or consumption of beer or for the resale of petroleum products in service stations (Article 8 of Regulation (EEC) No 1983/83).

2. *Exclusive purchasing obligation*

(Article 1)

35. The Regulation only covers agreements whereby the reseller agrees to purchase all his requirements for the contract goods from the other party. If the purchasing obligation relates to only part of such requirements, the block exemption does not apply. Clauses which allow the reseller to obtain the contract goods from other suppliers, should these sell them more cheaply or on more favourable terms than the other party, are still covered by the block exemption. The same applies to clauses releasing the reseller from his exclusive purchasing obligation should the other party be unable to supply.

36. The contract goods must be specified by brand or denomination in the agreement. Only if this is done will it be possible to determine the precise scope of the reseller's exclusive purchasing obligation (Article 1) and of the ban on dealing in competing products (Article 2(2)).

3. *Restriction on competition imposed on the supplier*

(Article 2(1))

37. This provision allows the reseller to protect himself against direct competition from the supplier in his principal sales area. The reseller's principal sales area is determined by his normal business activity. It may be more closely defined in the agreement. However, the supplier cannot be forbidden to supply dealers who obtain the contract goods outside this area and afterwards resell them to customers inside it or to appoint other resellers in the area.

4. *Limits of the block exemption*

(Article 3(c) and (d))

38. Article 3(c) provides that the exclusive purchasing obligation can be agreed for one or more products, but in the latter case the products must be so related as to be thought of as belonging to the same range of goods. The relationship can be founded on technical (e.g. a machine, accessories and spare parts for it) or commercial grounds (e.g. several products used for the same purpose) or on usage in the trade (different goods that are customarily offered for sale together). In the latter case, regard must be had to the usual practice at the reseller's level of distribution on the relevant market, taking into account all relevant dealers and not only particular forms of distribution. Exclusive purchasing agreements covering

goods which do not belong together can only be exempted from the competition rules by an individual decision.

39. Under Article 3(d), exclusive purchasing agreements concluded for an indefinite period are not covered by the block exemption. Agreements which specify a fixed term but are automatically renewable unless one of the parties gives notice to terminate are to be considered to have been concluded for an indefinite period.

V. Beer-supply agreements (Title II of Regulation (EEC) No 1984/83)

1. *Agreements of minor importance*

40. It is recalled that the Commission's notice on agreements of minor importance[1] states that the Commission holds the view that agreements between undertakings do not fall under the prohibition of Article 85(1) of the EEC Treaty if certain conditions as regards market share and turnover are met by the undertakings concerned. Thus, it is evident that when an undertaking, brewery or wholesaler surpasses the limits as laid down in the above notice, the agreements concluded by it may fall under Article 85(1) of the EEC Treaty. The notice, however, does not apply where in a relevant market competition is restricted by the cumulative effects of parallel networks of similar agreements which would not individually fall under Article 85(1) of the EEC Treaty if the notice was applicable. Since the markets for beer will frequently be characterized by the existence of cumulative effects, it seems appropriate to determine which agreements can nevertheless be considered *de minimus*.

The Commission is of the opinion that an exclusive beer-supply agreement concluded by a brewery, in the sense of Article 6, and including Article 8(2) of Regulation (EEC) No 1984/83 does not, in general, fall under Article 85(1) of the EEC Treaty if

— the market share of that brewery is not higher than 1% on the national market for the resale of beer in premises used for the sale and consumption of drinks, and

— if that brewery does not produce more than 200 000 hl of beer per annum.

However, these principles do not apply if the agreement in question is concluded for more than seven and a half years in as far as it covers beer and other drinks, and for 15 years if it covers only beer.

In order to establish the market share of the brewery and its annual production, the provisions of Article 4(2) of Regulation (EEC) No 1984/83 apply.

As regards exclusive beer-supply agreements in the sense of Article 6, and including Article 8(2) of Regulation (EEC) No 1984/83 which are concluded by wholesalers, the above principles apply *mutatis mutandis* by taking account of the position of the brewery whose beer is the main subject of the agreement in question.

The present communication does not preclude that in individual cases even agreements between undertakings which do not fulfil the above criteria, in particular where the number

[1] OJ C 121, 13.5.1992, p. 2.

of outlets tied to them is limited as compared to the number of outlets existing on the market, may still have only a negligible effect on trade between Member States or on competition, and would therefore not be caught by Article 85(1) of the EEC Treaty.

Neither does this communication in any way prejudge the application of national law to the agreements covered by it.

2. *Exclusive purchasing obligation*

(Article 6)

41. The beers and other drinks covered by the exclusive purchasing obligation must be specified by brand or denomination in the agreement. An exclusive purchasing obligation can only be imposed on the reseller for drinks which the supplier carries at the time the contract takes effect and provided that they are supplied in the quantities required, at sufficiently regular intervals and at prices and on conditions allowing normal sales to the consumer. Any extension of the exclusive purchasing obligation to drinks not specified in the agreement requires an additional agreement, which must likewise satisfy the requirements of Title II of the Regulation. A change in the brand or denomination of a drink which in other respects remains unchanged does not constitute such an extension of the exclusive purchasing obligation.

42. The exclusive purchasing obligation can be agreed in respect of one or more premises used for the sale and consumption of drinks which the reseller runs at the time the contract takes effect. The name and location of the premises must be stated in the agreement. Any extension of the exclusive purchasing obligation to other such premises requires an additional agreement, which must likewise satisfy the provisions of Title II of the Regulation.

43. The concept of 'premises used for the sale and consumption of drinks' covers any licensed premises used for this purpose. Private clubs are also included. Exclusive purchasing agreements between the supplier and the operator of an off-licence shop are governed by the provisions of Title I of the Regulation.

44. Special commercial or financial advantages are those going beyond what the reseller could normally expect under an agreement. The explanations given in the 13th recital are illustrations. Whether or not the supplier is affording the reseller special advantages depends on the nature, extent and duration of the obligation undertaken by the parties. In doubtful cases usage in the trade is the decisive element.

45. The reseller can enter into exclusive purchasing obligations both with a brewery in respect of beers of a certain type and with a drinks wholesaler in respect of beers of another type and/or other drinks. The two agreements can be combined into one document. Article 6 also covers cases where the drinks wholesaler performs several functions at once, signing the first agreement on the brewery's and the second on his own behalf and also undertaking delivery of all the drinks. The provisions of Title II do not apply to the contractual relations between the brewery and the drinks wholesaler.

46. Article 6(2) makes the block exemption also applicable to cases in which the supplier affords the owner of premises financial or other help in equipping them as a public house, restaurant, etc., and in return the owner imposes on the buyer or tenant of the premises an

exclusive purchasing obligation in favour of the supplier. A similar situation, economically speaking, is the transmission of an exclusive purchasing obligation from the owner of a public house to his successor. Under Article 8(1)(e) this is also, in principle, permissible.

3. *Other restrictions of competition that are exempted*

(Article 7)

47. The list of permitted obligations given in Article 7 is exhaustive. If any further obligations restricting competition are imposed on the reseller, the exclusive purchasing agreement as a whole is no longer covered by the block exemption.

48. The obligation referred to in paragraph 1(a) applies only so long as the supplier is able to supply the beers or other drinks specified in the agreement and subject to the exclusive purchasing obligation in sufficient quantities to cover the demand the reseller anticipates for the products from his customers.

49. Under paragraph 1(b), the reseller is entitled to sell beer of other types in draught form if the other party has tolerated this in the past. If this is not the case, the reseller must indicate that there is sufficient demand from his customers to warrant the sale of other draught beers. The demand must be deemed sufficient if it can be satisfied without a simultaneous drop in sales of the beers specified in the exclusive purchasing agreement. It is definitely not sufficient if sales of the additional draught beer turn out to be so slow that there is a danger of its quality deteriorating. It is for the reseller to assess the potential demand of his customers for other types of beer; after all, he bears the risk if his forecasts are wrong.

50. The provision in paragraph 1(c) is not only intended to ensure the possibility of advertising products supplied by over undertakings to the minimum extent necessary in any given circumstances. The advertising of such products should also reflect their relative importance *vis-à-vis* the competing products of the supplier who is party to the exclusive purchasing agreement. Advertising for products which the public house has just begun to sell may not be excluded or unduly impeded.

51. The Commission believes that the designations of types customary in inter-State trade and within the individual Member States may afford useful pointers to the interpretation of Article 7(2). Nevertheless the alternative criteria stated in the provision itself are decisive. In doubtful cases, whether or not two beers are clearly distinguishable by their composition, appearance or taste depends on custom at the place where the public house is situated. The parties may, if they wish, jointly appoint an expert to decide the matter.

4. *Agreements excluded from the block exemption*

(Article 8)

52. The reseller's right to purchase drinks from third parties may be restricted only to the extent allowed by Articles 6 and 7. In his purchases of goods other than drinks and in his procurement of services which are not directly connected with the supply of drinks by the other party, the reseller must remain free to choose his supplier. Under Article 8(1)(a) and (b), any action by the other party or by an undertaking connected with or appointed by him

or acting at his instigation or with his agreement to prevent the reseller exercising his rights in this regard will entail the loss of the block exemption. For the purposes of these provisions it makes no difference whether the reseller's freedom is restricted by contract, informal understanding, economic pressures or other practical measures.

53. The installation of amusement machines in tenanted public houses may by agreement be made subject to the owner's permission. The owner may refuse permission on the ground that this would impair the character of the premises or he may restrict the tenant to particular types of machines. However, the practice of some owners of tenanted public houses to allow the tenant to conclude contracts for the installation of such machines only with certain undertakings which the owner recommends is, as a rule, incompatible with this Regulation, unless the undertakings are selected on the basis of objective criteria of a qualitative nature that are the same for all potential providers of such equipment and are applied in a non-discriminatory manner. Such criteria may refer to the reliability of the undertaking and its staff and the quality of the services it provides. The supplier may not prevent a public house tenant from purchasing amusement machines rather than renting them.

54. The limitation of the duration of the agreement in Article 8(1)(c) and (d) does not affect the parties' right to renew their agreement in accordance with the provisions of Title II of the Regulation.

55. Article 8(2)(b) must be interpreted in the light both of the aims of the Community competition rules and of the general legal principle whereby contracting parties must exercise their rights in good faith.

56. Whether or not a third undertaking offers certain drinks covered by the exclusive purchasing obligation on more favourable terms than the other party for the purposes of the first indent of Article 8(2)(b) is to be judged in the first instance on the basis of a comparison of prices. This should take into account the various factors that go to determine the prices. If a more favourable offer is available and the tenant wishes to accept it, he must inform the other party of his intentions without delay so that the other party has an opportunity of matching the terms offered by the third undertaking. If the other party refuses to do so or fails to let the tenant have his decision within a short period, the tenant is entitled to purchase the drinks from the other undertaking. The Commission will ensure that exercise of the brewery's or drinks wholesaler's right to match the prices quoted by another supplier does not make it significantly harder for other suppliers to enter the market.

57. The tenant's right provided for in the second indent of Article 8(2)(b) to purchase drinks of another brand or denomination from third undertakings obtains in cases where the other party does not offer them. Here the tenant is not under a duty to inform the other party of his intentions.

58. The tenant's rights arising from Article 8(2)(b) override any obligation to purchase minimum quantities imposed upon him under Article 9 in conjunction with Article 2(3)(b) to the extent that this is necessary to allow the tenant full exercise of those rights.

VI. Service-station agreements (Title III of Regulation (EEC) No 1984/83)

1. *Exclusive purchasing obligation*

(Article 10)

59. The exclusive purchasing obligation can cover either motor vehicle fuels (e.g. petrol, diesel fuel, LPG, kerosene) alone or motor vehicle fuels and other fuels (e.g. heating oil, bottled gas, paraffin). All the goods concerned must be petroleum-based products.

60. The motor vehicle fuels covered by the exclusive purchasing obligation must be for use in motor-powered land or water vehicles or aircraft. The term 'service station' is to be interpreted in a correspondingly wide sense.

61. The Regulation applies to petrol stations adjoining public roads and fuelling installations on private property not open to public traffic.

2. *Other restrictions on competition that are exempted*

(Article 11)

62. Under Article 11(b) only the use of lubricants and related petroleum-based products supplied by other undertakings can be prohibited. This provision refers to the servicing and maintenance of motor vehicles, i.e. to the reseller's activity in the field of provision of services. It does not affect the reseller's freedom to purchase the said products from other undertakings for resale in the service station. The petroleum-based products related to lubricants referred to in paragraph (b) are additives and brake fluids.

63. For the interpretation of Article 11(c), the considerations stated in paragraph 49 above apply by analogy.

3. *Agreements excluded from the block exemption*

(Article 12)

64. These provisions are analogous to those of Article 8(1)(a), (b), (d) and (e) and 8(2)(a). Reference is therefore made to paragraphs 51 and 53 above.

VII. Transitional provisions for beer-supply and service-station agreements

(Article 15(2) and (3))

65. Under Article 15(2), all beer-supply and service-station agreements which were concluded and entered into force before 1 January 1984 remain covered by the provisions of Regulation No 67/67/EEC until 31 December 1988. From 1 January 1989 they must comply with the provisions of Titles II and III of Regulation (EEC) No 1984/83. Under Article 15(3), in the case of agreements which were in force on 1 July 1983, the same principle applies except that the 10-year maximum duration for such agreements laid down in Article 8(1)(d) and Article 12(1)(c) may be exceeded.

66. The sole requirement for the eligible beer-supply and service-station agreements to continue to enjoy the block exemption beyond 1 January 1989 is that they be brought into line with the new provisions. It is left to the undertakings concerned how they do so. One way is for the parties to agree to amend the original agreement, another for the supplier unilaterally to release the reseller from all obligations that would prevent the application of the block exemption after 1 January 1989. The latter method is only mentioned in Article 15(3) in relation to agreements in force on 1 July 1983. However, there is no reason why the possibility should not also be open to parties to agreements entered into between 1 July 1983 and 1 January 1984.

67. Parties lose the benefit of application of the transitional provisions if they extend the scope of their agreement as regards persons, places or subject matter, or incorporate into it additional obligations restrictive of competition. The agreement then counts as a new agreement. The same applies if the parties substantially change the nature or extent of their obligations to one another. A substantial change in this sense includes a revision of the purchase price of the goods supplied to the reseller or of the rent for a public house or service station which goes beyond mere adjustment to the changing economic environment.

COMMISSION REGULATION (EEC) No 123/85[1] OF 12 DECEMBER 1984

on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices,[2] as last amended by the Act of Accession of Greece,

Having published a draft of this Regulation,[3]

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Under Article 1(1)(a) of Regulation No 19/65/EEC the Commission is empowered to declare by means of a Regulation that Article 85(3) of the Treaty applies to certain categories of agreements falling within Article 85(1) to which only two undertakings are party and by which one party agrees with the other to supply only to that other undertaking certain goods for resale within a defined territory of the common market. In the light of experience since Commission Decision 75/73/EEC[4] and of the many motor vehicle distribution and servicing agreements which have been notified to the Commission pursuant to Articles 4 and 5 of Council Regulation No 17,[5] as last amended by Regulation (EEC) No 2821/71,[6] a category of agreements can be defined as satisfying the conditions laid down in Regulation No 19/65/EEC. These are agreements, for a definite or an indefinite period, by which the supplying party entrusts to the reselling party the task of promoting the distribution and servicing of certain products of the motor vehicle industry in a defined area and by which the supplier undertakes to supply contract goods for resale only to the dealer, or only to a limited number of undertakings within the distribution network besides the dealer, within the contract territory.

A list of definitions for the purpose of this Regulation is set out in Article 13.

(2) Notwithstanding that the obligations imposed by distribution and servicing agreements which are listed in Articles 1, 2 and 3 of this Regulation normally have as their object or effect the prevention, restriction or distortion of competition within the common market and are normally apt to affect trade between Member States, the prohibition in Article 85(1) of the Treaty may nevertheless be declared inapplicable to these agreements by virtue of Article 85(3), albeit only under certain restrictive conditions.

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[1] OJ L 15, 18.1.1985, p. 16.
[2] OJ 36, 6.3.1965, p. 533/65.
[3] OJ C 165, 24.6.1983, p. 2.
[4] OJ L 29, 3.2.1975, p. 1.
[5] OJ 13, 21.2.1962, p. 204/62.
[6] OJ L 285, 29.12.1971, p. 49.

(3) The applicability of Article 85(1) of the Treaty to distribution and servicing agreements in the motor vehicle industry stems in particular from the fact that restrictions on competition and the obligations connected with the distribution system listed in Articles 1 to 4 of this Regulation are regularly imposed in the same or similar form throughout the common market for the products supplied within the distribution system of a particular manufacturer. The motor vehicle manufacturers cover the whole common market or substantial parts of it by means of a cluster of agreements involving similar restrictions on competition and affect in this way not only distribution and servicing within Member States but also trade between them.

(4) The exclusive and selective distribution clauses can be regarded as indispensable measures of rationalization in the motor vehicle industry because motor vehicles are consumer durables which at both regular and irregular intervals require expert maintenance and repair, not always in the same place. Motor vehicle manufacturers cooperate with the selected dealers and repairers in order to provide specialized servicing for the product. On grounds of capacity and efficiency alone, such a form of cooperation cannot be extended to an unlimited number of dealers and repairers. The linking of servicing and distribution must be regarded as more efficient than a separation between a distribution organization for new vehicles on the one hand and a servicing organization which would also distribute spare parts on the other, particularly as, before a new vehicle is delivered to the final consumer, the undertaking within the distribution system must give it a technical inspection according to the manufacturer's specification.

(5) However, obligatory recourse to the authorized network is not in all respects indispensable for efficient distribution. The exceptions to the block exemption provide that the supply of contract goods to resellers may not be prohibited where they:

— belong to the same distribution system (Article 3, point 10(a)),

or

— purchase spare parts for their own use in effecting repairs or maintenance (Article 3, point 10(b)).

Measures taken by a manufacturer or by undertakings within the distribution system with the object of protecting the selective distribution system are compatible with the exemption under this Regulation. This applies in particular to a dealer's obligation to sell vehicles to a final consumer using the services of an intermediary only where that consumer has authorized that intermediary to act as his agent (Article 3, point 11).

(6) It should be possible to bar wholesalers not belonging to the distribution system from reselling parts originating from motor vehicle manufacturers. It may be supposed that the system of rapid availability of spare parts across the whole contract programme, including those with a low turnover, which is beneficial to the consumer, could not be maintained without obligatory recourse to the authorized network.

(7) The ban on dealing in competing products and that on dealing in other vehicles at stated premises may in principle be exempted, because they contribute to concentration by the undertakings in the distribution network of their efforts on the products supplied by the

manufacturer or with his consent, and thus ensure distribution and servicing appropriate for the vehicles (Article 3, point 3). Such obligations provide an incentive for the dealer to develop sales and servicing of contract goods and thus promote competition in the supply of those products as well as between those products and competing products.

(8) However, bans on dealing in competing products cannot be regarded as indispensable in all circumstances to efficient distribution. Dealers must be free to obtain from third parties supplies of parts which match the quality of those offered by the manufacturer, for example where the parts are produced by a subcontract manufacturer who also supplies the motor vehicle manufacturer, and to use and sell them. They must also keep their freedom to choose parts which are usable in motor vehicles within the contract programme and which not only match but exceed the quality standard. Such a limit on the ban on dealing in competing products takes account of the importance of vehicle safety and of the maintenance of effective competition (Article 3, point 4 and Article 4(1), points 6 and 7).

(9) The restrictions imposed on the dealer's activities outside the allotted area lead to more intensive distribution and servicing efforts in an easily supervised contract territory, to knowledge of the market based on closer contact with consumers, and to more demand-orientated supply (Article 3, points 8 and 9). However, demand for contract goods must remain flexible and should not be limited on a regional basis. Dealers must not be confined to satisfying the demand for contract goods within their contract territories, but must also be able to meet demand from persons and undertakings in other areas of the common market. Dealers' advertising in a medium which is directed to customers in the contract territory but also covers a wider area should not be prevented, because it does not run counter to the obligation to promote sales within the contract territory.

(10) The obligations listed in Article 4(1) are directly related to the obligations in Articles 1, 2 and 3, and influence their restrictive effect. These obligations, which might in individual cases be caught by the prohibition in Article 85(1) of the Treaty, may also be exempted because of their direct relationship with one or more of the obligations exempted by Articles 1, 2 and 3 (Article 4(2)).

(11) According to Article 1(2)(b) of Regulation No 19/65/EEC, conditions which must be satisfied if the declaration of inapplicability is to take effect must be specified.

(12) Under Article 5(1), points 1(a) and (b) it is a condition of exemption that the undertaking should honour the minimum guarantee and provide the minimum free servicing and vehicle recall work laid down by the manufacturer, irrespective of where in the common market the vehicle was purchased. These provisions are intended to prevent the consumer's freedom to buy anywhere in the common market from being limited.

(13) Article 5(1), point 2(a) is intended to allow the manufacturer to build up a coordinated distribution system, but without hindering the relationship of confidence between dealers and subdealers. Accordingly, if the supplier reserves the right to approve appointments of subdealers by the dealer, he must not be allowed to withhold approval arbitrarily.

(14) Article 5(1), point 2(b) obliges the supplier not to impose on a dealer within the distribution system requirements, as defined in Article 4(1), which are discriminatory or inequitable.

(15) Article 5(1), point 2(c) is intended to counter the concentration of the dealers demand on the supplier which might follow from cumulation of discounts. The purpose of this provision is to allow spare-parts suppliers which do not offer as wide a range of goods as the manufacturer to compete on equal terms.

(16) Article 5(1), point 2(d) makes exemption subject to the conditions that the dealer must be able to purchase for customers in the common market volume-produced passenger cars with the specifications appropriate for their place of residence or where the vehicle is to be registered, in so far as the corresponding model is also supplied by the manufacturer through undertakings within the distribution system in that place (Article 13, point 10). This provision obviates the danger that the manufacturer and undertakings within the distribution network might make use of product differentiation as between parts of the common market to partition the market.

(17) Article 5(2) makes the exemption of the no-competition clause and of the ban on dealing in other makes of vehicle subject to further threshold conditions. This is to prevent the dealer from becoming economically overdependent on the supplier because of such obligations, and abandoning the competitive activity which is nominally open to him, because to pursue it would be against the interests of the manufacturer or other undertakings within the distribution network.

(18) Under Article 5(2), point 1(a), the dealer may, where there are exceptional reasons, oppose application of excessive obligations covered by Article 3, points 3 or 5.

(19) The supplier may reserve the right to appoint further distribution and servicing undertakings in the contract territory or to alter the territory, but only if he can show that there are exceptional reasons for doing so (Article 5(2) point 1(b) and Article 5(3)). This is, for example, the case where there would otherwise be reason to apprehend a serious deterioration in the distribution or servicing of contract goods.

(20) Article 5(2), points 2 and 3 lay down minimum requirements for exemption which concern the duration and termination of the distribution and servicing agreement; the combined effect of a no-competition clause or a ban on dealing in other makes of vehicle, the investments the dealer makes in order to improve the distribution and servicing on contract goods and a short-term agreement or one terminable at short notice is greatly to increase the dealer's dependence on the supplier.

(21) In accordance with Article 1(2)(a) of Regulation No 19/65/EEC, restrictions or provisions which must not be contained in the agreements, if the declaration of inapplicability of Article 85(1) by this Regulation is to take effect, are to be specified.

(22) Agreements under which one motor vehicle manufacturer entrusts the distribution of its products to another must be excluded from the block exemption under this Regulation because of their far-reaching impact on competition (Article 6, point 1).

(23) An obligation to apply minimum resale prices or maximum trade discounts precludes exemption under this Regulation (Article 6, point 2).

(24) The exemption does not apply where the parties agree between themselves obligations concerning goods covered by this Regulation which would be acceptable in the combination of obligations which is exempted by Commission Regulations (EEC) No 1983/83[1] or (EEC) No 1984/83[2] on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements respectively, but which go beyond the scope of the obligations exempted by this Regulation (Article 6, point 3).

(25) Distribution and servicing agreements can be exempted, subject to the conditions laid down in Articles 5 and 6, so long as the application of obligations covered by Articles 1 to 4 of this Regulation brings about an improvement in distribution and servicing to the benefit of the consumer and effective competition exists, not only between manufacturers' distribution systems but also to a certain extent within each system within the common market. As regards the categories of products set out in Article 1 of this Regulation, the conditions necessary for effective competition, including competition in trade between Member States, may be taken to exist at present, so that European consumers may be considered in general to take an equitable share in the benefit from the operation of such competition.

(26) Articles 7, 8 and 9, concerning the retroactive effect of the exemption, are based on Articles 3 and 4 of Regulation No 19/65/EEC and Articles 4 to 7 of Regulation No 17. Article 10 embodies the Commission's powers under Article 7 of Regulation No 19/65/EEC to withdraw the benefit of its exemption or to alter its scope in individual cases, and lists several important examples of such cases.

(27) In view of the extensive effect of this Regulation on the persons it concerns, it is appropriate that it should not enter into force until 1 July 1985. In accordance with Article 2(1) of Regulation No 19/65/EEC, the exemption may be made applicable for a definite period. A period extending until 30 June 1995 is appropriate, because overall distribution schemes in the motor vehicle sector must be planned several years in advance.

(28) Agreements which fulfil the conditions set out in this Regulation need not be notified.

(29) This Regulation does not affect the application of Regulations (EEC) No 1983/83 or (EEC) No 1984/83 or of Commission Regulation (EEC) No 3604/82 of 23 December 1982 on the application of Article 85(3) of the Treaty to categories of specialization agreements,[3] or the right to request a Commission decision in an individual case pursuant to Council Regulation No 17. It is without prejudice to laws and administrative measures of the Member States by which the latter, having regard to particular circumstances, prohibit or declare unenforceable particular restrictive obligations contained in an agreement exempted under this Regulation; the foregoing cannot, however, affect the primacy of Community law,

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[1] OJ L 173, 30.6.1983, p. 1.
[2] OJ L 173, 30.6.1983, p. 5.
[3] OJ L 376, 31.12.1982, p. 33.

HAS ADOPTED THIS REGULATION:

Article 1

Pursuant to Article 85(3) of the Treaty it is hereby declared that subject to the conditions laid down in this Regulation Article 85(1) shall not apply to agreements to which only two undertakings are party and in which one contracting party agrees to supply within a defined territory of the common market

— only to the other party, or

— only to the other party and to a specified number of other undertakings within the distribution system,

for the purpose of resale certain motor vehicles intended for use on public roads and having three or more road wheels, together with spare parts therefor.

Article 2

The exemption under Article 85(3) of the Treaty shall also apply where the obligation referred to in Article 1 is combined with an obligation on the supplier neither to sell contract goods to final consumers nor to provide them with servicing for contract goods in the contract territory.

Article 3

The exemption under Article 85(3) of the Treaty shall also apply where the obligation referred to in Article 1 is combined with an obligation on the dealer:

(1) not, without the supplier's consent, to modify contract goods or corresponding goods, unless such modification is the subject of a contract with a final consumer and concerns a particular motor vehicle within the contract programme purchased by that final consumer;

(2) not to manufacture products which compete with contract goods;

(3) neither to sell new motor vehicles which compete with contract goods nor to sell, at the premises used for the distribution of contract goods, new motor vehicles other than those offered for supply by the manufacturer;

(4) neither to sell spare parts which compete with contract goods and do not match the quality of contract goods nor to use them for repair or maintenance of contract goods or corresponding goods;

(5) not to conclude with third parties distribution or servicing agreements for goods which compete with contract goods;

(6) without the supplier's consent, neither to conclude distribution or servicing agreements with undertakings operating in the contract territory for contract goods or corresponding goods nor to alter or terminate such agreements;

(7) to impose upon undertakings with which the dealer has concluded agreements in accordance with point 6 obligations corresponding to those which the dealer has accepted in relation to the supplier and which are covered by Articles 1 to 4 and are in conformity with Articles 5 and 6;

(8) outside the contract territory

(a) not to maintain branches or depots for the distribution of contract goods or corresponding goods,

(b) not to seek customers for contract goods or corresponding goods;

(9) not to entrust third parties with the distribution or servicing of contract goods or corresponding goods outside the contract territory;

(10) to supply to a reseller:

(a) contract goods or corresponding goods only where the reseller is an undertaking within the distribution system, or

(b) spare parts within the contract programme only where they are for the purposes of maintenance of a motor vehicle by the reseller;

(11) to sell motor vehicles within the contract programme or corresponding goods to final consumers using the services of an intermediary only if that intermediary has prior written authority to purchase a specified motor vehicle and, as the case may be, to accept delivery thereof on their behalf;

(12) to observe the obligations referred to in points 1 and 6 to 11 for a maximum period of one year after termination or expiry of the agreement.

Article 4

1. Articles 1, 2 and 3 shall apply notwithstanding any obligation imposed on the dealer to:

(1) observe, for distribution and servicing, minimum standards which relate in particular to:

(a) the equipment of the business premises and of the technical facilities for servicing;

(b) the specialized and technical training of staff;

(c) advertising;

(d) the collection, storage and delivery to customers of contract goods or corresponding goods and servicing relating to them;

(e) the repair and maintenance of contract goods and corresponding goods, particularly as concerns the safe and reliable functioning of motor vehicles;

(2) order contract goods from the supplier only at certain times or within certain periods, provided that the interval between ordering dates does not exceed three months;

(3) endeavour to sell, within the contract territory and within a specified period, such minimum quantity of contract goods as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales;

(4) keep in stock such quantity of contract goods as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales of contract goods within the contract territory and within a specified period;

(5) keep such demonstration vehicles within the contract programme, or such number thereof, as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales of motor vehicles within the contract programme;

(6) perform guarantee work, free servicing and vehicle recall work for contract goods and corresponding goods;

(7) use only spare parts within the contract programme or corresponding goods for guarantee work, free servicing and vehicle recall work in respect of contract goods or corresponding goods;

(8) inform customers, in a general manner, of the extent to which spare parts from other sources might be used for the repair or maintenance of contract goods or corresponding goods;

(9) inform customers whenever spare parts from other sources have been used for the repair or maintenance of contract goods or corresponding goods for which spare parts within the contract programme or corresponding goods, bearing a mark of the manufacturer, were also available.

2. The exemption under Article 85(3) of the Treaty shall also apply where the obligation referred to in Article 1 is combined with obligations referred to in paragraph 1 above and such obligations fall in individual cases under the prohibition contained in Article 85(1).

Article 5

1. Articles 1, 2 and 3 and Article 4(2) shall apply provided that:

(1) the dealer undertakes:

(a) in respect of motor vehicles within the contract programme or corresponding thereto which have been supplied in the common market by another undertaking within the distribution network, to honour guarantees and to perform free servicing and vehicle recall work to an extent which corresponds to the dealer's obligation covered by point 6 of Article 4(1) but which need not exceed that imposed upon the undertaking within the distribution system or accepted by the manufacturer when supplying such motor vehicles;

(b) to impose upon the undertakings operating within the contract territory with which the dealer has concluded distribution and servicing agreements as provided for in point 6 of Article 3 an obligation to honour guarantees and to perform free servicing and vehicle recall work at least to the extent to which the dealer himself is so obliged;

(2) the supplier:

(a) shall not without objectively valid reasons withhold consent to conclude, alter or terminate sub-agreements referred to in Article 3, point 6;

(b) shall not apply, in relation to the dealer's obligations referred to in Article 4(1), minimum requirements or criteria for estimates such that the dealer is subject to discrimination without objectively valid reasons or is treated inequitably;

(c) shall, in any scheme for aggregating quantities or values of goods obtained by the dealer from the supplier and from connected undertakings within a specified period for the purpose of calculating discounts, at least distinguish between supplies of

— motor vehicles within the contract programme,

— spare parts within the contract programme, for supplies of which the dealer is dependent on undertakings within the distribution network, and

— other goods;

(d) shall also supply to the dealer for the purpose of performance of a contract of sale concluded between the dealer and a final customer in the common market, any passenger car which corresponds to a model within the contract programme and which is marketed by the manufacturer or with the manufacturer's consent in the Member State in which the vehicle is to be registered.

2. In so far as the dealer has, in accordance with Article 5(1), assumed obligations for the improvement of distribution and servicing structures, the exemption referred to in Article 3, points 3 and 5 shall apply to the obligation not to sell new motor vehicles other than those within the contract programme or not to make such vehicles the subject of a distribution and servicing agreement, provided that

(1) the parties:

(a) agree that the supplier shall release the dealer from the obligations referred to in Article 3, points 3 and 5 where the dealer shows that there are objectively valid reasons for doing so;

(b) agree that the supplier reserves the right to conclude distribution and servicing agreements for contract goods with specified further undertakings operating within the contract territory or to alter the contract territory only where the supplier shows that there are objectively valid reasons for doing so;

(2) the agreement is for a period of at least four years or, if for an indefinite period, the period of notice for regular termination of the agreement is at least one year for both parties, unless

— the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or

— the dealer is a new entrant to the distribution system and the period of the agreement, or the period of notice for regular termination of the agreement, is the first agreed by that dealer;

(3) each party undertakes to give the other at least six months prior notice of intention not to renew an agreement concluded for a definite period.

3. A party may only invoke particular objectively valid grounds within the meaning of this Article which have been exemplified in the agreement if such grounds are applied without discrimination to undertakings within the distribution system in comparable cases.

4. The conditions for exemption laid down in this Article shall not affect the right of a party to terminate the agreement for cause.

Article 6

Articles 1, 2 and 3 and Article 4(2) shall not apply where:

(1) both parties to the agreement or their connected undertakings are motor vehicle manufacturers; or

(2) the manufacturer, the supplier or another undertaking within the distribution system obliges the dealer not to resell contract goods or corresponding goods below stated prices or not to exceed stated rates of trade discount; or

(3) the parties make agreements or engage in concerted practices concerning motor vehicles having three or more road wheels or spare parts therefor which are exempted from the prohibition in Article 85(1) of the Treaty under Regulations (EEC) No 1983/83, or (EEC) No 1984/83 to an extent exceeding the scope of this Regulation.

Article 7

1. As regards agreements existing on 13 March 1962 and notified before 1 February 1963 and agreements, whether notified or not, falling under Article 4(2), point 1 of Regulation No 17, the declaration of inapplicability of Article 85(1) of the Treaty contained in this Regulation shall apply with retroactive effect from the time at which the conditions of this Regulation were fulfilled.

2. As regards all other agreements notified before this Regulation entered into force, the declaration of inapplicability of Article 85(1) of the Treaty contained in this Regulation shall apply from the time at which the conditions of this Regulation were fulfilled, or from the date of notification, whichever is the later.

Article 8

If agreements existing on 13 March 1962 and notified before 1 February 1963 or agreements to which Article 4(2), point 1 of Regulation No 17 applies and which were notified before 1 January 1967 are amended before 1 October 1985 so as to fulfil the conditions for application of this Regulation, and if the amendment is communicated to the Commission before 31 December 1985, the prohibition in Article 85(1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication shall take effect from the time of its receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

Article 9[1]

1. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, Articles 7 and 8 shall apply except

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[1] **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**
The following paragraph is added to Article 9:
'3. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the Kingdom of Spain and of the Portuguese Republic, Articles 7 and 8 shall apply except that the relevant dates shall be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963, 1 January 1967 and 1 October 1985. The amendment made to the agreements in accordance with Article 8 need not be notified to the Commission.'
(OJ L 302, 15.11.1985, p. 167).

that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and I July 1973 instead of 1 February 1963 and 1 January 1967.

2. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, Articles 7 and 8 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of I February 1963 and 1 January 1967.

Article 10

The Commission may withdraw the benefit of the application of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds that in an individual case an agreement which falls within the scope of this Regulation nevertheless has effects which are incompatible with the provisions of Article 85(3) of the Treaty, and in particular:

(1) where, in the common market or a substantial part thereof, contract goods or corresponding goods are not subject to competition from products considered by consumers as similar by reason of their characteristics, price and intended use;

(2) where the manufacturer or an undertaking within the distribution system continuously or systematically, and by means not exempted by this Regulation, makes it difficult for final consumers or other undertakings within the distribution system to obtain contract goods or corresponding goods, or to obtain servicing for such goods, within the common market;

(3) where, over a considerable period, prices or conditions of supply for contract goods or for corresponding goods are applied which differ substantially as between Member States, and such substantial differences are chiefly due to obligations exempted by this Regulation;

(4) where, in agreements concerning the supply to the dealer of passenger cars which correspond to a model within the contract programme, prices or conditions which are not objectively justifiable are applied, with the object or the effect of partitioning the common market.

Article 11

The provisions of this Regulation shall also apply in so far as the obligations referred to in Articles 1 to 4 apply to undertakings which are connected with a party to an agreement.

Article 12

This Regulation shall apply *mutatis mutandis* to concerted practices of the types defined in Articles 1 to 4.

Article 13

For the purposes of this Regulation the following terms shall have the following meanings.

(1) 'Distribution and servicing agreements' are framework agreements between two undertakings, for a definite or indefinite period, whereby the party supplying goods entrusts to the other the distribution and servicing of those goods.

(2) 'Parties' are the undertakings which are party to an agreement within the meaning of Article 1: 'the supplier' being the undertaking which supplies the contract goods, and 'the dealer', the undertaking entrusted by the supplier with the distribution and servicing of contract goods.

(3) The 'contract territory' is the defined territory of the common market to which the obligation of exclusive supply in the meaning of Article 1 applies.

(4) 'Contract goods' are motor vehicles intended for use on public roads and having three or more road wheels, and spare parts therefor, which are the subject of an agreement within the meaning of Article 1.

(5) 'The contract programme' refers to the totality of the contract goods.

(6) 'Spare parts' are parts which are to be installed in or upon a motor vehicle so as to replace components of that vehicle. They are to be distinguished from other parts and accessories according to customary usage in the trade.

(7) The 'manufacturer' is the undertaking:

(a) which manufactures or procures the manufacture of the motor vehicles in the contract programme, or

(b) which is connected with an undertaking described at (a).

(8) 'Connected undertakings' are:

(a) undertakings one of which directly or indirectly

— holds more than half of the capital or business assets of the other, or

— has the power to exercise more than half the voting rights in the other, or

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the other, or

— has the right to manage the affairs of the other;

(b) undertakings in relation to which a third undertaking is able directly or indirectly to exercise such rights or powers as are mentioned in (a) above.

9. 'Undertakings within the distribution system' are besides the parties to the agreement, the manufacturer and undertakings which are entrusted by the manufacturer or with the manufacturer's consent with the distribution or servicing of contract goods or corresponding goods.

10. A 'passenger car which corresponds to a model within the contract programme' is a passenger car

— manufactured or assembled in volume by the manufacturer, and

— identical as to body style, drive-line, chassis, and type of motor with a passenger car within the contract programme.

11. 'Corresponding goods', 'corresponding motor vehicles' and 'corresponding parts' are those which are similar in kind to those in the contract programme, are distributed by the manufacturer or with the manufacturer's consent, and are the subject of a distribution or servicing agreement with an undertaking within the distribution system.

12. 'Distribute' and 'sell' include other forms of supply such as leasing.

Article 14

This Regulation shall enter into force on 1 July 1985.

It shall remain in force until 30 June 1995.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Commission Notice[1] concerning Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements

(85/C 17/03)

In Regulation (EEC) No 123/85 on the block exemption of motor vehicle distribution agreements the Commission recognizes that exclusive and selective distribution in this industry is in principle compatible with Article 85(3) of the Treaty. This assessment is subject to a number of conditions. At the request of some of the commercial sectors involved, this notice sets out some of those conditions and lays down certain administrative principles for the procedures which the Commission might initiate under Article 7 of Council Regulation No 19/65/EEC[2] in combination with Article 10, point 3 and 4 of Regulation (EEC) No 123/85,[3] taking account of the present stage of integration of the European Community.

I

1. Freedom of movement of European consumers and limited availability of vehicle models

The Commission starts from the position that the common market affords advantages to European consumers, and that this is especially so where there is effective competition. Accordingly, Regulation (EEC) No 123/85 presupposes that in the motor vehicle sector effective competition exists between manufacturers and between their distribution networks.

The European consumer must derive a fair share of the benefits which flow from the distribution and servicing agreements. Admittedly, the consumer may benefit from the fact that servicing is carried out by specialists (Article 3, points 3 and 5) and that such service can be obtained throughout the network from dealers and repairers who are obliged to observe minimum requirements (Article 4(1)).

However, the European consumer's basic rights include above all the right to buy a motor vehicle and to have it maintained or repaired wherever prices and quality are most advantageous to him.

(a) This right to buy relates to new vehicles from a manufacturer each of whose dealers offers them in a form and specification mainly required by final consumers in the dealer's contract territory (contract goods).

(b) In the interests of competition at the various stages of distribution in the common market and in those of European consumers, a certain limited availability of other vehicles within the distribution system is also considered indispensable. Any dealer within the

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[1] OJ C 17, 18.1.1985, p. 4.
[2] OJ 36, 6.3.1965, p. 533/65.
[3] OJ L 15, I8.1.1985, p. 16.

distribution system must be able to order from a supplier within the distribution system any volume-produced passenger car which a final consumer has ordered from him and intends to register in another Member State, in the form and specification marketed by the manufacturer or with his consent in that Member State (passenger cars corresponding to those in the contract programme, Article 5(1), point 2(d) and Article 13, point 10 of Regulation (EEC) No 123/85).

This provision does not oblige the manufacturer to produce vehicles which he would not otherwise offer within the common market. Nor does it oblige the manufacturer to sell particular vehicle models in any particular part of the common market where he does not, or does not yet, wish to market them. He is only obliged to supply to a dealer within his distribution system a new passenger car required by that dealer to fulfil a contract with a final consumer and intended for another Member State where that dealer's contract programme includes cars of a corresponding kind.

2. Abusive hindrance

The European consumer must not be subject to abusive hindrance, either in the exporting country, where he wishes to buy a vehicle, or in the country of destination, where he seeks to register it. The restrictions inherent in an exempted exclusive and selective distribution system do not represent abuses. However, further agreements or concerted practices between undertakings in the distribution system that limit the European consumer's final freedom to purchase do jeopardize the exemption given by the Regulation, as do unilateral measures on the part of a manufacturer or his importers or dealers which have a widespread effect against consumer's interests (Article 10, point 2). Examples are: dealers refuse to perform guarantee work on vehicles which they have not sold and which have been imported from other Member States; manufacturers or their importers withhold their cooperation in the registration of vehicles which European consumers have imported from other Member States; abnormally long delivery periods.

3. Intermediaries

The European consumer must be able to make use of the services of individuals or undertakings to assist in purchasing a new vehicle in another Member State (Article 3, points 10 and 11). However, except as regards contracts between dealers within the distribution system for the sale of contract goods, undertakings within the distribution system can be obliged not to supply new motor vehicles within the contract programme or corresponding vehicles to or through a third party who represents himself as an authorized reseller of new vehicles within the contract programme or corresponding vehicles or carries on an activity equivalent to that of a reseller. It is for the intermediary or the consumer to give the dealer within the distribution system documentary evidence that the intermediary, in buying and accepting delivery of a vehicle, is acting on behalf and on account of the consumer.

II

The Commission may withdraw the benefit of the application of Regulation (EEC) No 123/85, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds that in an individual case an agreement which falls within the scope of Regulation (EEC) No 123/85

nevertheless has effects which are incompatible with the provisions of Article 85(3) of the Treaty, and in particular

— where, over a considerable period, prices or conditions of supply for contract goods or for corresponding goods are applied which differ substantially as between Member States, and such substantial differences are chiefly due to obligations exempted by Regulation (EEC) No 123/85 (Article 10, point 3);

— where, in agreements concerning the supply to the dealer of passenger cars which correspond to a model within the contract programme, prices or conditions which are not objectively justifiable are applied, with the object or effect of partitioning the common market (Article 10, point 4).

The Commission may pursue such proceedings in individual cases, upon application (particularly on the basis of complaints from consumers) or on its own initiative, in accordance with the procedural rules laid down in Council Regulation No 17[1] and Commission Regulation No 99/63/EEC,[2] under which the parties concerned must be informed of the objections raised and given an opportunity to respond to them before the Commission adopts a decision. Whether the Commission initiates such proceedings depends chiefly on the results of preliminary inquiries, the circumstances of the case and the degree of prejudice to the public interest.

Price differentials for motor vehicles as between Member States are to a certain extent a reflection of the particular play of supply and demand in the areas concerned. Substantial price differences generally give reason to suspect that national measures or private restrictive practices are behind them.

In view of the present stage of integration of the common market, for the time being certain circumstances will not of themselves justify an investigation of whether an agreement exempted by Regulation (EEC) No 123/85 is incompatible with the conditions of Article 85(3) of the Treaty. For the time being, the Commission does not propose to carry out investigations into private practices under Article 10, point 3 or 4 of Regulation (EEC) No 123/85 where the following circumstances obtain (this does not exclude intervention by the Commission in particular cases):

1. Price differentials between Member States (Article 10, point 3 in association with Article 13, point 11)

Recommended net prices for resale to final consumers (list prices) of a motor vehicle within the contract programme in one Member State and of the same or a corresponding motor vehicle in another Member State differ, and

(a) the difference expressed in ecus does not exceed 12% of the lower price, or, over a period of less than one year, exceeds that percentage either

— by not more than a further 6% of the list price, or

— only in respect of an insignificant portion of the motor vehicles within the contract programme, or

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[1] OJ 13, 21.2.1962, p. 204/62, as last amended by Regulation (EEC) No 2822/71, OJ L 285, 29.12.1971, p. 49.

[2] OJ 127, 20.8.1963, p. 2268/63.

(b) the difference is to be attributed, following analysis of the objective data, to the fact that

— the purchaser of the vehicle in one of those Member States must pay taxes, charges or fees amounting in total to more than 100% of the net price, or

— the freedom to set the price or margin for the resale of the vehicle is directly or indirectly subject in one of those Member States to restriction by national measures lasting longer than one year;

and that such measures do not represent infringements of the Treaty.

In so far as they are public knowledge, prices net of discounts shall replace recommended net prices. Particular account will be taken, for an appropriate period, of alterations of the parities within the European monetary system or fluctuations in exchange rates in a Member State.

2. Price differentials between passenger cars within the contract programme and corresponding cars (Article 10, point 4 in association with Article 5(1), point 2(d) and Article 13, point 10)

When selling to a dealer a passenger car corresponding to a model within the contract programme, the supplier charges an objectively justifiable supplement on account of special distribution costs and any differences in equipment and specification.

In a Member State where pricing is affected in the manner described at II 1(b) above, the supplier charges a further supplement; however, he does not exceed the price which would be charged in similar cases in that Member State not subject to such effects in which the lowest price net of tax is recommended for the sale to a final consumer of that vehicle within the contract programme (or, as the case may be, of a corresponding vehicle).

Where the limits indicated above are exceeded, the Commission may open a procedure on its own initiative under Article 10, points 3 and 4 of Regulation (EEC) No 123/85; whether it does so or not will depend mainly on the results of investigations that may be made as to whether the exempted agreement is in fact the principal cause of actual price differences in the meaning of Article 10, point 3 or 4 or, as the case may be, has led to a partitioning of the common market or is, in the light of experience, liable to do so. Price comparisons made in this connection will take account of differences in equipment and specification and in ancillary items such as the extent of the guarantee, delivery services or registration formalities.

III

1. The rights of Member States, persons and associations of persons to make applications to the Commission under Article 3 of Council Regulation No 17 (i.e. complaints) are unaffected. The Commission will examine such complaints with all due diligence.

2. This notice is without prejudice to any finding of the Court of Justice of the European Communities or of courts of the Member States.

3. Any withdrawal of or amendment to this notice will be effected by publication in the *Official Journal of the European Communities.*

Clarification of the activities of motor vehicle intermediaries[1]

(91/C 329/06)

This notice is to supplement the notice[2] published with Regulation (EEC) No 123/85 in order to clarify the scope of the activities of the intermediaries mentioned in that Regulation. The relationship between an intermediary and the person for whom he or it is acting is primarily governed by their contract and by the national law applicable, and does not affect the rights and obligations of third parties to the contract. This notice does not therefore summarize all the obligations of an intermediary.

1. Principles

The following guidelines, which are in line with the balanced objectives pursued by Regulation (EEC) No 123/85, are based on two principles. The first is that the intermediary referred to in the Regulation is a provider of services acting for the account of a purchaser and final user; he cannot assume risks normally associated with ownership, and is given prior written authority by an identified principal, whose name and address are given, to exercise such activity. The second is the principle of the transparency of the authorization, and in particular the requirement that, under national law, the intermediary pass on to the purchaser all the benefits obtained in the negotiations carried out on his behalf.

In this context, three groups of criteria should be distinguished:

(a) with regard to the validity of the authorization and to the provision of assistance;

(b) with regard to the interrnediary's scope for advertising;

(c) with regard to the intermediary's possibilities of supply.

The Commission's experience suggests that the following guidelines and criteria appear appropriate for dealing with the practical requirements. Activities which do not conform to these guidelines and criteria will justify the presumption, in the absence of evidence to the contrary, that an intermediary is acting beyond the limits set by Article 3(11) of Regulation (EEC) No 123/85, or creating a confusion in the mind of the public on this point by giving the impression that he is a reseller.

2. Practical criteria

(a) *The validity of the authorization and the service of assistance*

The intermediary is free to organize the structure of his activities. However, operations involving a network of independent undertakings using a common name or other common distinctive signs could create the misleading impression of an authorized distribution system.

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[1] OJ C 329, 18.12.1991, p. 20.
[2] OJ C 17, 18.1.1985, p. 4.

An intermediary may use an outlet in the same building as a supermarket if the outlet is outside the premises where the principal activities of the supermarket are carried on, provided that he complies wih the principles set out in the present notice.

Although he cannot assume the risks of ownership, the intermediary must be free to assume the transport and storage risks associated with the vehicle and the credit risks relating to the final purchaser for the financing of the purchase in a foreign country. The services must be provided in total transparency with regard to the various services offered and to payment, and this must be verifiable through the presentation of detailed and exhaustive accounts to the purchaser.

The intermediary must list in detail to the client, in a document which may be separable from the written authorization, the various services offered to him and must give him the possibility to choose those which suit him. In this document, an intermediary not supplying the full range of services associated with the putting into circulation of an imported vehicle should state which services he is not supplying.

(b) *Advertising by the intermediary*

The intermediary must be able to advertise, though without creating in potential purchasers' minds any confusion between himself and a reseller. Subject to this restriction, he should be able to:

— concentrate his activities, and thus his advertising, on a given brand or on a particular model, provided that he expressly adds an appropriate disclaimer indicating that he is not a reseller, but acts as an intermediary offering his services,

— provide full information on the price which he can obtain, making it clear that the price indicated is his best estimate,

— display cars which have been bought by his clients using his services, or a particular type or model which he can obtain for them, provided that he expressly and visibly makes it clear that he is acting as an intermediary offering his services and not as a reseller, and that types or models which he displays are not for sale,

— use all logos and brand names, in accordance with the applicable rules of law, but without creating any confusion in the mind of the public with regard to the fact that he is an intermediary and not part of the distribution network of the manufacturer or manufacturers concerned.

Where a supermarket carries on a distinct activity as an intermediary, all necessary measures must be taken to avoid confusion in the minds of buyers (final users) with its principal commercial activities conducted under its usual or distinctive sign.

(c) *Supply of the intermediaries*

In general, the intermediary is free to organize his business relationship with the various dealers in the distribution networks of the different manufacturers; this should not lead the intermediary to establish with such dealers a relationship which is privileged and contrary to

contractual obligations accepted in accordance with Regulation (EEC) No 123/85, especially Articles 3(8)(a) and (b), (9) and (4)(1)(3). In particular the intermediary must obtain supplies on conditions which are normal on the market, and he must not:

— make agreements by which he undertakes obligations to buy,

— receive discounts different from those which are customary on the market of the country in which the car is purchased.

In this context, sales of more than 10% of his annual sales by any one authorized dealer through any one intermediary would create the presumption of a privileged relationship contrary to the Articles cited above.

2. *Licensing agreements for the transfer of technology*

COMMISSION REGULATION (EEC) No 2349/84[1] OF 23 JULY 1984

on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements

As amended by Commission Regulation (EEC) No 151/93 of 23 December 1992.[2]

THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices,[3] as last amended by the Act of Accession of Greece and in particular Article 1 thereof

Having published a draft of this Regulation,[4]

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 85(3) of the Treaty by regulation to certain categories of agreements and concerted practices falling within the scope of Article 85(1) to which only two undertakings are party and which include restrictions imposed in relation to the acquisition or use of industrial property rights, in particular patents, utility models, designs or trade marks, or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or application of industrial processes.

(2) Patent licensing agreements are agreements whereby one undertaking, the holder of a patent (the licensor), permits another undertaking (the licensee) to exploit the patented invention by one or more of the means of exploitation afforded by patent law, in particular manufacture, use or putting on the market.

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[1] OJ L 219, 16.8.1984, p. 15; Corrigendum OJ L 280, 22.10.1985, p. 32.

[2] OJ L 21, 29.1.1993, p. 8. Article 5 of this Regulation provides:
'1. This Regulation shall enter into force on 1 April 1993.
2. Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) No 2349/84 and (EEC) No 556/89, as amended by this Regulation, shall apply with retroactive effect from the time at which the conditions for the application of the group exemption were fulfilled.'

[3] OJ 36, 6.3.1965 p. 533/65.

[4] OJ C 58, 3.3.1979, p. 12.

(3) In the light of experience acquired so far, it is possible to define a category of patent licensing agreements which are capable of falling within the scope of Article 85(1), but which can normally be regarded as satisfying the conditions laid down in Article 85(3). To the extent that patent licensing agreements to which undertakings in only one Member State are party and which concern only one or more patents for that Member State are capable of affecting trade between Member States, it is appropriate to include them in the exempted category.

(4) The present Regulation applies to licences issued in respect of national patents of the Member States, Community patents,[1] or European patents[2] granted for Member States, licences in respect of utility models or 'certificats d'utilité' issued in the Member States, and licences in respect of inventions for which a patent application is made within one year.

Where such patent licensing agreements contain obligations relating not only to territories within the common market but also obligations relating to non-member countries, the presence of the latter does not prevent the present Regulation from applying to the obligations relating to territories within the common market.

(5) However, where licensing agreements for non-member countries or for territories which extend beyond the frontiers of the Community have effects within the common market which may fall within the scope of Article 85(1), such agreements should be covered by the Regulation to the same extent as would agreements for territories within the common market.

(6) The Regulation should also apply to agreements concerning the assignment and acquisition of the rights referred to in point 4 above where the risk associated with exploitation remains with the assignor, patent licensing agreements in which the licensor is not the patentee but is authorized by the patentee to grant the licence (as in the case of sub-licences) and patent licensing agreements in which the parties' rights or obligations are assumed by connected undertakings.

(7) The Regulation does not apply to agreements concerning sales alone, which are governed by the provisions of Commission Regulation (EEC) No 1983/83 of 22 June 1983 concerning the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements.[3]

(8) Since the experience so far acquired is inadequate, it is not appropriate to include within the scope of the Regulation patent pools, licensing agreements entered into in connection with joint ventures, reciprocal licensing, or licensing agreements in respect of plant breeder's rights. Reciprocal agreements which do not involve any territorial restrictions within the common market should, however, be so included.

(9) On the other hand, it is appropriate to extend the scope of the Regulation to patent licensing agreements which also contain provisions assigning, or granting the right to use, non-patented technical knowledge, since such mixed agreements are commonly concluded in

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[1] Convention for the European patent for the common market (Community Patent Convention) of 15 December 1975 (OJ L 17, 26.1.1976, p. 1).

[2] Convention on the grant of European patents of 5 October 1973.

[3] OJ L 173, 30.6.1983, p. 1.

order to allow the transfer of a complex technology containing both patented and non-patented elements. Such agreements can only be regarded as fulfilling the conditions of Article 85(3) for the purposes of this Regulation where the communicated technical knowledge is secret and permits a better exploitation of the licensed patents (know-how). Provisions concerning know-how are covered by the Regulation only in so far as the licensed patents are necessary for achieving the objects of the licensed technology and as long as at least one of the licensed patents remains in force.

(10) It is also appropriate to extend the scope of the Regulation to patent licensing agreements containing ancillary provisions relating to trade marks, subject to ensuring that the trade mark licence is not used to extend the effects of the patent licence beyond the life of the patents. For this purpose it is necessary to allow the licensee to identify himself within the 'licensed territory', i.e. the territory covering all or part of the common market where the licensor holds patents which the licensee is authorized to exploit, as the manufacturer of the 'licensed product', i.e. the product which is the subject matter of the licensed patent or which has been obtained directly from the process which is the subject matter of the licensed patent, to avoid his having to enter into a new trade mark agreement with the licensor when the licensed patents expire in order not to lose the goodwill attaching to the licensed product.

(11) Exclusive licensing agreements, i.e. agreements in which the licensor undertakes not to exploit the 'licensed invention', i.e. the licensed patented invention and any know-how communicated to the licensee, in the licensed territory himself and not to grant further licences there, are not in themselves incompatible with Article 85(1) where they are concerned with the introduction and protection of a new technology in the licensed territory, by reason of the scale of the research which has been undertaken and of the risk that is involved in manufacturing and marketing a product which is unfamiliar to users in the licensed territory at the time the agreement is made. This may also be the case where the agreements are concerned with the introduction and protection of a new process for manufacturing a product which is already known. In so far as in other cases agreements of this kind may fall within the scope of Article 85(1), it is useful for the purposes of legal certainty to include them in Article 1, in order that they may also benefit from the exemption. However, the exemption of exclusive licensing agreements and certain export bans imposed on the licensor and his licensees is without prejudice to subsequent developments in the case law of the Court of Justice regarding the status of such agreements under Article 85(1).

(12) The obligations listed in Article 1 generally contribute to improving the production of goods and to promoting technical progress; they make patentees more willing to grant licences and licensees more inclined to undertake the investment required to manufacture, use and put on the market a new product or to use a new process, so that undertakings other than the patentee acquire the possibility of manufacturing their products with the aid of the latest techniques and of developing those techniques further. The result is that the number of production facilities and the quantity and quality of goods produced in the common market are increased. This is true, in particular, of obligations on the licensor and on the licensee not to exploit the licensed invention in, and in particular not to export the licensed product into, the licensed territory in the case of the licensor and the 'territories reserved for the licensor', that is to say, territories within the common market in which the licensor has patent protection and has not granted any licences, in the case of the licensee. This is also

true both of the obligation of the licensee not to conduct an active policy of putting the product on the market (i.e. prohibition of active competition as defined in Article 1(1)(5)) in the territories of other licensees for a period which may equal the duration of the licence and also the obligation of the licensee not to put the licensed product on the market in the territories of other licensees for a limited period of a few years (i.e. a prohibition not only of active competition but also of 'passive competition' whereby the licensee of a territory simply responds to requests which he has not solicited from users or resellers established in the territories of other licensees — Article 1(1)(6)). However, such obligations may be permitted under the Regulation only in respect of territories in which the licensed product is protected by 'parallel patents', that is to say, patents covering the same invention, within the meaning of the case law of the Court of Justice, and as long as the patents remain in force.

(13) Consumers will as a rule be allowed a fair share of the benefit resulting from this improvement in the supply of goods on the market. To safeguard this effect, however, it is right to exclude from the application on Article 1 cases where the parties agree to refuse to meet demand from users or resellers within their respective territories who would resell for export, or to take other steps to impede parallel imports, or where the licensee is obliged to refuse to meet unsolicited demand from the territory of other licensees (passive sales). The same applies where such action is the result of a concerted practice between the licensor and the licensee.

(14) The obligations referred to above thus do not impose restrictions which are not indispensable to the attainment of the abovementioned objectives.

(15) Competition at the distribution stage is safeguarded by the possibility of parallel imports and passive sales. The exclusivity obligations covered by the Regulation thus do not normally entail the possibility of eliminating competition in respect of a substantial part of the products in question. This is so even in the case of agreements which grant exclusive licences for a territory covering the whole of the common market.

(16) To the extent that in their agreements the parties undertake obligations of the type referred to in Articles 1 and 2 but which are of more limited scope and thus less restrictive of competition than is permitted by those Articles, it is appropriate that these obligations should also benefit under the exemptions provided for in the Regulation.

(17) If in a particular case an agreement covered by this Regulation is found to have effects which are incompatible with the provisions of Article 85(3) of the Treaty, the Commission may withdraw the benefit of the block exemption from the undertakings concerned, in accordance with Article 7 of Regulation No 19/65/EEC.

(18) It is not necessary expressly to exclude from the category defined in the Regulation agreements which do not fulfil the conditions of Article 85(1). Nevertheless it is advisable, in the interests of legal certainty for the undertakings concerned, to list in Article 2 a number of obligations which are not normally restrictive of competition, so that these also may benefit from the exemption in the event that, because of particular economic or legal circumstances, they should exceptionally fall within the scope of Article 85(1). The list of such obligations given in Article 2 is not exhaustive.

(19) The Regulation must also specify what restrictions or provisions may not be included in patent licensing agreements if these are to benefit from the block exemption. The restrictions listed in Article 3 may fall under the prohibition of Article 85(1); in these cases

there can be no general presumption that they will lead to the positive effects required by Article 85(3), as would be necessary for the granting of a block exemption.

(20) Such restrictions include those which deny the licensee the right enjoyed by any third party to challenge the validity of the patent or which automatically prolong the agreement by the life of any new patent granted during the life of the licensed patents which are in existence at the time the agreement is entered into. Nevertheless, the parties are free to extend their contractual relationship by entering into new agreements concerning such new patents, or to agree the payment of royalties for as long as the licensee continues to use know-how communicated by the licensor which has not entered into the public domain, regardless of the duration of the original patents and of any new patents that are licensed.

(21) They also include restrictions on the freedom of one party to compete with the other and in particular to involve himself in techniques other than those licensed, since such restrictions impede technical and economic progress. The prohibition of such restrictions should however be reconciled with the legitimate interest of the licensor in having his patented invention exploited to the full and to this end to require the licensee to use his best endeavours to manufacture and market the licensed product.

(22) Such restrictions include, further, an obligation on the licensee to continue to pay royalties after all the licensed patents have ceased to be in force and the communicated know-how has entered into the public domain, since such an obligation would place the licensee at a disadvantage by comparison with his competitors, unless it is established that this obligation results from arrangements for spreading payments in respect of previous use of the licensed invention.

(23) They also include restrictions imposed on the parties regarding prices, customers or marketing of the licensed products or regarding the quantities to be manufactured or sold, especially since restrictions of the latter type may have the same effect as export bans.

(24) Finally, they include restrictions to which the licensee submits at the time the agreement is made because he wishes to obtain the licence, but which give the licensor an unjustified competitive advantage, such as an obligation to assign to the licensor any improvements the licensee may make to the invention, or to accept other licences or goods and services that the licensee does not want from the licensor.

(25) It is appropriate to offer to parties to patent licensing agreements containing obligations which do not come within the terms of Articles 1 and 2 and yet do not entail any of the effects restrictive of competition referred to in Article 3 a simplified means of benefiting, upon notification, from the legal certainty provided by the block exemption (Article 4). This procedure should at the same time allow the Commission to ensure effective supervision as well as simplifying the administrative control of agreements.

(26) The Regulation should apply with retroactive effect to patent licensing agreements in existence when the Regulation comes into force where such agreements already fulfil the conditions for application of the Regulation or are modified to do so (Articles 6 to 8). Under Article 4(3) of Regulation No 19/65/EEC, the benefit of these provisions may not be claimed in actions pending at the date of entry into force of this Regulation, nor may it be relied on as grounds for claims for damages against third parties.

(27) Agreements which come within the terms of Articles 1 and 2 and which have neither the object nor the effect of restricting competition in any other way need no longer be notified. Nevertheless, undertakings will still have the right to apply in individual cases for negative clearance under Article 2 of Council Regulation No 17[1] or for exemption under Article 85(3),

HAS ADOPTED THIS REGULATION:

Article 1

1. Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to patent licensing agreements, and agreements combining the licensing of patents and the communication of know-how, to which only two undertakings are party and which include one or more of the following obligations:

(1) an obligation on the licensor not to license other undertakings to exploit the licensed invention in the licensed territory, covering all or part of the common market, in so far and as long as one of the licensed patents remains in force;

(2) an obligation on the licensor not to exploit the licensed invention in the licensed territory himself in so far and as long as one of the licensed patents remains in force;

(3) an obligation on the licensee not to exploit the licensed invention in territories within the common market which are reserved for the licensor, in so far and as long as the patented product is protected in those territories by parallel patents;

(4) an obligation on the licensee not to manufacture or use the licensed product, or use the patented process or the communicated know-how, in territories within the common market which are licensed to other licensees, in so far and as long as the licensed product is protected in those territories by parallel patents;

(5) an obligation on the licensee not to pursue an active policy of putting the licensed product on the market in the territories within the common market which are licensed to other licensees, and in particular not to engage in advertising specifically aimed at those territories or to establish any branch or maintain any distribution depot there, in so far and as long as the licensed product is protected in those territories by parallel patents;

(6) an obligation on the licensee not to put the licensed product on the market in the territories licensed to other licensees within the common market for a period not exceeding five years from the date when the product is first put on the market within the common market by the licensor or one of his licensees, in so far and as long as the product is protected in these territories by parallel patents;

(7) an obligation on the licensee to use only the licensor's trade mark or the get-up determined by the licensor to distinguish the licensed product, provided that the licensee is not prevented from identifying himself as the manufacturer of the licensed product.

2. The exemption of restrictions on putting the licensed product on the market resulting from the obligations referred to in paragraph 1(2), (3), (5) and (6) shall apply only if the

[1] OJ 13, 21.2.1962, p. 204/62.

licensee manufactures the licensed product himself or has it manufactured by a connected undertaking or by a subcontractor.

3. The exemption provided for in paragraph 1 shall also apply where in a particular agreement the parties undertake obligations of the types referred to in that paragraph but with a more limited scope than is permitted by the paragraph.

Article 2

1. Article 1 shall apply notwithstanding the presence in particular of any of the following obligations, which are generally not restrictive of competition:

(1) an obligation on the licensee to procure goods or services from the licensor or from an undertaking designated by the licensor, in so far as such products or services are necessary for a technically satisfactory exploitation of the licensed invention;

(2) an obligation on the licensee to pay a minimum royalty or to produce a minimum quantity of the licensed product or to carry out a minimum number of operations exploiting the licensed invention;

(3) an obligation on the licensee to restrict his exploitation of the licensed invention to one or more technical fields of application covered by the licensed patent;

(4) an obligation on the licensee not to exploit the patent after termination of the agreement in so far as the patent is still in force;

(5) an obligation on the licensee not to grant sub-licences or assign the licence;

(6) an obligation on the licensee to mark the licensed product with an indication of the patentee's name, the licensed patent or the patent licensing agreement;

(7) an obligation on the licensee not to divulge know-how communicated by the licensor; the licensee may be held to this obligation even after the agreement has expired;

(8) obligations:

(a) to inform the licensor of infringements of the patent,

(b) to take legal action against an infringer,

(c) to assist the licensor in any legal action against an infringer,
provided that these obligations are without prejudice to the licensee's right to challenge the validity of the licensed patent;

(9) an obligation on the licensee to observe specifications concerning the minimum quality of the licensed product, provided that such specifications are necessary for a technically satisfactory exploitation of the licensed invention, and to allow the licensor to carry out related checks;

(10) an obligation on the parties to communicate to one another any experience gained in exploiting the licensed invention and to grant one another a licence in respect of inventions relating to improvements and new applications, provided that such communication or licence is non-exclusive;

(11) an obligation on the licensor to grant the licensee any more favourable terms that the licensor may grant to another undertaking after the agreement is entered into.

2. In the event that, because of particular circumstances, the obligations referred to in paragraph 1 fall within the scope of Article 85(1), they shall also be exempted even if they are not accompanied by any of the obligations exempted by Article 1.

The exemption provided for in this paragraph shall also apply where in an agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

Article 3

Articles 1 and 2(2) shall not apply where:

(1) the licensee is prohibited from challenging the validity of licensed patents or other industrial or commercial property rights within the common market belonging to the licensor or undertakings connected with him, without prejudice to the right of the licensor to terminate the licensing agreement in the event of such a challenge;

(2) the duration of the licensing agreement is automatically prolonged beyond the expiry of the licensed patents existing at the time the agreement was entered into by the inclusion in it of any new patent obtained by the licensor, unless the agreement provides each party with the right to terminate the agreement at least annually after the expiry of the licensed patents existing at the time the agreement was entered into, without prejudice to the right of the licensor to charge royalties for the full period during which the licensee continues to use know-how communicated by the licensor which has not entered into the public domain, even if that period exceeds the life of the patents;

(3) one party is restricted from competing with the other party, with undertakings connected with the other party or with other undertakings within the common market in respect of research and development, manufacture, use or sales, save as provided in Article 1 and without prejudice to an obligation on the licensee to use his best endeavours to exploit the licensed invention;

(4) the licensee is charged royalties on products which are not entirely or partially patented or manufactured by means of a patented process, or for the use of know-how which has entered into the public domain otherwise than by the fault of the licensee or an undertaking connected with him, without prejudice to arrangements whereby, in order to facilitate payment, the royalty payments for the use of a licensed invention are spread over a period extending beyond the life of the licensed patents or the entry of the know-how into the public domain;

(5) the quantity of licensed products one party may manufacture or sell or the number of operations exploiting the licensed invention he may carry out are subject to limitations;

(6) one party is restricted in the determination of prices, components of prices or discounts for the licensed products;

(7) one party is restricted as to the customers he may serve, in particular by being prohibited from supplying certain classes of user, employing certain terms of distribution or, with the aim of sharing customers, using certain types of packaging for the products, save as provided in Article 1(1)(7) and Article 2(1)(3);

(8) the licensee is obliged to assign wholly or in part to the licensor rights in or to patents for improvements or for new applications of the licensed patents;

(9) the licensee is induced at the time the agreement is entered into to accept further licences which he does not want or to agree to use patents, goods or services which he does not want, unless such patents, products or services are necessary for a technically satisfactory exploitation of the licensed invention;

(10) without prejudice to Article 1(1)(5), the licensee is required, for a period exceeding that permitted under Article 1(1)(6), not to put the licensed product on the market in territories licensed to other licensees within the common market or not to do so as a result of a concerted practice between the parties;

(11) one or both of the parties are required:

(a) to refuse without any objectively justified reason to meet demand from users or resellers in their respective territories who would market products in other territories within the common market;

(b) to make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular to exercise industrial or commercial property rights or take measures so as to prevent users or resellers from obtaining outside, or from putting on the market in, the licensed territory products which have been lawfully put on the market within the common market by the patentee or with his consent;

or do so as a result of a concerted practice between them.

Article 4

1. The exemption provided for in Articles 1 and 2 shall also apply to agreements containing obligations restrictive of competition which are not covered by those Articles and do not fall within the scope of Article 3, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27,[1] as last amended by Regulation (EEC) No 1699/75,[2] and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it; and

(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this article and to the notification. Paragraph 2 and 3(b) shall apply *mutatis mutandis*.

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[1] OJ 35, 10.5.1962, p. 1118/62. Amended most recently by Regulation (EEC) No 2526/85 of 5 August 1985 (OJ L 240, 7.9.1985).

[2] OJ L 172, 3.7.1975, p. 11.

5. The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the transmission to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date of notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

Article 5

1. This Regulation shall not apply:

(1) to agreements between members of a patent pool which relate to the pooled patents;

(2) to patent licensing agreements between competitors who hold interests in a joint venture or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture;

(3) to agreements under which one party grants to the other party a patent licence and that other party, albeit in separate agreements or through connected undertakings, grants to the first party a licence under patents or trade marks or reciprocal sales rights for unprotected products or communicates to him know-how, where the parties are competitors in relation to the products covered by those agreements;

(4) to licensing agreements in respect of plant breeder's rights.

2. This Regulation shall nevertheless apply:

(a) to agreements to which paragraph 1(2) applies, under which a parent undertaking grants the joint venture a patent licence, provided that the contract products and the other products of the participating undertakings which are considered by users to be equivalent in view of their characteristics, price and intended use represent:

— in case of a licence limited to production not more than 20%,

— in case of a licence covering production and distribution not more than 10%,

of the market for all such products in the common market a substantial part thereof;

(b) to reciprocal licences within the meaning of point 3 of paragraph 1, provided that the parties are not subject to any territorial restriction within the common market with

regard to the manufacture, use or putting on the market of the contract products or on the use of the licensed processes.

3. This Regulation shall continue to apply where the market shares referred to in point (a) of paragraph 2 are exceeded during any period of two consecutive financial years by not more than one-tenth.

Where this latter limit is also exceeded, this Regulation shall continue to apply for a period of six months following the end of the financial year during which it was exceeded.

Article 6

1. As regards agreements existing on 13 March 1962 and notified before I February 1963 and agreements, whether notified or not, to which Article 4(2)(2)(b) of Regulation No 17 applies, the declaration of inapplicability of Article 85(1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.

2. As regards all other agreements notified before this Regulation entered into force, the declaration of inapplicability of Article 85(1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled, or from the date of notification, whichever is the later.

Article 7

If agreements existing on 13 March 1962 and notified before 1 February 1963 or agreements to which Article 4(2)(2)(b) of Regulation No 17 applies and notified before 1 January 1967 are amended before 1 April 1985 so as to fulfil the conditions for application of this Regulation and if the amendment is communicated to the Commission before 1 July 1985 the prohibition in Article 85(1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication shall take effect from the time of its receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

Article 8[1]

1. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, Articles 6 and 7 shall apply except that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

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[1] **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**
The following paragraph is added to Article 8:
'3. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the Kingdom of Spain and of the Portuguese Republic, Articles 6 and 7 shall apply except that the relevant dates shall be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963, 1 January 1967 and 1 April 1985. The amendment made to these agreements in accordance with Article 7 need not be notified to the Commission.'
(OJ L 302, 15.11.1985, p. 166).

2. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, Articles 6 and 7 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

Article 9

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, and in particular where:

(1) such effects arise from an arbitration award;

(2) the licensed products or the services provided using a licensed process are not exposed to effective competition in the licensed territory from identical products or services or products or services considered by users as equivalent in view of their characteristics, price and intended use;

(3) the licensor does not have the right to terminate the exclusivity granted to the licensee at the latest five years from the date the agreement was entered into and at least annually thereafter if, without legitimate reason, the licensee fails to exploit the patent or to do so adequately;

(4) without prejudice to Article 1(1)(6), the licensee refuses, without objectively valid reason, to meet unsolicited demand from users or resellers in the territory of other licensees;

(5) one or both of the parties:

(a) without any objectively justified reason refuse to meet demand from users or resellers in their respective territories who would market the products in other territories within the common market; or

(b) make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular where they exercise industrial or commercial property rights or take measures so as to prevent resellers or users from obtaining outside, or from putting on the market in, the licensed territory products which have been lawfully put on the market within the common market by the patentee or with his consent.

Article 10

1. This Regulation shall apply to:

(a) patent applications;

(b) utility models;

(c) applications for registration of utility models;

(d) 'certificats d'utilité' and 'certificats d'addition' under French law; and

(e) applications for 'certificats d'utilité' and 'certificats d'addition' under French law;

equally as it applies to patents.

2. This Regulation shall also apply to agreements relating to the exploitation of an invention if an application within the meaning of paragraph 1 is made in respect of the invention for the licensed territory within one year from the date when the agreement was entered into.

Article 11

This Regulation shall also apply to:

1. patent licensing agreements where the licensor is not the patentee but is authorized by the patentee to grant a licence or a sub-licence;

2. assignments of a patent or of a right to a patent where the sum payable in consideration of the assignment is dependent upon the turnover attained by the assignee in respect of the patented products, the quantity of such products manufactured or the number of operations carried out employing the patented invention;

3. patent licensing agreements in which rights or obligations of the licensor or the licensee are assumed by undertakings connected with them.

Article 12

1. 'Connected undertakings' for the purposes of this Regulation means:

(a) undertakings in which a party to the agreement, directly or indirectly:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs of the undertaking;

(b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

2. Undertakings in which the parties to the agreement or undertakings connected with them jointly have directly or indirectly the rights or powers set out in paragraph l(a) shall be considered to be connected with each of the parties to the agreement.

Article 13

1. Information acquired pursuant to Article 4 shall be used only for the purposes of this Regulation .

2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation 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.

Article 14

This Regulation shall enter into force on I January 1985.

It shall apply until 31 December 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EEC) No 556/89[1] OF 30 NOVEMBER 1988

on the application of Article 85(3) of the Treaty to certain categories of know-how licensing agreements

As amended by Commission Regulation (EEC) No 151/93 of 23 December 1992.[2]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices,[3] as last amended by the Act of Accession of Spain and Portugal, and in particular to Article 1 thereof,

Having published a draft of this Regulation,[4]

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 85(3) of the Treaty by Regulation to certain categories of bilateral agreements and concerted practices falling within the scope of Article 85(1) which include restrictions imposed in relation to the acquisition or use of industrial property rights, in particular patents, utility models, designs or trade marks, or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or application of industrial processes.

The increasing economic importance of non-patented technical information (e.g. descriptions of manufacturing processes, recipes, formulae, designs or drawings), commonly termed 'know-how', the large number of agreements currently being concluded by undertakings including public research facilities solely for the exploitation of such information (so-called 'pure' know-how licensing agreements) and the fact that the transfer of know-how is, in practice, frequently irreversible make it necessary to provide greater legal certainty with regard to the status of such agreements under the competition rules, thus encouraging the dissemination of technical knowledge in the Community. In the light of experience acquired so far, it is possible to define a category of such know-how licensing agreements covering all or part of the common market which are capable of falling within the scope of Article 85(1) but which can normally be regarded as satisfying the conditions laid down in Arti-

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[1] OJ L 61, 4.3.1989, p. 1.

[2] OJ L 21, 29.1.1993, p. 8.
Article 5 of this Regulation provides:
'1. This Regulation shall enter into force on 1 April 1993.
2. Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) No 2349/84 and (EEC) No 556/89, as amended by this Regulation, shall apply with retroactive effect from the time at which the conditions for the application of the group exemption were fulfilled.'

[3] OJ 36, 6.3.1965, p. 533/65.

[4] OJ C 214, 12.8.1987, p. 2.

cle 85(3), where the licensed know-how is secret, substantial and identified in any appropriate form ('the know-how'). These definitional requirements are only intended to ensure that the communication of the know-how provides a valid justification for the application of the present Regulation and in particular for the exemption of obligations which are restrictive of competition.

A list of definitions for the purposes of this Regulation is set out in Article 1.

(2) As well as pure know-how agreements, mixed know-how and patent licensing agreements play an increasingly important role in the transfer of technology. It is therefore appropriate to include within the scope of this Regulation mixed agreements which are not exempted by Commission Regulation (EEC) No 2349/84 (Articles 1, 2 or 4)[1] and in particular the following:

— mixed agreements in which the licensed patents are not necessary for the achievement of the objects of the licensed technology containing both patented and non-patented elements; this may be the case where such patents do not afford effective protection against the exploitation of the technology by third parties;

— mixed agreements which, regardless of whether or not the licensed patents are necessary, for the achievement of the objects of the licensed technology, contain obligations which restrict the exploitation of the relevant technology by the licensor or the licensee in Member States without patent protection, in so far and as long as such obligations are based in whole or in part on the exploitation of the licensed know-how and fulfil the other conditions set out in this Regulation.

It is also appropriate to extend the scope of this Regulation to pure or mixed agreements containing ancillary provisions relating to trade marks and other intellectual property rights where there are no obligations restrictive of competition other than those also attached to the know-how and exempted under the present Regulation.

However, such agreements, too, can only be regarded as fulfilling the conditions of Article 85(3) for the purposes of this Regulation where the licensed technical knowledge is secret, substantial and identified.

(3) The provisions of the present Regulation are not applicable to agreements covered by Regulation (EEC) No 2349/84 on patent licensing agreements.

(4) Where such pure or mixed know-how licensing agreements contain not only obligations relating to territories within the common market but also obligations relating to non-member countries, the presence of the latter does not prevent the present Regulation from applying to the obligations relating to territories within the common market.

However, where know-how licensing agreements for non-member countries or for territories which extend beyond the frontiers of the Community have effects within the common market which may fall within the scope of Article 85(1), such agreements should be covered by the Regulation to the same extent as would agreements for territories within the common market.

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[1] OJ L 219, 16.8.1984, p. 15.

(5) It is not appropriate to include within the scope of the Regulation agreements solely for the purpose of sale, except where the licensor undertakes for a preliminary period before the licensee himself commences production using the licensed technology to supply the contract products for sale by the licensee. Also excluded from the scope of the Regulation are agreements relating to marketing know-how communicated in the context of franchising arrangements[1] or to know-how agreements entered into in connection with arrangements such as joint ventures or patent pools and other arrangements in which the licensing of the know-how occurs in exchange for other licences not related to improvements to or new applications of that know-how, as such agreements pose different problems which cannot at present be dealt with in one Regulation (Article 5).

(6) Exclusive licensing agreements, i.e. agreements in which the licensor undertakes not to exploit the licensed technology in the licensed territory himself or to grant further licences there, may not be in themselves incompatible with Article 85(1) where they are concerned with the introduction and protection of a new technology in the licensed territory, by reason of the scale of the research which has been undertaken and of the increase in the level of competition, in particular interbrand competition, and in the competitiveness of the undertakings concerned resulting from the dissemination of innovation within the Community.

In so far as agreements of this kind fall in other circumstances within the scope of Article 85(1), it is appropriate to include them in Article 1, in order that they may also benefit from the exemption.

(7) Both these and the other obligations listed in Article 1 encourage the transfer of technology and thus generally contribute to improving the production of goods and to promoting technical progress, by increasing the number of production facilities and the quality of goods produced in the common market and expanding the possibilities of further development of the licensed technology. This is true, in particular, of an obligation on the licensee to use the licensed product only in the manufacture of its own products, since it gives the licensor an incentive to disseminate the technology in various applications while reserving the separate sale of the licensed product to himself or other licensees. It is also true of obligations on the licensor and on the licensee to refrain not only from active but also from passive competition, in the licensed territory, in the case of the licensor, and in the territories reserved for the licensor or other licensees in the case of the licensee. The users of technologically new or improved products requiring major investment are often not final consumers but intermediate industries which are well informed about prices and alternative sources of supply of the products within the Community. Hence, protection against active competition only would not afford the parties and other licensees the security they needed, especially during the initial period of exploitation of the licensed technology when they would be investing in tooling up and developing a market for the product and in effect increasing demand.

In view of the difficulty of determining the point at which know-how can be said to be no longer secret, and the frequent licensing of a continuous stream of know-how, especially where technology in the industry is rapidly evolving, it is appropriate to limit to a fixed number of years the periods of territorial protection, of the licensor and the licensee from one another, and as between licensees, which are automatically covered by the exemption.

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[1] Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchising agreements (OJ L 359, 28.12.1988, p. 46).

Since, as distinguished from patent licences, know-how licences are frequently negotiated after the goods or services incorporating the licensed technology have proved successful on the market, it is appropriate to take for each licensed territory the date of signature of the first licence agreement entered into for that territory by the licensor in respect of the same technology as the starting point for the permitted periods of territorial protection of the licensor and licensee from one another. As to the protection of a licensee from manufacture, use, active or passive sales by other licensees the starting point should be the date of signature of the first licence agreement entered into by the licensor within the EEC. The exemption of the territorial protection shall apply for the whole duration of such allowed periods as long as the know-how remains secret and substantial, irrespective of when the Member States in question joined the Community and provided that each of the licensees, the restricted as well as the protected one, manufactures the licensed product himself or has it manufactured.

Exemption under Article 85(3) of longer periods of territorial protection, in particular to protect expensive and risky investment or where the parties were not already competitors before the grant of the licence, can only be granted by individual decision. On the other hand, parties are free to extend the term of their agreement to exploit any subsequent improvements and to provide for the payment of additional royalties. However, in such cases, further periods of territorial protection, starting from the date of licensing of the improvements in the EEC, may be allowed only by individual decision, in particular where the improvements to or new applications of the licensed technology are substantial and secret and not of significantly less importance than the technology initially granted or require new expensive and risky investment.

(8) However, it is appropriate in cases where the same technology is protected in some Member States by necessary patents within the meaning of recital 9 of Regulation (EEC) No 2349/84 to provide with respect to those Member States an exemption under this Regulation for the territorial protection of the licensor and licensee from one another and as between licensees against manufacture, use and active sales in each other's territory for the full life of the patents existing in such Member States.

(9) The obligations listed in Article 1 also generally fulfil the other conditions for the application of Article 85(3). Consumers will as a rule be allowed a fair share of the benefit resulting from the improvement in the supply of goods on the market. Nor do the obligations impose restrictions which are not indispensable to the attainment of the abovementioned objectives. Finally, competition at the distribution stage is safeguarded by the possibility of parallel imports, which may not be hindered by the parties in any circumstances. The exclusivity obligations covered by the Regulation thus do not normally entail the possibility of eliminating competition in respect of a substantial part of the products in question. This also applies in the case of agreements which grant exclusive licences for a territory covering the whole of the common market where there is the possibility of parallel imports from third countries, or where there are other competing technologies on the market, since then the territorial exclusivity may lead to greater market integration and stimulate Community-wide interbrand competition.

(10) It is desirable to list in the Regulation a number of obligations that are commonly found in know-how licensing agreements but are normally not restrictive of competition and to provide that in the event that because of the particular economic or legal circumstances

they should fall within Article 85(1), they also would be covered by the exemption. This list, in Article 2, is not exhaustive.

(11) The Regulation must also specify what restrictions or provisions may not be included in know-how licensing agreements if these are to benefit from the block exemption. The restrictions, which are listed in Article 3, may fall under the prohibition of Article 85(1), but in their case there can be no general presumption that they will lead to the positive effects required by Article 85(3), as would be necessary for the granting of a block exemption, and consequently an exemption can be granted only on an individual basis.

(12) Agreements which are not automatically covered by the exemption because they contain provisions that are not expressly exempted by the Regulation and not expressly excluded from exemption, including those listed in Article 4(2) of the Regulation, may none the less generally be presumed to be eligible for application of the block exemption. It will be possible for the Commission rapidly to establish whether this is the case for a particular agreement. Such agreements should therefore be deemed to be covered by the exemption provided for in this Regulation where they are notified to the Commission and the Commission does not oppose the application of the exemption within a specified period of time.

(13) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85(3), the Commission may withdraw the benefit of the block exemption (Article 7).

(14) The list in Article 2 includes among others obligations on the licensee to cease using the licensed know-how after the termination of the agreement ('post-term use ban') (Article 2(1)(3)) and to make improvements available to the licensor (grant-back clause) (Article 2(1)(4)). A post-term use ban may be regarded as a normal feature of the licensing of know-how as otherwise the licensor would be forced to transfer his know-how in perpetuity and this could inhibit the transfer of technology. Moreover, undertakings by the licensee to grant back to the licensor a licence for improvements to the licensed know-how and/or patents are generally not restrictive of competition if the licensee is entitled by the contract to share in future experience and inventions made by the licensor and the licensee retains the right to disclose experience acquired or grant licences to third parties where to do so would not disclose the licensor's know-how.

On the other hand, a restrictive effect on competition arises where the agreement contains both a post-term use ban and an obligation on the licensee to make his improvements to the know-how available to the licensor, even on a non-exclusive and reciprocal basis, and to allow the licensor to continue using them even after the expiry of the agreement. This is so because in such a case the licensee has no possibility of inducing the licensor to authorize him to continue exploiting the originally licensed know-how, and hence the licensee's own improvements as well, after the expiry of the agreement.

(15) The list in Article 2 also includes an obligation on the licensee to keep paying royalties until the end of the agreement independently of whether or not the licensed know-how has entered into the public domain through the action of third parties (Article 2(1)(7)). As a rule, parties do not need to be protected against the foreseeable financial consequences of an agreement freely entered into and should therefore not be restricted in their choice of the appropriate means of financing the technology transfer. This applies especially where know-how is concerned since here there can be no question of an abuse of a legal monopoly and,

under the legal systems of the Member States, the licensee may have a remedy in an action under the applicable national law. Furthermore provisions for the payment of royalties in return for the grant of a whole package of technology throughout an agreed reasonable period independently of whether or not the know-how has entered into the public domain, are generally in the interest of the licensee in that they prevent the licensor demanding a high initial payment up front with a view to diminishing his financial exposure in the event of premature disclosure. Parties should be free, in order to facilitate payment by the licensee, to spread the royalty payments for the use of the licensed technology over a period extending beyond the entry of the know-how into the public domain. Moreover, continuous payments should be allowed throughout the term of the agreement in cases where both parties are fully aware that the first sale of the product will necessarily disclose the know-how. Nevertheless, the Commission may, where it was clear from the circumstances that the licensee would have been able and willing to develop the know-how himself in a short period of time, in comparison with which the period of continuing payments is excessively long, withdraw the benefit of the exemption under Article 7 of this Regulation.

Finally, the use of methods of royalties calculation which are unrelated to the exploitation of the licensed technology or the charging of royalties on products whose manufacture at no stage includes the use of any of the licensed patents or secret techniques would render the agreement ineligible for the block exemption (Article 3(5)). The licensee should also be freed from his obligation to pay royalties, where the know-how becomes publicly known through the action of the licensor. However, the mere sale of the product by the licensor or an undertaking connected with him does not constitute such an action (Article 2(1)(7) and Article 3(5)).

(16) An obligation on the licensee to restrict his exploitation of the licensed technology to one or more technical fields of application ('fields of use') or to one or more product markets is also not caught by Article 85(1) (Article 2(1)(8)). This obligation is not restrictive of competition since the licensor can be regarded as having the right to transfer the know-how only for a limited purpose. Such a restriction must however not constitute a disguised means of customer sharing.

(17) Restrictions which give the licensor an unjustified competitive advantage, such as an obligation on the licensee to accept quality specifications, other licences or goods and services that the licensee does not want from the licensor, prevent the block exemption from being applicable. However, this does not apply where it can be shown that the licensee wanted such specifications, licences, goods or services for reasons of his own convenience (Article 3(3)).

(18) Restrictions whereby the parties share customers within the same technological field of use or the same product market, either by an actual prohibition on supplying certain classes of customer or an obligation with an equivalent effect, would also render the agreement ineligible for the block exemption (Article 3(6)).

This does not apply to cases where the know-how licence is granted in order to provide a single customer with a second source of supply. In such a case, a prohibition on the licensee from supplying persons other than the customer concerned may be indispensable for the grant of a licence to the second supplier since the purpose of the transaction is not to create an independent supplier in the market. The same applies to limitations on the quantities the

licensee may supply to the customer concerned. It is also reasonable to assume that such restrictions contribute to improving the production of goods and to promoting technical progress by furthering the dissemination of technology. However, given the present state of experience of the Commission with respect to such clauses and the risk in particular that they might deprive the second supplier of the possibility of developing his own business in the fields covered by the agreement it is appropriate to make such clauses subject to the opposition procedure (Article 4(2)).

(19) Besides the clauses already mentioned, the list of restrictions precluding application of the block exemption in Article 3 also includes restrictions regarding the selling prices of the licensed product or the quantities to be manufactured or sold, since they limit the extent to which the licensee can exploit the licensed technology and particularly since quantity restrictions may have the same effect as export bans (Article 3(7) and (8)). This does not apply where a licence is granted for use of the technology in specific production facilities and where both a specific know-how is communicated for the setting-up, operation and maintenance of these facilities and the licensee is allowed to increase the capacity of the facilities or to set up further facilities for its own use on normal commercial terms. On the other hand, the licensee may lawfully be prevented from using the licensor's specific know-how to set up facilities for third parties, since the purpose of the agreement is not to permit the licensee to give other producers access to the licensor's know-how while it remains secret (Article 2(1) (12)).

(20) To protect both the licensor and the licensee from being tied into agreements whose duration may be automatically extended beyond their initial term as freely determined by the parties, through a continuous stream of improvements communicated by the licensor, it is appropriate to exclude agreements with such a clause from the block exemption (Article 3(10)). However, the parties are free at any time to extend their contractual relationship by entering into new agreements concerning new improvements.

(21) The Regulation should apply with retroactive effect to know-how licensing agreements in existence when the Regulation comes into force where such agreements already fulfil the conditions for application of the Regulation or are modified to do so (Articles 8 to 10). Under Article 4(3) of Regulation No 19/65/EEC, the benefit of these provisions may not be claimed in actions pending at the date of entry into force of this Regulation, nor may it be relied on as grounds for claims for damages against third parties.

(22) Agreements which come within the terms of Articles 1 and 2 and which have neither the object nor the effect of restricting competition in any other way need no longer be notified. Nevertheless, undertakings will still have the right to apply in individual cases for negative clearance under Article 2 of Council Regulation No 17[1] or for exemption under Article 85(3),

HAS ADOPTED THIS REGULATION:

Article 1

(1) Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to pure know-how

[1] OJ 13, 21.2.1962, p. 204/62.

licensing agreements and to mixed know-how and patent licensing agreements not exempted by Regulation (EEC) No 2349/84, including those agreements containing ancillary provisions relating to trade marks or other intellectual property rights, to which only two undertakings are party and which include one or more of the following obligations:

1. an obligation on the licensor not to license other undertakings to exploit the licensed technology in the licensed territory;

2. an obligation on the licensor not to exploit the licensed technology in the licensed territory himself;

3. an obligation on the licensee not to exploit the licensed technology in territories within the common market which are reserved for the licensor;

4. an obligation on the licensee not to manufacture or use the licensed product, or use the licensed process, in territories within the common market which are licensed to other licensees;

5. an obligation on the licensee not to pursue an active policy of putting the licensed product on the market in the territories within the common market which are licensed to other licensees, and in particular not to engage in advertising specifically aimed at those territories or to establish any branch or maintain any distribution depot there;

6. an obligation on the licensee not to put the licensed product on the market in the territories licensed to other licensees within the common market;

7. an obligation on the licensee to use only the licensor's trademark or the get-up determined by the licensor to distinguish the licensed product during the term of the agreement, provided that the licensee is not prevented from identifying himself as the manufacturer of the licensed products;

8. an obligation on the licensee to limit his production of the licensed product to the quantities he requires in manufacturing his own products and to sell the licensed product only as an integral part of or a replacement part for his own products or otherwise in connection with the sale of his own products, provided that such quantities are freely determined by the licensee.

(2) The exemption provided for the obligations referred to in paragraph l(l)(2) and (3) shall extend for a period not exceeding for each licensed territory within the EEC 10 years from the date of signature of the first licence agreement entered into by the licensor for that territory in respect of the same technology.

The exemption provided for the obligations referred to in paragraph 1(4) and (5) shall extend for a period not exceeding 10 years from the date of signature of the first licence agreement entered into by the licensor within the EEC in respect of the same technology.

The exemption provided for the obligation referred to in paragraph 1(6) shall extend for a period not exceeding five years from the date of the signature of the first licence agreement entered into by the licensor within the EEC in respect of the same technology.

(3) The exemption provided for in paragraph 1 shall apply only where the parties have identified in any appropriate form the initial know-how and any subsequent improvements to

it, which become available to the parties and are communicated to the other party pursuant to the terms of the agreement and for the purpose thereof, and only for as long as the know-how remains secret and substantial.

(4) In so far as the obligations referred to in paragraph 1(1) to (5) concern territories including Member States in which the same technology is protected by necessary patents, the exemption provided for in paragraph 1 shall extend for those Member States as long as the licensed product or process is protected in those Member States by such patents, where the duration of such protection exceeds the periods specified in paragraph 2.

(5) The exemption of restrictions on putting the licensed product on the market resulting from the obligations referred to in paragraph 1(2), (3), (5) and (6) shall apply only if the licensee manufactures or proposes to manufacture the licensed product himself or has it manufactured by a connected undertaking or by a subcontractor.

(6) The exemption provided for in paragraph 1 shall also apply where in a particular agreement the parties undertake obligations of the types referred to in that paragraph but with a more limited scope than is permitted by the paragraph.

(7) For the purposes of the present Regulation the following terms shall have the following meanings:

1. 'know-how' means a body of technical information that is secret, substantial and identified in any appropriate form;

2. the term 'secret' means that the know-how package as a body or in the precise configuration and assembly of its components is not generally known or easily accessible, so that part of its value consists in the lead-time the licence gains when it is communicated to him; it is not limited to the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the licensor's business;

3. the term 'substantial' means that the know-how includes information which is of importance for the whole or a significant part of (i) a manufacturing process, or (ii) a product or service, or (iii) for the development thereof and excludes information which is trivial. Such know-how must thus be useful, i.e. can reasonably be expected at the date of conclusion of the agreement to be capable of improving the competitive position of the licensee, for example by helping him to enter a new market or giving him an advantage in competition with other manufacturers or providers of services who do not have access to the licensed secret know-how or other comparable secret know-how;

4. the term 'identified' means that the know-how is described or recorded in such a manner as to make it possible to verify that it fulfils the criteria of secrecy and substantiality and to ensure that the licensee is not unduly restricted in his exploitation of his own technology. To be identified the know-how can either be set out in the licence agreement or in a separate document or recorded in any other appropriate form at the latest when the know-how is transferred or shortly thereafter, provided that the separate document or other record can be made available if the need arises;

5. 'pure know-how licensing agreements' are agreements whereby one undertaking, the licensor, agrees to communicate the know-how, with or without an obligation to disclose any subsequent improvements, to another undertaking, the licensee, for exploitation in the licensed territory;

6. 'mixed know-how and patent licensing agreements' are agreements not exempted by Regulation (EEC) No 2349/84 under which a technology containing both non-patented elements and elements that are patented in one or more Member States is licensed;

7. the terms 'licensed know-how' or 'licensed technology' mean the initial and any subsequent know-how communicated directly or indirectly by the licensor to a licensee by means of pure or mixed know-how and patent licensing agreements; however, in the case of mixed know-how and patent licensing agreements the term 'licensed technology' also includes any patents for which a licence is granted besides the communication of the know-how;

8. the term 'the same technology' means the technology as licensed to the first licensee and enhanced by any improvements made thereto subsequently, irrespective of whether and to what extent such improvements are exploited by the parties or the other licensees and irrespective of whether the technology is protected by necessary patents in any Member States;

9. 'the licensed products' are goods or services the production or provision of which requires the use of the licensed technology;

10. the term 'exploitation' refers to any use of the licensed technology in particular in the production, active or passive sales in a territory even if not coupled with manufacture in that territory, or leasing of the licensed products;

11. 'the licensed territory' is the territory covering all or at least part of the common market where the licensee is entitled to exploit the licensed technology;

12. 'territory reserved for the licensor' means territories in which the licensor has not granted any licences and which he has expressly reserved for himself;

13. 'connected undertakings' means:

(a) undertakings in which a party to the agreement, directly or indirectly;

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs of the undertaking;

(b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a);

(d) undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers listed in (a): such jointly controlled undertakings are considered to be connected with each of the parties to the agreement.

Article 2

(1) Article 1 shall apply notwithstanding the presence in particular of any of the following obligations, which are generally not restrictive of competition:

1. an obligation on the licensee not to divulge the know-how communicated by the licensor; the licensee may be held to this obligation after the agreement has expired;

2. an obligation on the licensee not to grant sublicences or assign the licence;

3. an obligation on the licensee not to exploit the licensed know-how after termination of the agreement in so far and as long as the know-how is still secret;

4. an obligation on the licensee to communicate to the licensor any experience gained in exploiting the licensed technology and to grant him a non-exclusive licence in respect of improvements to or new applications of that technology, provided that:

(a) the licensee is not prevented during or after the term of the agreement from freely using his own improvements, in so far as these are severable from the licensor's know-how, or licensing them to third parties where licensing to third parties does not disclose the know-how communicated by the licensor that is still secret; this is without prejudice to an obligation on the licensee to seek the licensor's prior approval to such licensing provided that approval may not be withheld unless there are objectively justifiable reasons to believe that licensing improvements to third parties will disclose the licensor's know-how, and

(b) the licensor has accepted an obligation, whether exclusive or not, to communicate his own improvements to the licensee and his right to use the licensee's improvements which are not severable from the licensed know-how does not extend beyond the date on which the licensee's right to exploit the licensor's know-how comes to an end, except for termination of the agreement for breach by the licensee; this is without prejudice to an obligation on the licensee to give the licensor the option to continue to use the improvements after that date, if at the same time he relinquishes the post-term use ban or agrees, after having had an opportunity to examine the licensee's improvements, to pay appropriate royalties for their use;

5. an obligation on the licensee to observe minimum quality specifications for the licensed product or to procure goods or services from the licensor or from an undertaking designated by the licensor, in so far as such quality specifications, products or services are necessary for:

(a) a technically satisfactory exploitation of the licensed technology, or

(b) for ensuring that the production of the licensee conforms to the quality standards that are respected by the licensor and other licensees,

and to allow the licensor to carry out related checks;

6. obligations:

(a) to inform the licensor of misappropriation of the know-how or of infringements of the licensed patents, or

(b) to take or to assist the licensor in taking legal action against such misappropriation or infringements,

provided that these obligations are without prejudice to the licensee's right to challenge the validity of the licensed patents or to contest the secrecy of the licensed know-how except where he himself has in some way contributed to its disclosure;

7. an obligation on the licensee, in the event of the know-how becoming publicly known other than by action of the licensor, to continue paying until the end of the agreement the royalties in the amounts, for the periods and according to the methods freely determined by the parties, without prejudice to the payment of any additional damages in the event of the know-how becoming publicly known by the action of the licensee in breach of the agreement;

8. an obligation on the licensee to restrict his exploitation of the licensed technology to one or more technical fields of application covered by the licensed technology or to one or more product markets;

9. an obligation on the licensee to pay a minimum royalty or to produce a minimum quantity of the licensed product or to carry out a minimum number of operations exploiting the licensed technology;

10. an obligation on the licensor to grant the licensee any more favourable terms that the licensor may grant to another undertaking after the agreement is entered into;

11. an obligation on the licensee to mark the licensed product with the licensor's name;

12. an obligation on the licensee not to use the licensor's know-how to construct facilities for third parties; this is without prejudice to the right of the licensee to increase the capacity of its facilities or to set up additional facilities for its own use on normal commercial terms, including the payment of additional royalties.

(2) In the event that, because of particular circumstances, the obligations referred to in paragraph 1 fall within the scope of Article 85(1), they shall also be exempted even if they are not accompanied by any of the obligations exempted by Article 1.

(3) The exemption provided for in paragraph 2 shall also apply where in an agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

Article 3

Articles 1 and 2(2) shall not apply where:

1. the licensee is prevented from continuing to use the licensed know-how after the termination of the agreement where the know-how has meanwhile become publicly known, other than by the action of the licensee in breach of the agreement;

2. the licensee is obliged either:

(a) to assign in whole or in part to the licensor rights to improvements to or new applications of the licensed technology;

(b) to grant the licensor an exclusive licence for improvements to or new applications of the licensed technology which would prevent the licensee during the currency of the agreement

and/or thereafter from using his own improvements in so far as these are severable from the licensor's know-how, or from licensing them to third parties, where such licensing would not disclose the licensor's know-how that is still secret; or

(c) in the case of an agreement which also includes a post-term use ban, to grant back to the licensor, even on a non-exclusive and reciprocal basis, licences for improvements which are not severable from the licensor's know-how, if the licensor's right to use the improvements is of a longer duration than the licensee's right to use the licensor's know-how, except for termination of the agreement for breach by the licensee;

3. the licensee is obliged at the time the agreement is entered into to accept quality specifications or further licences or to procure goods or services which he does not want, unless such licences, quality specifications, goods or services are necessary for a technically satisfactory exploitation of the licensed technology or for ensuring that the production of the licensee conforms to the quality standards that are respected by the licensor and other licensees;

4. the licensee is prohibited from contesting the secrecy of the licensed know-how or from challenging the validity of licensed patents within the common market belonging to the licensor or undertakings connected with him, without prejudice to the right of the licensor to terminate the licensing agreement in the event of such a challenge;

5. the licensee is charged royalties on goods or services which are not entirely or partially produced by means of the licensed technology or for the use of know-how which has become publicly known by the action of the licensor or an undertaking connected with him;

6. one party is restricted within the same technological field of use or within the same product market as to the customers he may serve, in particular by being prohibited from supplying certain classes of uses, employing certain forms of distribution or, with the aim of sharing customers, using certain types of packaging for the products, save as provided in Article 1(1)(7) and Article 4(2);

7. the quantity of the licensed products one party may manufacture or sell or the number of operations exploiting the licensed technology he may carry out are subject to limitations, save as provided in Article 1(l)(8) and Article 4(2);

8. one party is restricted in the determination of prices, components of prices or discounts for the licensed products;

9. one party is restricted from competing with the other party, with undertakings connected with the other party or with other undertakings within the common market in respect of research and development, production or use of competing products and their distribution, without prejudice to an obligation on the licensee to use his best endeavours to exploit the licensed technology and without prejudice to the right of the licensor to terminate the exclusivity granted to the licensee and cease communicating improvements in the event of the licensee's engaging in any such competing activities and to require the licensee to prove that the licensed know-how is not used for the production of goods and services other than those licensed;

10. the initial duration of the licensing agreement is automatically prolonged by the inclusion in it of any new improvements communicated by the licensor, unless the licensee has the right to refuse such improvements or each party has the right to terminate the agreement at the expiry of the initial term of the agreement and at least every three years thereafter;

11. the licensor is required, albeit in separate agreements, for a period exceeding that permitted under Article 1(2) not to license other undertakings to exploit the same technology in the licensed territory, or a party is required for periods exceeding those permitted under Articles 1(2) or 1(4) not to exploit the same technology in the territory of the other party or of other licensees;

12. one or both of the parties are required:

(a) to refuse without any objectively justified reason to meet demand from users or resellers in their respective territories who would market products in other territories within the common market;

(b) to make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or resellers from obtaining outside, or from putting on the market in the licensed territory products which have been lawfully put on the market within the common market by the licensor or with his consent;

or do so as a result of a concerted practice between them.

Article 4

(1) The exemption provided for in Articles 1 and 2 shall also apply to agreements containing obligations restrictive of competition which are not covered by those Articles and do not fall within the scope of Article 3, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27[1] and that the Commission does not oppose such exemption within a period of six months.

(2) Paragraph 1 shall in particular apply to an obligation on the licensee to supply only a limited quantity of the licensed product to a particular customer, where the know-how licence is granted at the request of such a customer in order to provide him with a second source of supply within a licensed territory.

This provision shall also apply where the customer is the licensee and the licence, in order to provide a second source of supply, provides for the customer to make licensed products or have them made by a sub-contractor.

(3) The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

(4) Paragraphs 1 and 2 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it; and

(b) the information furnished with the notification is complete and in accordance with the facts.

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[1] OJ 35, 10.5.1962, p. 1118/62.

(5) The benefit of paragraphs 1 and 2 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 3 and 4(b) shall apply *mutatis mutandis*.

(6) The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the transmission to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 5. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

(7) The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

(8) If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date of notification.

(9) If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

(10) If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

Article 5

(1) This Regulation shall not apply to:

1. agreements between members of a patent or know-how pool which relate to the pooled technologies;

2. know-how licensing agreements between competing undertakings which hold interests in a joint venture, or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture;

3. agreements under which one party grants the other a know-how licence and the other party, albeit in separate agreements or through connected undertakings, grants the first party a patent, trade mark or know-how licence or exclusive sales rights, where the parties are competitors in relation to the products covered by those agreements;

4. agreements including the licensing of intellectual property rights other than patents (in particular trade marks, copyright and design rights) or the licensing of software except where these rights or the software are of assistance in achieving the object of the licensed technology and there are no obligations restrictive of competition other than those also attached to the licensed know-how and exempted under the present Regulation.

(2) This Regulation shall nevertheless apply:

(a) to agreements to which paragraph 1(2) applies, under which a parent undertaking grants the joint venture a know-how licence, provided that the contract products and the other products of the participating undertakings which are considered by users to be equivalent in view of their characteristics, price and intended use represent:

— in case of an exploitation licence limited to production not more than 20%,

— in case of an exploitation licence covering production and distribution not more than 10% of the market for all such products in the common market or a substantial part thereof;

(b) to reciprocal licences within the meaning of point 3 of paragraph 1, provided that the parties are not subject to any territorial restriction within the common market with regard to the manufacture, use or putting on the market of the contract products or on the use of the licensed proccesses.

(3) This Regulation shall continue to apply, where the market shares referred to in point (a) of paragraph 2 are exceeded during any period of two consecutive financial years by not more than one tenth. Where this latter limit is also exceeded, this Regulation shall continue to apply for a period of six months following the end of the financial year during which it was exceeded.

Article 6

This Regulation shall also apply to:

1. pure know-how agreements or mixed agreements where the licensor is not the developer of the know-how or the patentee but is authorized by the developer or the patentee to grant a licence or a sublicence;

2. assignments of know-how or of know-how and patents where the risk associated with exploitation remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent upon the turnover attained by the assignee in respect of products made using the know-how or the patents, the quantity of such products manufactured or the number of operations carried out employing the know-how or the patents;

3. pure know-how agreements or mixed agreements in which rights or obligations of the licensor or the licensee are assumed by undertakings connected with them.

Article 7

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, and in particular where:

1. such effects arise from an arbitration award;

2. the effect of the agreement is to prevent the licensed products from being exposed to effective composition in the licensed territory from identical products or products considered by users as equivalent in view of their characteristics, price and intended use;

3. the licensor does not have the right to terminate the exclusivity granted to the licensee at the latest five years from the date the agreement was entered into and at least annually thereafter if, without legitimate reason, the licensee fails to exploit the licensed technology or to do so adequately;

4. without prejudice to Article 1(1)(6), the licensee refuses, without objectively valid reason, to meet unsolicited demand from users or resellers in the territory of other licensees;

5. one or both of the parties:

(a) without objectively justified reason, refuse to meet demand from users or resellers in their respective territories who would market the products in other territories within the common market; or

(b) make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular where they exercise intellectual property rights or take measures so as to prevent resellers or users from obtaining outside, or from putting on the market in the licensed territory products which have been lawfully put on the market within the common market by the licensor or with his consent;

6. the operation of the post-term use ban referred to in Article 2(1)(3) prevents the licensee from working an expired patent which can be worked by all other manufacturers;

7. the period for which the licensee is obliged to continue paying royalties after the know-how has become publicly known by the action of third parties, as referred to in Article 2(1)(7), substantially exceeds the lead time acquired because of the head-start in production and marketing and this obligation is detrimental to competition in the market;

8. the parties were already competitors before the grant of the licence and obligations on the licensee to produce a minimum quantity or to use his best endeavours as referred to in Article 2(1)(9) and Article 3(9) have the effect of preventing the licensee from using competing technologies.

Article 8

(1) As regards agreements existing on 13 March 1962 and notified before 1 February 1963 and agreements, whether notified or not, to which Article 4(2)(2)(b) of Regulation No 17 applies, the declaration of inapplicability of Article 85(1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.

(2) As regards all other agreements notified before this Regulation entered into force, the declaration of inapplicability of Article 85(1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled, or from the date of notification, whichever is the later.

Article 9

If agreements existing on 13 March 1962 and notified before 1 February 1963 or agreements to which Article 4(2)(2)(b) of Regulation No 17 applies and notified before 1 January 1967

are amended before 1 July 1989 so as to fulfil the conditions for application of this Regulation, and if the amendment is communicated to the Commission before 1 October 1989 the prohibition in Article 85(1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication shall take effect from the time of its receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

Article 10

(1) As regards agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, Articles 8 and 9 shall apply except that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.
(2) As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, Articles 8 and 9 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.
(3) As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Spain and Portugal, Articles 8 and 9 shall apply except that the relevant dates shall be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963 and 1 January 1967.

Article 11

(1) Information acquired pursuant to Article 4 shall be used only for the purposes of the Regulation.
(2) The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation 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.

Article 12

This Regulation shall enter into force on 1 April 1989.
It shall apply until 31 December 1999.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

3. Specialization and research and development agreements

COUNCIL REGULATION (EEC) No 2821/71[1] OF 20 DECEMBER 1971

on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices modified by Regulation (EEC) No 2743/72 of 19 December 1972[2]

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

Whereas Article 85(1) of the Treaty may in accordance with Article 85(3) be declared inapplicable to categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85(3);

Whereas the provisions for implementation of Article 85(3) must be adopted by way of regulation pursuant to Article 87;

Whereas the creation of a common market requires that undertakings be adopted to the conditions of the enlarged market and whereas cooperation between undertakings can be a suitable means of achieving this;

Whereas agreements, decisions and concerted practices for cooperation between undertakings which enable the undertakings to work more rationally and adapt their productivity and competitiveness to the enlarged market may, in so far as they fall within the prohibition contained in Article 85(1), be exempted therefrom under certain conditions; whereas this measure is necessary in particular as regards agreements, decisions and concerted practices

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[1] OJ L 285, 29.12.1971, p. 46; (Special Edition 1971 — III, p. 1032).
[2] OJ L 291, 28.12.1972, p. 144; (Special Edition 1972, 28-30.12.1972, p. 60).

relating to the application of standards and types, research and development of products or processes up to the stage of industrial application, exploitation of the results thereof and specialization;

Whereas it is desirable that the Commission be enabled to declare by way of regulation that the provisions of Article 85(1) do not apply to those categories of agreements, decisions and concerted practices, in order to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy;

Whereas it should be laid down under what conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers;

Whereas under Article 6 of Regulation No 17[1] the Commission may provide that a decision taken in accordance with Article 85(3) of the Treaty shall apply with retroactive effect; whereas it is desirable that the Commission be empowered to issue regulations whose provisions are to the like effect;

Whereas under Article 7 of Regulation No 17 agreements, decisions and concerted practices may by decision of the Commission be exempted from prohibition, in particular if they are modified in such manner that Article 85(3) applies to them; whereas it is desirable that the Commission be enabled to grant by regulation like exemption to such agreements, decisions and concerted practices if they are modified in such manner as to fall within a category defined in an exempting regulation;

Whereas the possibility cannot be excluded that, in a specific case, the conditions set out in Article 85(3) may not be fulfilled; whereas the Commission must have power to regulate such a case in pursuance of Regulation No 17 by way of decision having effect for the future,

HAS ADOPTED THIS REGULATION:

Article 1

1. Without prejudice to the application of Regulation No 17 the Commission may, by Regulation and in accordance with article 85(3) of the Treaty, declare that Article 85(1) shall not apply to categories of agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object:

(a) the application of standards or types;

(b) the research and development of products or processes up to the stage of industrial application and exploitation of the results, including provisions regarding industrial property rights and confidential technical knowledge;

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[1] OJ 13, 21.2.1962, p. 204/62; (Special Edition 1959-62, p. 87).

(c) specialization, including agreements necessary for achieving it.

2. Such regulation shall define the categories of agreements, decisions and concerted practices to which it applies and shall specify in particular:

(a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;

(b) the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

Article 2

1. Any Regulation pursuant to Article 1 shall be made for a specified period.

2. It may be repealed or amended where circumstances have changed with respect to any of the facts which were basic to its being made; in such case, a period shall be fixed for modification of the agreements decisions and concerted practices to which the earlier Regulation applies.

Article 3

A Regulation pursuant to Article 1 may provide that it shall apply with retroactive effect to agreements, decisions and concerted practices to which, at the date of entry into force of that Regulation, a decision issued with retroactive effect in pursuance of Article 6 of Regulation No 17 would have applied.

Article 4

1. A Regulation pursuant to Article 1 may provide that the prohibition contained in Article 85(1) of the Treaty shall not apply, for such period as shall be fixed by that Regulation, to agreements, decisions and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85(3), where:

— within six months from the entry into force of the Regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the Regulation; and

— the modifications are brought to the notice of the Commission within the time limit fixed by the Regulation.

2. Paragraph 1 shall apply to agreements, decisions and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.

3. The benefit of the provisions laid down pursuant to paragraph 1 may not be claimed in actions pending at the date of entry into force of a regulation adopted pursuant to Article 1; neither may it be relied on as grounds for claims for damages against third parties.[1, 2]

Article 5

Before making a regulation, the Commission shall publish a draft thereof to enable all persons and organizations concerned to submit their comments within such time limit, being not less than one month, as the Commission shall fix.

Article 6

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

(a) before publishing a draft regulation;

(b) before making a regulation.

2. Paragraphs 5 and 6 of Article 10 of Regulation No 17, relating to consultation with the Advisory Committee, shall apply by analogy. it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

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[1] **Council Regulation (EEC) No 2743/72 of 19 December 1972**
1. The following is inserted at the end of paragraph 1:
'A Regulation adopted pursuant to Article 1 may lay down that the prohibition referred to in Article 85(1) of the Treaty shall not apply, for the period fixed in the same Regulation, to agreements and concerted practices which existed at the date of accession and which, by virtue of accession, come within the scope of Article 85 and do not fulfil the conditions set out in Article 85(3).'
2. Paragraph 2 shall be supplemented by the following:
'Paragraph 1 shall be applicable to those agreements and concerted practices which, by virtue of the accession, come within the scope of Article 85(1) of the Treaty and for which notification before 1 July 1973 is mandatory, in accordance with Articles 5 and 25 of Regulation No 17, only if notification was given before that date.'
(OJ L 291, 28.12.1972, p. 144).

[2] **Documents concerning the accession of the Hellenic Republic, the Kingdom of Spain and the Portuguese Republic**
In Article 4:
— paragraph 1 is supplemented by the following:
'The provisions of the preceding subparagraph shall apply in the same way in the case of the accession of the Hellenic Republic, the Kingdom of Spain and of the Portuguese Republic.'
— paragraph 2 is supplemented by the following:
'Paragraph 1 shall not apply to agreements and concerted practices to which Article 85(1) of the Treaty applies by virtue of the accession of the Kingdom of Spain and of the Portuguese Republic and which must be notified before 1 July 1986, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.'
(OJ L 291, 19.11.1979, p. 99; OJ L 302, 15.11.1985, p. 166).

Article 7

Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case agreements, decisions or concerted practices to which a regulation made pursuant to Article 1 of this Regulation applies have nevertheless certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, it may withdraw the benefit of application of that regulation and take a decision in accordance with Articles 6 and 8 of Regulation No 17, without any notification under Article 4(1) of Regulation No 17 being required.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EEC) No 417/85[1] OF 19 DECEMBER 1984

on the application of Article 85(3) of the Treaty to categories of specialization agreements

As amended by Commission Regulation (EEC) No 151/93 of 23 December 1992.[2]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices,[3] as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,[4]

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 85(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 85(1) which relate to specialization, including agreements necessary for achieving it.

(2) Agreements on specialization in present or future production may fall within the scope of Article 85(1).

(3) Agreements on specialization in production generally contribute to improving the production or distribution of goods, because undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. It is likely that, given effective competition, consumers will receive a fair share of the resulting benefit.

(4) Such advantages can arise equally from agreements whereby each participant gives up the manufacture of certain products in favour of another participant and from agreements whereby the participants undertake to manufacture certain products or have them manufactured only jointly.

(5) The Regulation must specify what restrictions of competition may be included in specialization agreements. The restrictions of competition that are permitted in the Regu-

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[1] OJ L 53, 22.2.1985. p. 1.

[2] OJ L 21, 29.1.1993, p. 8. Article 5 of this Regulation provides:
'1. This Regulation shall enter into force on 1 April 1993.
2. Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) No 2349/84 and (EEC) No 556/89, as amended by this Regulation, shall apply with retroactive effect from the time at which the conditions for the application of the group exemption were fulfilled.'

[3] OJ L 285, 29.12.1971, p. 46.

[4] OJ C 211, 11.8.1984, p. 2.

lation in addition to reciprocal obligations to give up manufacture are normally essential for the making and implementation of such agreements. These restrictions are therefore, in general, indispensable for the attainment of the desired advantages for the participating undertakings and consumers. It may be left to the parties to decide which of these provisions they include in their agreements.

(6) The exemption must be limited to agreements which do not give rise to the possibility of eliminating competition in respect of a substantial part of the products in question. The Regulation must therefore apply only as long as the market share and turnover of the participating undertakings do not exceed a certain limit.

(7) It is, however, appropriate to offer undertakings which exceed the turnover limit set in the Regulation a simplified means of obtaining the legal certainty provided by the block exemption. This must allow the Commission to exercise effective supervision as well as simplifying its administration of such agreements.

(8) In order to facilitate the conclusion of long-term specialization agreements, which can have a bearing on the structure of the participating undertakings, it is appropriate to fix the period of validity of the Regulation at 13 years. If the circumstances on the basis of which the Regulation was adopted should change significantly within this period, the Commission will make the necessary amendments.

(9) Agreements, decisions and concerted practices which are automatically exempted pursuant to this Regulation need not be notified. Undertakings may none the less in an individual case request a decision pursuant to Council Regulation No 17,[1] as last amended by the Act of Accession of Greece,

HAS ADOPTED THIS REGULATION:

Article 1

Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements on specialization whereby, for the duration of the agreement, undertakings accept reciprocal obligations:

(a) not to manufacture certain products or to have them manufactured, but to leave it to other parties to manufacture the products or have them manufactured; or

(b) to manufacture certain products or have them manufactured only jointly.

Article 2

1. Article 1 shall also apply to the following restrictions of competition:

(a) an obligation not to conclude with third parties specialization agreements relating to identical products or to products considered by users to be equivalent in view of their characteristics, price and intended use;

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[1] OJ 13, 21.2.1962, p. 204/62.

(b) an obligation to procure products which are the subject of the specialization exclusively from another party, a joint undertaking or an undertaking jointly charged with their manufacture, except where they are obtainable on more favourable terms elsewhere and the other party, the joint undertaking or the undertaking charged with manufacture is not prepared to offer the same terms;

(c) an obligation to grant other parties the exclusive right, within the whole or a defined area of the common market, to distribute products which are the subject of the specialization, provided that intermediaries and users can also obtain the products from other suppliers and the parties do not render it difficult for intermediaries and users to thus obtain the products;

(d) an obligation to grant one of the parties the exclusive right to distribute products which are the subject of the specialization, provided that that party does not distribute products of a third undertaking which compete with the contract products;

(e) an obligation to grant the exclusive right to distribute products which are the subject of the specialization to a joint undertaking or to a third undertaking, provided that the joint undertaking or third undertaking does not manufacture or distribute products which compete with the contract products;

(f) an obligation to grant the exclusive right to distribute within the whole or a defined area of the common market the products which are the subject of the specialization to joint undertakings or third undertakings which do not manufacture or distribute products which compete with the contract products, provided that users and intermediaries can also obtain the contract products from other suppliers and that neither the parties nor the joint undertakings or third undertakings entrusted with the exclusive distribution of the contract products render it difficult for users and intermediaries to thus obtain the contract products.

2. Article 1 shall also apply where the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

2a. Article 1 shall not apply if restrictions of competition other than those set out in paragraphs 1 and 2 are imposed upon the parties by agreement, decision or concerted practice.

3. Article 1 shall apply notwithstanding that any of the following obligations, in particular, are imposed:

(a) an obligation to supply other parties with products which are the subject of the specialization and in so doing to observe minimum standards of quality;

(b) an obligation to maintain minimum stocks of products which are the subject of the specialization and of replacement parts for them;

(c) an obligation to provide customer and guarantee services for products which are the subject of specialization.

Article 3

1. Article 1 shall apply only if

(a) the products which are the subject of the specialization together with the participating undertakings' other products which are considered by users to be equivalent in view of their characteristics, price and intended use do not represent more than 20% of the market for all such products in the common market or a substantial part thereof; and

(b) the aggregate turnover of all the participating undertakings does not exceed ECU 1 000 million.

2. If pursuant to point (d), (e) or (f) of Article 2(1), one of the parties, a joint undertaking, a third undertaking or more than one joint undertaking or third undertaking are entrusted with the distribution of the products which are the subject of the specialization, Article 1 shall apply only if:

(a) the products which are the subject of the specialization together with the participating undertakings' other products which are considered by users to be equivalent in view of their characteristics, price and intended use do not represent more than 10% of the market for all such products in the common market or a substantial part thereof; and

(b) the aggregate annual turnover of all the participating undertakings does not exceed ECU 1 000 million.

3. Article 1 shall continue to apply if the market shares and turnover referred to in paragraphs 1 and 2 are exceeded during any period of two consecutive financial years by not more than one tenth.

4. Where the limits laid down in paragraph 3 are also exceeded, Article 1 shall continue to apply for a period of six months following the end of the financial year during which they were exceeded.

Article 4

1. The exemption provided for in Article 1 shall also apply to agreements involving participating undertakings whose aggregate turnover exceeds the limits laid down in Article 3 (1)(b), (2)(b) and (3), on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27[1] and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

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[1] OJ 35, 10.5.1962, p. 1118/62. Amended most recently by Regulation (EEC) No 2526/85 of 5 August 1985 (OJ L 240, 7.9.1985).

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it; and

(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3(b) shall apply *mutatis mutandis*.

5. The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date of notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

Article 5

1. Information acquired pursuant to Article 4 shall be used only for the purposes of this Regulation.

2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of a kind that is covered by the obligation of professional secrecy.

3. 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.

Article 6

For the purpose of calculating total annual turnover within the meaning of Article 3(1)(b) and (2)(b), the turnovers achieved during the last financial year by the participating undertakings in respect of all goods and services excluding tax shall be added together. For this purpose, no account shall be taken of dealings between the participating undertakings or between these undertakings and a third undertaking jointly charged with manufacture or sale.

Article 7

1. For the purposes of Article 3(1) and (2), and Article 6, participating undertakings are:

(a) undertakings party to the agreement;

(b) undertakings in which a party to the agreement, directly or indirectly:

— owns more than half the capital or business assets,

— has the power to exercise more than half the voting rights,

— has the power to appoint at least half the members of the supervisory board, board of management or bodies legally representing the undertakings, or

— has the right to manage the affairs;

(c) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (b);

(d) undertakings in or over which an undertaking referred to in (c) directly or indirectly has the rights or powers listed in (b).

2. Undertakings in which the undertakings referred to in paragraph 1(a) to (d) directly or indirectly jointly have the rights or powers set out in paragraph 1(b) shall also be considered to be participating undertakings.

Article 8

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has effects which are incompatible with the conditions set out in Article 85(3) of the Treaty, and in particular where:

(a) the agreement is not yielding significant results in terms of rationalization or consumers are not receiving a fair share of the resulting benefit; or

(b) the products which are the subject of the specialization are not subject in the common market or a substantial part thereof to effective competition from identical products or products considered by users to be equivalent in view of their characteristics, price and intended use.

Article 9[1]

This Regulation shall apply *mutatis mutandis* to decisions of associations of undertakings and concerted practices.

Article 10

1. This Regulation shall enter into force on 1 March 1985. It shall apply until 31 December 1997.

2. Commission Regulation (EEC) No 3604/82[2] is hereby repealed.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

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[1] **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**
The following Article is inserted:
'Article 9a
The prohibition in Article 85(1) of the Treaty shall not apply to the specialization agreements which were in existence at the date of the accession of the Kingdom of Spain and of the Portuguese Republic and which, by reason of this accession, fall within the scope of Article 85(1), if, before 1 July 1986, they are so amended that they comply with the conditions laid down in this Regulation.'
(OJ L 302, 15.11.1985, p. 167).

[2] OJ L 376, 31.12.1982, p. 33.

COMMISSION REGULATION (EEC) No 418/85[1] OF 19 DECEMBER 1984

on the application of Article 85(3) of the Treaty to categories of research and development agreements

As amended by Commission Regulation (EEC) No 151/93 of 23 December 1992.[2]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices,[3] as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation,[4]

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 85(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 85(1) which have as their object the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding industrial property rights and confidential technical knowledge.

(2) As stated in the Commission's 1968 notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises,[5] agreements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not fall within the scope of Article 85(1) of the Treaty. In certain circumstances, however, such as where the parties agree not to carry out other research and development in the same field, thereby forgoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 85(1) and should therefore not be excluded from this Regulation.

(3) Agreements providing for both joint research and development and joint exploitation of the results may fall within Article 85(1) because the parties jointly determine how the products developed are manufactured or the processes developed are applied or how related intellectual property rights or know-how are exploited.

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[1] OJ L 53, 22.2.1985, p. 5.

[2] OJ L 21, 29.1.1993, p. 8. Article 5 of this Regulation provides:
'1. This Regulation shall enter into force on 1 April 1993.
2. Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) No 2349/84 and (EEC) No 556/89, as amended by this Regulation, shall apply with retroactive effect from the time at which the conditions for the application of the group exemption were fulfilled.'

[3] OJ L 285, 29.12.1971, p. 46.

[4] OJ C 16, 21.1.1984, p. 3.

[5] OJ C 75, 29.7.1968, p. 3, corrected by OJ C 84, 28.8.1968, p. 14.

(4) Cooperation in research and development and in the exploitation of the results generally promotes technical and economic progress by increasing the dissemination of technical knowledge between the parties and avoiding duplication of research and development work, by stimulating new advances through the exchange of complementary technical knowledge, and by rationalizing the manufacture of the products or application of the processes arising out of the research and development. These aims can be achieved only where the research and development programme and its objectives are clearly defined and each of the parties is given the opportunity of exploiting any of the results of the programme that interest it; where universities or research institutes participate and are not interested in the industrial exploitation of the results, however, it may be agreed that they may use the said results solely for the purpose of further research.

(5) Consumers can generally be expected to benefit from the increased volume and effectiveness of research and development through the introduction of new or improved products or services or the reduction of prices brought about by new or improved processes.

(6) This Regulation must specify the restrictions of competition which may be included in the exempted agreements. The purpose of the permitted restrictions is to concentrate the research activities of the parties in order to improve their chances of success, and to facilitate the introduction of new products and services onto the market. These restrictions are generally necessary to secure the desired benefits for the parties and consumers.

(7) The joint exploitation of results can be considered as the natural consequence of joint research and development. It can take different forms ranging from manufacture to the exploitation of intellectual property rights or know-how that substantially contributes to technical or economic progress. In order to attain the benefits and objectives described above and to justify the restrictions of competition which are exempted, the joint exploitation must relate to products or processes for which the use of the results of the research and development is decisive. Joint exploitation is not therefore justified where it relates to improvements which were not made within the framework of a joint research and development programme but under an agreement having some other principal objective, such as the licensing of intellectual property rights, joint manufacture or specialization, and merely containing ancillary provisions on joint research and development.

(8) The exemption granted under the Regulation must be limited to agreements which do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. In order to guarantee that several independent poles of research can exist in the common market in any economic sector, it is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products capable of being improved or replaced by the results of the research and development exceeds a certain level at the time the agreement is entered into.

(9) In order to guarantee the maintenance of effective competition during joint exploitation of the results, it is necessary to provide that the block exemption will cease to apply if the parties' combined shares of the market for the products arising out of the joint research and development become too great. However, it should be provided that the exemption will continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilization of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the generally substantial investments involved.

(10) Agreements between undertakings which do not fulfil the market share conditions laid down in the Regulation may, in appropriate cases, be granted an exemption by individual decision, which will in particular take account of world competition and the particular circumstances prevailing in the manufacture of high technology products.

(11) It is desirable to list in the Regulation a number of obligations that are commonly found in research and development agreements but that are normally not restrictive of competition and to provide that, in the event that, because of the particular economic or legal circumstances, they should fall within Article 85(1), they also would be covered by the exemption. This list is not exhaustive.

(12) The Regulation must specify what provisions may not be included in agreements if these are to benefit from the block exemption by virtue of the fact that such provisions are restrictions falling within Article 85(1) for which there can be no general presumption that they will lead to the positive effects required by Article 85(3).

(13) Agreements which are not automatically covered by the exemption because they include provisions that are not expressly exempted by the Regulation and are not expressly excluded from exemption are none the less capable of benefiting from the general presumption of compatibility with Article 85(3) on which the block exemption is based. It will be possible for the Commission rapidly to establish whether this is the case for a particular agreement. Such an agreement should therefore be deemed to be covered by the exemption provided for in this Regulation where it is notified to the Commission and the Commission does not oppose the application of the exemption within a specified period of time.

(14) Agreements covered by this Regulation may also take advantage of provisions contained in other block exemption Regulations of the Commission, and in particular Regulation (EEC) No 417/85[1] on specialization agreements, Regulation (EEC) No 1983/83[2] on exclusive distribution agreements, Regulation (EEC) No 1984/83,[3] on exclusive purchasing agreements and Regulation (EEC) No 2349/84[4] on patent licensing agreements, if they fulfil the conditions set out in these Regulations. The provisions of the aforementioned Regulations are, however, not applicable in so far as this Regulation contains specific rules.

(15) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85(3), the Commission may withdraw the benefit of the block exemption.

(16) The Regulation should apply with retroactive effect to agreements in existence when the Regulation comes into force where such agreements already fulfil its conditions or are modified to do so. The benefit of these provisions may not be claimed in actions pending at the date of entry into force of this Regulation, nor may it be relied on as grounds for claims for damages against third parties.

(17) Since research and development cooperation agreements are often of a long-term nature, especially where the cooperation extends to the exploitation of the results, it is

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[1] OJ L 53, 22.2.1985, p. 1.
[2] OJ L 173, 30.6.1983, p. 1.
[3] OJ L 173, 30.6.1983, p. 5.
[4] OJ L 219, 16.8.1984, p. 15.

appropriate to fix the period of validity of the Regulation at 13 years. If the circumstances on the basis of which the Regulation was adopted should change significantly within this period, the Commission will make the necessary amendments.

(18) Agreements which are automatically exempted pursuant to this Regulation need not be notified. Undertakings may nevertheless in a particular case request a decision pursuant to Council Regulation No 17,[1] as last amended by the Act of Accession of Greece,

HAS ADOPTED THIS REGULATION:

Article 1

1. Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements entered into between undertakings for the purpose of:

(a) joint research and development of products or processes and joint exploitation of the results of that research and development;

(b) joint exploitation of the results of research and development of products or processes jointly carried out pursuant to a prior agreement between the same undertakings; or

(c) joint research and development of products or processes excluding joint exploitation of the results, in so far as such agreements fall within the scope of Article 85(1).

2. For the purposes of this Regulation:

(a) *research and development of products or processes* means the acquisition of technical knowledge and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results;

(b) *contract processes* means processes arising out of the research and development;

(c) *contract products* means products or services arising out of the research and development or manufactured or provided applying the contract processes;

(d) *exploitation of the results* means the manufacture of the contract products or the application of the contract processes or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application;

(e) *technical knowledge* means technical knowledge which is either protected by all intellectual property right or is secret (know-how).

3. Research and development of the exploitation of the results are carried out jointly where:

(a) the work involved is:

— carried out by a joint team, organization or undertaking,

— jointly entrusted to a third party, or

[1] OJ 13, 21.2.1962, p. 204/62.

— allocated between the parties by way of specialization in research, development or production;

(b) the parties collaborate in any way in the assignment or the licensing of intellectual property rights or the communication of know-how, within the meaning of paragraph 2(d), to third parties.

Article 2

The exemption provided for in Article 1 shall apply on condition that:

(a) the joint research and development work is carried out within the framework of a programme defining the objectives of the work and the field in which it is to be carried out;

(b) all the parties have access to the results of the work;

(c) where the agreement provides only for joint research and development, each party is free to exploit the results of the joint research and development and any pre-existing technical knowledge necessary therefor independently;

(d) the joint exploitation relates only to results which are protected by intellectual property rights or constitute know-how which substantially contributes to technical or economic progress and that the results are decisive for the manufacture of the contract products or the application of the contract processes;

(e) undertakings charged with manufacture by way of specialization in production are required to fulfil orders for supplies from all the parties.

Article 3

1. Where the parties are not competing manufacturers of products capable of being improved or replaced by the contract products, the exemption provided for in Article 1 shall apply for the duration of the research and development programme and, where the results are jointly exploited, for five years from the time the contract products are first put on the market within the common market.

2. Where two or more of the parties are competing manufacturers within the meaning of paragraph 1, the exemption provided for in Article 1 shall apply for the period specified in paragraph 1 only if at the time the agreement is entered into, the parties' combined production of the products capable of being improved or replaced by the contract products does not exceed 20% of the market for such products in the common market or a substantial part thereof.

3. After the end of the period referred to in paragraph 1, the exemption provided for in Article 1 shall continue to apply as long as the production of the contract products together with the parties' combined production of other products which are considered by users to be equivalent in view of their characteristics, price and intended use does not exceed 20% of the total market for such products in the common market or a substantial part thereof. Where contract products are components used by the parties of the manufacture of other products, reference shall be made to the markets for such of those latter products for which the components represent a significant part.

3a. Where one of the parties, a joint undertaking, a third undertaking or more than one joint undertaking or third undertaking are entrusted with the distribution of the products which are the subject of the agreement under Article 4(1)(fa), (fb) or (fc), the exemption provided for in Article 1 shall apply only if the parties' production of the products referred to in paragraphs 2 and 3 does not exceed 10% of the market for all such products in the common market or a substantial part thereof.

4. The exemption provided for in Article 1 shall continue to apply where the market shares referred to in paragraphs 3 and 4 are exceeded during any period of two consecutive financial years by not more than one tenth.

5. Where the limits laid down in paragraph 5 are also exceeded, the exemption provided for in Article 1 shall continue to apply for a period of six months following the end of the financial year during which they were exceeded.

Article 4

1. The exemption provided for in Article 1 shall also apply to the following restrictions of competition imposed on the parties:

(a) an obligation not to carry out independently research and development in the field to which the programme relates or in a closely connected field during the execution of the programme;

(b) an obligation not to enter into agreements with third parties on research and development in the field to which the programme relates or in a closely connected field during the execution of the programme;

(c) an obligation to procure the contract products exclusively from parties, joint organizations or undertakings or third parties, jointly charged with their manufacture;

(d) an obligation not to manufacture the contract products or apply the contract processes in territories reserved for other parties;

(e) an obligation to restrict the manufacture of the contract products or application of the contract processes to one or more technical fields of application, except where two or more of the parties are competitors within the meaning of Article 3 at the time the agreement is entered into;

(f) an obligation not to pursue, for a period of five years from the time the contract products are first put on the market within the common market, an active policy of putting the products on the market in territories reserved for other parties, and in particular not to engage in advertising specifically aimed at such territories or to establish any branch or maintain any distribution depot there for the distribution of the products, provided that users and intermediaries can obtain the contract products from other suppliers and the parties do not render it difficult for intermediaries and users to thus obtain the products;

(fa) an obligation to grant one of the parties the exclusive right to distribute the contract products, provided that that party does not distribute products manufactured by a third producer which compete with the contract products;

(fb) an obligation to grant the exclusive right to distribute the contract products to a joint undertaking or to a third undertaking, provided that the joint undertaking or third undertaking does not manufacture or distribute products which compete with the contract products;

(fc) an obligation to grant the exclusive right to distribute the contract products in the whole or a defined area of the common market to joint undertakings or third undertakings which do not manufacture or distribute products which compete with the contract products, provided that users and intermediaries are also able to obtain the contract products from other suppliers and neither the parties nor the joint undertakings or third undertakings entrusted with the exclusive distribution of the contract products render it difficult for users and intermediaries to thus obtain the contract products;

(g) an obligation on the parties to communicate to each other any experience they may gain in exploiting the results and to grant each other non-exclusive licences for inventions relating to improvements or new applications.

2. The exemption provided for in Article 1 shall also apply where in a particular agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

Article 5

1. Article 1 shall apply notwithstanding that any of the following obligations, in particular, are imposed on the parties during the currency of the agreement:

(a) an obligation to communicate patented or non-patented technical knowledge necessary for the carrying out of the research and development programme for the exploitation of its results;

(b) an obligation not to use any know-how received from another party for purposes other than carrying out the research and development programme and the exploitation of its results;

(c) an obligation to obtain and maintain in force intellectual property rights for the contract products or processes;

(d) an obligation to preserve the confidentiality of any know-how received or jointly developed under the research and development programme; this obligation may be imposed even after the expiry of the agreement;

(e) an obligation:

(i) to inform other parties of infringements of their intellectual property rights,

(ii) to take legal action against infringers, and

(iii) to assist in any such legal action or share with the other parties in the cost thereof;

(f) an obligation to pay royalties or render services to other parties to compensate for unequal contributions to the joint research and development or unequal exploitation of its results;

(g) an obligation to share royalties received from third parties with other parties;

(h) an obligation to supply other parties with minimum quantities of contract products and to observe minimum standards of quality.

2. In the event that, because of particular circumstances, the obligations referred to in paragraph 1 fall within the scope of Article 85(1), they also shall be covered by the exemption. The exemption provided for in this paragraph shall also apply where in a particular agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

Article 6

The exemption provided for in Article 1 shall not apply where the parties, by agreement, decision or concerted practice:

(a) are restricted in their freedom to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the programme relates or, after its completion, in the field to which the programme relates or in a connected field;

(b) are prohibited after completion of the research and development programme from challenging the validity of intellectual property rights which the parties hold in the common market and which are relevant to the programme or, after the expiry of the agreement, from challenging the validity of intellectual property rights which the parties hold in the common market and which protect the results of the research and development;

(c) are restricted as to the quantity of the contract products they may manufacture or sell or as to the number of operations employing the contract process they may carry out;

(d) are restricted in their determination of prices, components of prices or discounts when selling the contract products to third parties;

(e) are restricted as to the customers they may serve, without prejudice to Article 4(1)(e);

(f) are prohibited from putting the contract products on the market or pursuing an active sales policy for them in territories within the common market that are reserved for other parties after the end of the period referred to in Article 4(1)(f);

(g) are required not to grant licences to third parties to manufacture the contract products or to apply the contract processes even though the exploitation by the parties themselves of the results of the joint research and development is not provided for or does not take place;

(h) are required:

— to refuse without any objectively justified reason to meet demand from users or dealers established in their respective territories who would market the contract products in other territories within the common market, or

— to make it difficult for users or dealers to obtain the contract products from other dealers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or dealers from obtaining, or from putting on the market within the common market, products which have been lawfully put on the market within the common market by another party or with its consent.

Article 7

1. The exemption provided for in this Regulation shall also apply to agreements of the kinds described in Article 1 which fulfil the conditions laid down in Articles 2 and 3 and which contain obligations restrictive of competition which are not covered by Articles 4 and 5 and do not fall within the scope of Article 6, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27[1] and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it, and

(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3(b) shall apply *mutatis mutandis.*

5. The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date of notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

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[1] OJ 35, 10.5.1962, p. 1118/62. Amended most recently by Regulation (EEC) No 2526/85 of 5 August 1985 (OJ L 240, 7.9.1985).

Article 8

1. Information acquired pursuant to Article 7 shall be used only for the purposes of this Regulation.

2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of a kind that is covered by the obligation of professional secrecy.

3. 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.

Article 9

1. The provisions of this Regulation shall also apply to rights and obligations which the parties create for undertakings connected with them. The market shares held and the actions and measures taken by connected undertakings shall be treated as those of the parties themselves.

2. Connected undertakings for the purposes of this Regulation are:

(a) undertakings in which a party to the agreement, directly or indirectly:

— owns more than half the capital or business assets,

— has the power to exercise more than half the voting rights,

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertakings, or

— has the right to manage the affairs;

(b) undertakings which directly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in or over which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have, directly or indirectly, the rights or powers set out in paragraph 2(a) shall be considered to be connected with each of the parties to the agreement.

Article 10

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, and in particular where:

(a) the existence of the agreement substantially restricts the scope for third parties to carry out research and development in the relevant field because of the limited research capacity available elsewhere;

(b) because of the particular structure of supply, the existence of the agreement substantially restricts the access of third parties to the market for the contract products;

(c) without any objectively valid reason, the parties do not exploit the results of the joint research and development;

(d) the contract products are not subject in the whole or a substantial part of the common market to effective competition from identical products or products considered by users as equivalent in view of their characteristics, price and intended use.

Article 11[1]

1. In the case of agreements notified to the Commission before 1 March 1985, the exemption provided for in Article 1 shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled or, where the agreement does not fall within Article 4(2)(3)(b) of Regulation No 17, not earlier than the date of notification.

2. In the case of agreements existing on 13 March 1962 and notified to the Commission before 1 February 1963, the exemption shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.

3. Where agreements which were in existence on 13 March 1962 and which were notified to the Commission before 1 February 1963, or which are covered by Article 4(2)(3)(b) of Regulation No 17 and were notified to the Commission before 1 January 1967, are amended before 1 September 1985 so as to fulfil the conditions for application of this Regulation, such amendment being communicated to the Commission before 1 October 1985, the prohibition laid down in Article 85(1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication of amendments shall take effect from the date of their receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

4. In the case of agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, paragraphs 1 to 3 shall apply except that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

5. In the case of agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, paragraphs 1 to 3 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

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[1] **Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic**
The following paragraph is added to Article 11:
'6. As regards agreements to which Article 83 of the Treaty applies as a result of the accession of the Kingdom of Spain and of the Portuguese Republic, paragraphs 1 to 3 shall apply except that the relevant dates should be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963, 1 January 1967, 1 March 1985 and 1 September 1985. The amendment made to the agreements in accordance with the provisions of paragraph 3 need not be notified to the Commission.'
(OJ L 302, 15.11.1985, p. 167).

Article 12

This Regulation shall apply *mutatis mutandis* to decisions of associations of undertakings.

Article 13

This Regulation shall enter into force on 1 March 1985.

It shall apply until 31 December 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

4. Franchising agreements

COMMISSION REGULATION (EEC) No 4087/88[1] OF 30 NOVEMBER 1988

on the application of Article 85(3) of the Treaty to categories of franchise agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices,[2] as last amended by the Act of Accession of Spain and Portugal, and in particular Article 1 thereof,

Having published a draft of this Regulation,[3]

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 85(3) of the Treaty by Regulation to certain categories of bilateral exclusive agreements falling within the scope of Article 85(1) which either have as their object the exclusive distribution or exclusive purchase of goods, or include restrictions imposed in relation to the assignment or use of industrial property rights.

(2) Franchise agreements consist essentially of licences of industrial or intellectual property rights relating to trade marks or signs and know-how, which can be combined with restrictions relating to supply or purchase of goods.

(3) Several types of franchise can be distinguished according to their object: industrial franchise concerns the manufacturing of goods, distribution franchise concerns the sale of goods, and service franchise concerns the supply of services.

(4) It is possible on the basis of the experience of the Commission to define categories of franchise agreements which fall under Article 85(1) but can normally be regarded as satisfying the conditions laid down in Article 85(3). This is the case for franchise agreements whereby one of the parties supplies goods or provides services to end users. On the other hand, industrial franchise agreements should not be covered by this Regulation. Such

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[1] OJ L 359, 28.12.1988, p. 46.
[2] OJ 36, 6.3.1965, p. 533/65.
[3] OJ C 229, 27.8.1987, p. 3.

agreements, which usually govern relationships between producers, present different characteristics to the other types of franchise. They consist of manufacturing licences based on patents and/or technical know-how, combined with trade mark licences. Some of them may benefit from other block exemptions if they fulfil the necessary conditions.

(5) This Regulation covers franchise agreements between two undertakings, the franchisor and the franchisee, for the retailing of goods or the provision of services to end users, or a combination of these activities, such as the processing or adaptation of goods to fit specific needs of their customers. It also covers cases where the relationship between franchisor and franchisees is made through a third undertaking, the master franchisee. It does not cover wholesale franchise agreements because of the lack of experience of the Commission in that field.

(6) Franchise agreements as defined in this Regulation can fall under Article 85(1). They may in particular affect intra-Community trade where they are concluded between undertakings from different Member States or where they form the basis of a network which extends beyond the boundaries of a single Member State.

(7) Franchise agreements as defined in this Regulation normally improve the distribution of goods and/or the provision of services as they give franchisors the possibility of establishing a uniform network with limited investments, which may assist the entry of new competitors on the market, particularly in the case of small and medium-sized undertakings, thus increasing interbrand competition. They also allow independent traders to set up outlets more rapidly and with higher chance of success than if they had to do so without the franchisor's experience and assistance. They have therefore the possibility of competing more efficiently with large distribution undertakings.

(8) As a rule, franchise agreements also allow consumers and other end users a fair share of the resulting benefit, as they combine the advantage of a uniform network with the existence of traders personally interested in the efficient operation of their business. The homogeneity of the network and the constant cooperation between the franchisor and the franchisees ensures a constant quality of the products and services. The favourable effect of franchising on interbrand competition and the fact that consumers are free to deal with any franchisee in the network guarantees that a reasonable part of the resulting benefits will be passed on to the consumers.

(9) This Regulation must define the obligations restrictive of competition which may be included in franchise agreements. This is the case in particular for the granting of an exclusive territory to the franchisees combined with the prohibition on actively seeking customers outside that territory, which allows them to concentrate their efforts on their allotted territory. The same applies to the granting of an exclusive territory to a master franchisee combined with the obligation not to conclude franchise agreements with third parties outside that territory. Where the franchisees sell or use in the process of providing services, goods manufactured by the franchisor or according to its instructions and or bearing its trade mark, an obligation on the franchisees not to sell, or use in the process of the provision of services, competing goods, makes it possible to establish a coherent network which is identified with the franchised goods. However, this obligation should only be accepted with respect to the goods which form the essential subject-matter of the franchise. It should notably not relate to accessories or spare parts for these goods.

(10) The obligations referred to above thus do not impose restrictions which are not necessary for the attainment of the abovementioned objectives. In particular, the limited territorial protection granted to the franchisees is indispensable to protect their investment.

(11) It is desirable to list in the Regulation a number of obligations that are commonly found in franchise agreements and are normally not restrictive of competition and to provide that if, because of the particular economic or legal circumstances, they fall under Article 85(1), they are also covered by the exemption. This list, which is not exhaustive, includes in particular clauses which are essential either to preserve the common identity and reputation of the network or to prevent the know-how made available and the assistance given by the franchisor from benefiting competitors.

(12) The Regulation must specify the conditions which must be satisfied for the exemption to apply. To guarantee that competition is not eliminated for a substantial part of the goods which are the subject of the franchise, it is necessary that parallel imports remain possible. Therefore, cross deliveries between franchisees should always be possible. Furthermore, where a franchise network is combined with another distribution system, franchisees should be free to obtain supplies from authorized distributors. To better inform consumers, thereby helping to ensure that they receive a fair share of the resulting benefits, it must be provided that the franchisee shall be obliged to indicate its status as an independent undertaking, by any appropriate means which does not jeopardize the common identity of the franchised network. Furthermore, where the franchisees have to honour guarantees for the franchisor's goods, this obligation should also apply to goods supplied by the franchisor, other franchisees or other agreed dealers.

(13) The Regulation must also specify restrictions which may not be included in franchise agreements if these are to benefit from the exemption granted by the Regulation, by virtue of the fact that such provisions are restrictions falling under Article 85(1) for which there is no general presumption that they will lead to the positive effects required by Article 85(3). This applies in particular to market sharing between competing manufacturers, to clauses unduly limiting the franchisee's choice of supplies or customers, and to cases where the franchisee is restricted in determining its prices. However, the franchisor should be free to recommend prices to the franchisees, where it is not prohibited by national laws and to the extent that it does not lead to concerted practices for the effective application of these prices.

(14) Agreements which are not automatically covered by the exemption because they contain provisions that are not expressly exempted by the Regulation and not expressly excluded from exemption may none the less generally be presumed to be eligible for application of Article 85(3). It will be possible for the Commission rapidly to establish whether this is the case for a particular agreement. Such agreements should therefore be deemed to be covered by the exemption provided for in this Regulation where they are notified to the Commission and the Commission does not oppose the application of the exemption within a specified period of time.

(15) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85(3), in particular as interpreted by the administrative practice of the Commission and the case-law of the Court of Justice, the Commission may withdraw the benefit of the block exemption. This applies in particular where competition is significantly restricted because of the structure of the relevant market.

(16) Agreements which are automatically exempted pursuant to this Regulation need not be notified. Undertakings may nevertheless in a particular case request a decision pursuant to Council Regulation No 17[1] as last amended by the Act of Accession of Spain and Portugal.

(17) Agreements may benefit from the provisions either of this Regulation or of another Regulation, according to their particular nature and provided that they fulfil the necessary conditions of application. They may not benefit from a combination of the provisions of this Regulation with those of another block exemption Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

1. Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is thereby declared that Article 85(1) of the Treaty shall not apply to franchise agreements to which two undertakings are party, which include one or more of the restrictions listed in Article 2.

2. The exemption provided for in paragraph 1 shall also apply to master franchise agreements to which two undertakings are party. Where applicable, the provisions of this Regulation concerning the relationship between franchisor and franchisee shall apply mutatis mutandis to the relationship between franchisor and master franchisee and between master franchisee and franchisee.

3. For the purposes of this Regulation:

(a) 'franchise' means a package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end users;

(b) 'franchise agreement' means an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services; it includes at least obligations relating to:

— the use of a common name or shop sign and a uniform presentation of contract premises and/or means of transport,

— the communication by the franchisor to the franchisee of know-how,

— the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement;

(c) 'master franchise agreement' means an agreement whereby one undertaking, the franchisor, grants the other, the master franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of concluding franchise agreements with third parties, the franchisees;

(d) 'franchisor's goods' means goods produced by the franchisor or according to its instructions, and/or bearing the franchisor's name or trade mark;

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[1] OJ 13, 21.2.1962, p. 204/62.

(e) 'contract premises' means the premises used for the exploitation of the franchise or, when the franchise is exploited outside those premises, the base from which the franchisee operates the means of transport used for the exploitation of the franchise (contract means of transport);

(f) 'know-how' means a package of non-patented practical information, resulting from experience and testing by the franchisor, which is secret, substantial and identified;

(g) 'secret' means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; it is not limited in the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the franchisor's business;

(h) 'substantial' means that the know-how includes information which is of importance for the sale of goods or the provision of services to end users, and in particular for the presentation of goods for sale, the processing of goods in connection with the provision of services, methods of dealing with customers, and administration and financial management; the know-how must be useful for the franchisee by being capable, at the date of conclusion of the agreement, of improving the competitive position of the franchisee, in particular by improving the franchisee's performance or helping it to enter a new market;

(i) 'identified' means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality; the description of the know-how can either be set out in the franchise agreement or in a separate document or recorded in any other appropriate form.

Article 2

The exemption provided for in Article 1 shall apply to the following restrictions of competition:

(a) an obligation on the franchisor, in a defined area of the common market, the contract territory, not to:

— grant the right to exploit all or part of the franchise to third parties,

— itself exploit the franchise, or itself market the goods or services which are the subject-matter of the franchise under a similar formula,

— itself supply the franchisor's goods to third parties;

(b) an obligation on the master franchisee not to conclude franchise agreements with third parties outside its contract territory;

(c) an obligation on the franchisee to exploit the franchise only from the contract premises;

(d) an obligation on the franchisee to refrain, outside the contract territory, from seeking customers for the goods or the services which are the subject-matter of the franchise;

(e) an obligation on the franchisee not to manufacture, sell or use in the course of the provision of services, goods competing with the franchisor's goods which are the subject-matter of the franchise; where the subject-matter of the franchise is the sale or use in the course of the provision of services both certain types of goods and spare parts or accessories therefore, that obligation may not be imposed in respect of these spare parts or accessories.

Article 3

1. Article 1 shall apply notwithstanding the presence of any of the following obligations on the franchisee, in so far as they are necessary to protect the franchisor's industrial or intellectual property rights or to maintain the common identity and reputation of the franchised network:

(a) to sell, or use in the course of the provision of services, exclusively goods matching minimum objective quality specifications laid down by the franchisor;

(b) to sell, or use in the course of the provision of services, goods which are manufactured only by the franchisor or by third parties designed by it, where it is impracticable, owing to the nature of the goods which are the subject-matter of the franchise, to apply objective quality specifications;

(c) not to engage, directly or indirectly, in any similar business in a territory where it would compete with a member of the franchised network, including the franchisor; the franchisee may be held to this obligation after termination of the agreement, for a reasonable period which may not exceed one year, in the territory where it has exploited the franchise;

(d) not to acquire financial interests in the capital of a competing undertaking, which would give the franchisee the power to influence the economic conduct of such undertaking;

(e) to sell the goods which are the subject-matter of the franchise only to end users, to other franchisees and to resellers within other channels of distribution supplied by the manufacturer of these goods or with its consent;

(f) to use its best endeavours to sell the goods or provide the services that are the subject-matter of the franchise; to offer for sale a minimum range of goods, achieve a minimum turnover, plan its orders in advance, keep minimum stocks and provide customer and warranty services;

(g) to pay to the franchisor a specified proportion of its revenue for advertising and itself carry out advertising for the nature of which it shall obtain the franchisor's approval.

2. Article 1 shall apply notwithstanding the presence of any of the following obligations on the franchisee:

(a) not to disclose to third parties the know-how provided by the franchisor; the franchisee may be held to this obligation after termination of the agreement;

(b) to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;

(c) to inform the franchisor of infringements of licensed industrial or intellectual property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

(d) not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise; the franchisee may be held to this obligation after termination of the agreement;

(e) to attend or have its staff attend training courses arranged by the franchisor;

(f) to apply the commercial methods devised by the franchisor, including any subsequent modification thereof, and use the licensed industrial or intellectual property rights;

(g) to comply with the franchisor's standards for the equipment and presentation of the contract premises and/or means of transport;

(h) to allow the franchisor to carry out checks of the contract premises and/or means of transport, including the goods sold and the services provided, and the inventory and accounts of the franchisee;

(i) not without the franchisor's consent to change the location of the contract premises;

(j) not without the franchisor's consent to assign the rights and obligations under the franchise agreement.

3. In the event that, because of particular circumstances, obligations referred to in paragraph 2 fall within the scope of Article 85(1), they shall also be exempted even if they are not accompanied by any of the obligations exempted by Article 1.

Article 4

The exemption provided for in Article 1 shall apply on condition that:

(a) the franchisee is free to obtain the goods that are the subject-matter of the franchise from other franchisees: where such goods are also distributed through another network of authorized distributors, the franchisee must be free to obtain the goods from the latter;

(b) where the franchisor obliges the franchisee to honour guarantees for the franchisor's goods, that obligation shall apply in respect of such goods supplied by any member of the franchised network or other distributors which give a similar guarantee, in the common market;

(c) the franchisee is obliged to indicate its status as an independent undertaking; this indication shall however not interfere with the common identity of the franchised network resulting in particular from the common name or shop sign and uniform appearance of the contract premises and/or means of transport.

Article 5

The exemption granted by Article 1 shall not apply where:

(a) undertakings producing goods or providing services which are identical or are considered by users as equivalent in view of their characteristics, price and intended use, enter into franchise agreements in respect of such goods or services;

(b) without prejudice to Article 2(e) and Article 3(1)(b), the franchisee is prevented from obtaining supplies of goods of a quality equivalent to those offered by the franchisor;

(c) without prejudice to Article 2(e), the franchisee is obliged to sell, or use in the process of providing services, goods manufactured by the franchisor or third parties designated by the franchisor and the franchisor refuses, for reasons other than protecting the franchisor's industrial or intellectual property rights, or maintaining the common identity and reputation

of the franchised network, to designate as authorized manufacturers third parties proposed by the franchisee;

(d) the franchisee is prevented from continuing to use the licensed know-how after termination of the agreement where the know-how has become generally known or easily accessible, other than by breach of an obligation by the franchisee;

(e) the franchisee is restricted by the franchisor, directly or indirectly, in the determination of sale prices for the goods or services which are the subject-matter of the franchise, without prejudice to the possibility for the franchisor of recommending sale prices;

(f) the franchisor prohibits the franchisee from challenging the validity of the industrial or intellectual property rights which form part of the franchise, without prejudice to the possibility for the franchisor of terminating the agreement in such a case;

(g) franchisees are obliged not to supply within the common market the goods or services which are the subject-matter of the franchise to end users because of their place of residence.

Article 6

1. The exemption provided for in Article 1 shall also apply to franchise agreements which fulfil the conditions laid down in Article 4 and include obligations restrictive of competition which are not covered by Articles 2 and 3(3) and do not not fall within the scope of Article 5, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27[1] and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date on the postmark of the place of posting.

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it; and

(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 can be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3(b) shall apply *mutatis mutandis*.

5. The Commission may oppose exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

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[1] OJ 35, 10.5.1962, p. 1118/62.

6. The Commission may withdraw its opposition to the exemption at any time. However, where that opposition was raised at the request of a Member State, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date of the notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85(3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and its opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

Article 7

1. Information acquired pursuant to Article 6 shall be used only for the purposes of this Regulation.

2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of a kind that is covered by the obligation of professional secrecy.

3. 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.

Article 8

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3) of the EEC Treaty, and in particular where territorial protection is awarded to the franchisee and:

(a) access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar agreements established by competing manufacturers or distributors;

(b) the goods or services which are the subject-matter of the franchise do not face, in a substantial part of the common market, effective competition from goods or services which are identical or considered by users as equivalent in view of their characteristics, price and intended use;

(c) the parties, or one of them, prevent end users, because of their place of residence, from obtaining, directly or through intermediaries, the goods or services which are the subject-matter of the franchise within the common market, or use differences in specifications concerning those goods or services in different Member States, to isolate markets;

(d) franchisees engage in concerted practices relating to the sale prices of the goods or services which are the subject-matter of the franchise;

(e) the franchisor uses its right to check the contract premises and means of transport, or refuses its agreement to requests by the franchisee to move the contract premises or assign its rights and obligations under the franchise agreement, for reasons other than protecting the franchisor's industrial or intellectual property rights, maintaining the common identity and reputation of the franchised network or verifying that the franchisee abides by its obligations under the agreement.

Article 9

This Regulation shall enter into force on 1 February 1989.

It shall remain in force until 31 December 1999.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

5. *Insurance sector*

COUNCIL REGULATION (EEC) No 1534/91[1] OF 31 MAY 1991

on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof,

Having regard to the proposal from the Commission,[2]

Having regard to the opinion of the European Parliament,[3]

Having regard to the opinion of the Economic and Social Committee,[4]

Whereas Article 85(1) of the Treaty may, in accordance with Article 85(3), be declared inapplicable to categories of agreements, decisions and concerted practices which satisfy the requirements of Article 85(3);

Whereas the detailed rules for the application of Article 85(3) of the Treaty must be adopted by way of a Regulation based on Article 87 of the Treaty;

Whereas cooperation between undertakings in the insurance sector is, to a certain extent, desirable to ensure the proper functioning of this sector and may at the same time promote consumers' interests;

Whereas the application of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[5] enables the Commission to exercise close supervision on issues arising from concentrations in all sectors, including the insurance sector;

Whereas exemptions granted under Article 85(3) of the Treaty cannot themselves affect Community and national provisions safeguarding consumers' interests in this sector;

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[1] OJ L 143, 7.6.1991, p. 1.
[2] OJ C 16, 23.1.1990, p. 13.
[3] OJ C 260, 15.10.1990, p. 57.
[4] OJ C 182, 23.7.1990, p. 27.
[5] OJ L 395, 30.12.1989, p. 1.

Whereas agreements, decisions and concerted practices serving such aims may, in so far as they fall within the prohibition contained in Article 85(1) of the Treaty, be exempted therefrom under certain conditions; whereas this applies in particular to agreements, decisions and concerted practices relating to the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims, the establishment of standard policy conditions, common coverage of certain types of risks, the settlement of claims, the testing and acceptance of security devices, and registers of, and information on, aggravated risks;

Whereas in view of the large number of notifications submitted pursuant to Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty[1] as last amended by the Act of Accession of Spain and Portugal, it is desirable that in order to facilitate the Commission's task, it should be enabled to declare, by way of Regulation, that the provisions of Article 85(1) of the Treaty are inapplicable to certain categories of agreements, decisions and concerted practices;

Whereas it should be laid down under which conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers;

Whereas, in the exercise of such powers, the Commission will take account not only of the risk of competition being eliminated in a substantial part of the relevant market and of any benefit that might be conferred on policyholders resulting from the agreements, but also of the risk which the proliferation of restrictive clauses and the operation of accommodation companies would entail for policyholders;

Whereas the keeping of registers and the handling of information on aggravated risks should be carried out subject to the proper protection of confidentiality;

Whereas, under Article 6 of Regulation No 17, the Commission may provide that a decision taken in accordance with Article 85(3) of the Treaty shall apply with retroactive effect; whereas the Commission should also be able to adopt provisions to such effect in a Regulation;

Whereas, under Article 7 of Regulation No 17, agreements, decisions and concerted practices may, by decision of the Commission, be exempted from prohibition, in particular if they are modified in such manner that they satisfy the requirements of Article 85(3) of the Treaty; whereas it is desirable that the Commission be enabled to grant by Regulation like exemption to such agreements, decisions and concerted practices if they are modified in such manner as to fall within a category defined in an exempting Regulation;

Whereas it cannot be ruled out that, in specific cases, the conditions set out in Article 85(3) of the Treaty may not be fulfilled; whereas the Commission must have the power to regulate such cases pursuant to Regulation No 17 by way of a Decision having effect for the future,

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[1] OJ 13, 21.2.1962, p. 204/62.

HAS ADOPTED THIS REGULATION:

Article 1

1. Without prejudice to the application of Regulation No 17, the Commission may, by means of a Regulation and in accordance with Article 85(3) of the Treaty, declare that Article 85(1) shall not apply to categories of agreements between undertakings, decisions of associations of undertakings and concerted practices in the insurance sector which have as their object cooperation with respect to:

(a) the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims;

(b) the establishment of common standard policy conditions;

(c) the common coverage of certain types of risks;

(d) the settlement of claims;

(e) the testing and acceptance of security devices;

(f) registers of, and information on, aggravated risks, provided that the keeping of these registers and the handling of this information is carried out subject to the proper protection of confidentiality.

2. The Commission Regulation referred to in paragraph 1, shall define the categories of agreements, decisions and concerted practices to which it applies and shall specify in particular:

(a) the restrictions or clauses which may, or may not, apear in the agreements, decisions and concerted practices;

(b) the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

Article 2

Any Regulation adopted pursuant to Article 1 shall be of limited duration.

It may be repealed or amended where circumstances have changed with respect to any of the facts which were essential to its being adopted; in such case, a period shall be fixed for modification of the agreements, decisions and concerted practices to which the earlier Regulation applies.

Article 3

A Regulation adopted pursuant to Article 1 may provide that it shall apply with retroactive effect to agreements, decisions and concerted practices to which, at the date of entry into force of the said Regulation, a Decision taken with retroactive effect pursuant to Article 6 of Regulation No 17 would have applied.

Article 4

1. A Regulation adopted pursuant to Article 1 may provide that the prohibition contained in Article 85(1) of the Treaty shall not apply, for such period as shall be fixed in that Regulation, to agreements, decisions and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85(3) where:

— within six months from the entry into force of the said Regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the said Regulation and

— the modifications are brought to the notice of the Commission within the time limit fixed by the said Regulation.

The provisions of the first subparagraph shall apply in the same way to those agreements, decisions and concerted practices existing at the date of accession of new Member States to which Article 85(1) of the Treaty applies by virtue of accession and which do not satisfy the conditions of Article 85(3).

2. Paragraph 1 shall apply to agreements, decisions and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.

Paragraph 1 shall not apply to agreements, decisions and concerted practices existing at the date of accession of new Member States to which Article 85(1) of the Treaty applies by virtue of accession and which had to be notified within six months from the date of accession in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified within the said period.

3. The benefit of provisions adopted pursuant to paragraph 1 may not be invoked in actions pending at the date of entry into force of a Regulation adopted pursuant to Article 1; neither may it be invoked as grounds for claims for damages against third parties.

Article 5

Where the Commission proposes to adopt a Regulation, it shall publish a draft thereof to enable all persons and organizations concerned to submit to it their comments within such time limit, being not less than one month, as it shall fix.

Article 6

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

(a) before publishing a draft Regulation;

(b) before adopting a Regulation.

2. Article 10(5) and (6) of Regulation No 17, relating to consultation of the Advisory Committee, shall apply. However, joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

Article 7

Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that, in any particular case, agreements, decisions and concerted practices, to which a Regulation adopted pursuant to Article 1 applies, have nevertheless certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, it may withdraw the benefit of application of the said regulation and take a decision in accordance with Articles 6 and 8 of Regulation No 17, without any notification under Article 4(1) of Regulation No 17 being required.

Article 8

Not later than six years after the entry into force of the Commission Regulation provided for in Article 1, the Commission shall submit to the European Parliament and the Council a report on the functioning of this Regulation, accompanied by such proposals for amendments to this Regulation as may appear necessary in the light of experience.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EEC) No 3932/92[1] OF 21 DECEMBER 1992

on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector,[2]

Having published a draft of this Regulation,[3]

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 1534/91 empowers the Commission to apply Article 85(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices in the insurance sector which have as their object:

   (a) cooperation with respect to the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims;

   (b) the establishment of common standard policy conditions;

   (c) the common coverage of certain types of risks;

   (d) the settlement of claims;

   (e) the testing and acceptance of security devices;

   (f) registers of, and information on, aggraved risks.

(2) The Commission by now has acquired sufficient experience in handling individual cases to make use of such power in respect of the categories of agreements specified in points (a), (b), (c) and (e) of the list.

(3) In many cases, collaboration between insurance companies in the aforementioned fields goes beyond what the Commission has permitted in its notice concerning cooperation between enterprises,[4] and is caught by the prohibition in Article 85(1). It is therefore appropriate to specify the obligations restrictive of competition which may be included in the four categories of agreements covered by it.

(4) It is further necessary to specify for each of the four categories the conditions which must be satisfied before the exemption can apply. These conditions have to ensure that the collaboration between insurance undertakings is and remains compatible with Article 85(3).

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[1] OJ L 398, 31.12.1992, p. 7.
[2] OJ L 143, 7.6.1991, p. 1.
[3] OJ C 207, 14.8.1992, p. 2.
[4] OJ C 75, 29.7.1968, p. 3; corrigendum OJ C 84, 28.8.1968, p. 14.

(5) It is finally necessary to specify for each of these categories the situations in which the exemption does not apply. For this purpose it has to define the clauses which may not be included in the agreements covered by it because they impose undue restrictions on the parties, as well as other situations falling under Article 85(1) for which there is no general presumption that they will yield the benefits required by Article 85(3).

(6) Collaboration between insurance undertakings or within associations of undertakings in the compilation of statistics on the number of claims, the number of individual risks insured, total amounts paid in respect of claims and the amount of capital insured makes it possible to improve the knowledge of risks and facilitates the rating of risks for individual companies. The same applies to their use to establish indicative pure premiums or, in the case of insurance involving capitalization, frequency tables. Joint studies on the probable impact of extraneous circumstances that may influence the frequency or scale of claims, or the yield of different types of investments, should also be included. It is, however, necessary to ensure that the restrictions are only exempted to the extent to which they are necessary to attain these objectives. It is therefore appropriate to stipulate that concerted practices on commercial premiums — that is to say, the premiums actually charged to policyholders, comprising a loading to cover administrative, commercial and other costs, plus a loading for contingencies or profit margins — are not exempted, and that even pure premiums can serve only for reference purposes.

(7) Standard policy conditions or standard individual clauses for direct insurance and standard models illustrating the profits of a life insurance policy have the advantage of improving the comparability of cover for the consumer and of allowing risks to be classified more uniformly. However, they must not lead either to the standardization of products or to the creation of too captive a customer base. Accordingly, the exemptions should apply on condition that they are not binding, but serve only as models.

(8) Standard policy conditions may in particular not contain any systematic exclusion of specific types of risk without providing for the express possibility of including that cover by agreement and may not provide for the contractual relationship with the policyholder to be maintained for an excessive period or go beyond the initial object to the policy. This is without prejudice to obligations arising from Community or national law.

(9) In addition, it is necessary to stipulate that the common standard policy conditions must be generally accessible to any interested person, and in particular to the policyholder, so as to ensure that there is real transparency and therefore benefit for consumers.

(10) The establishment of co-insurance or co-reinsurance groups designed to cover an unspecified number of risks must be viewed favourably in so far as it allows a greater number of undertakings to enter the market and, as a result, increases the capacity for covering, in particular, risks that are difficult to cover because of their scale, rarity or novelty.

(11) However, so as to ensure effective competition it is appropriate to exempt such groups subject to the condition that the participants shall not hold a share of the relevant market in excess of a given percentage. The percentage of 15% appears appropriate in

the case of co-reinsurance groups. The percentage should be reduced to 10% in the case of co-insurance groups. This is because the mechanism of co-insurance requires uniform policy conditions and commercial premiums, with the result that residual competition between members of a co-insurance group is particularly reduced. As regards catastrophe risks or aggravated risks, those figures shall be calculated only with reference to the market share of the group itself.

(12) In the case of co-reinsurance groups, it is necessary to cover the determination of the risk premium including the probable cost of covering the risk. It is further necessary to cover the determination of the operating cost of the co-reinsurance and the remuneration of the participants in their capacity as co-reinsurers.

(13) It should be legitimate in both cases to declare group cover for the risks brought into the group to be subject to (a) the application of common or accepted conditions of cover, (b) the requirement that agreement be obtained prior to the settlement of all (or all large) claims, (c) to joint negotiation of retrocession, and (d) to a ban on retroceding individual shares. The requirement that all risks be brought into the group should however be excluded because that would be an excessive restriction of competition.

(14) The establishment of groups constituted only by reinsurance companies need not be covered by this Regulation due to lack of sufficient experience in this field.

(15) The new approach in the realm of technical harmonization and standardization, as defined in the Council resolution of 7 May 1985,[1] and also the global approach to certification and testing, which was presented by the Commission in its communication to the Council of 15 June 1989[2] and which was approved by the Council in its resolution of 21 December 1989,[3] are essential to the functioning of the internal market because they promote competition, being based on standard quality criteria throughout the Community.

(16) It is in the hope of promoting those standard quality criteria that the Commission permits insurance undertakings to collaborate in order to establish technical specifications and rules concerning the evaluation and certification of the compliance of security devices which as far as possible should be uniform at a European level, thereby ensuring their use in practice.

(17) Cooperation in the evaluation of security devices and of the undertakings installing and maintaining them is useful in so far as it removes the need for repeated individual evaluation. Accordingly, the Regulation should define the conditions under which the formulation of technical specifications and procedures for certifying such security devices and the undertakings installing or maintaining them are authorized. The purpose of such conditions is to ensure that all manufacturers and installation and maintenance undertakings may apply for evaluation, and that the evaluation and certification are guided by objective and well-defined criteria.

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[1] OJ C 136, 4.6.1985, p. 1.
[2] OJ C 267, 19.10.1989, p. 3.
[3] OJ C 10, 16.1.1990, p. 1.

(18) Lastly, such agreements must not result in an exhaustive list; each undertaking must remain free to accept devices and installation and maintenance undertakings not approved jointly.

(19) If individual agreements exempted by this Regulation neverthelesss have effects which are incompatible with Article 85(3), as interpreted by the administrative practice of the Commission and the case-law of the Court of Justice, the Commission must have the power to withdraw the benefit of the block exemption. This applies for example where studies on the impact of future developments are based on unjustifiable hypotheses; or where recommended standard policy conditions contain clauses which create, to the detriment of the policyholder, a significant imbalance between the rights and obligations arising from the contract; or where groups are used or managed in such a way as to give one or more participating undertakings the means of acquiring or reinforcing a preponderant influence on the relevant market, or if these groups result in market sharing, or if policyholders encounter unusual difficulties in finding cover for aggravated risks outside a group. This last consideration would normally not apply where a group covers less than 25% of those risks.

(20) Agreements which are exempted pursuant to this Regulation need not be notified. Undertakings may nevertheless in cases of doubt notify their agreements pursuant to Council Regulation No 17,[1] as last amended by the Act of Accession of Spain and Portugal,

HAS ADOPTED THIS REGULATION:

TITLE I

General provisions

Article 1

Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements, decisions by associations of undertakings and concerted practices in the insurance sector which seek cooperation with respect to:

(a) the establishment of common risk-premium tariffs based on collectively ascertained statistics or on the number of claims;

(b) the establishment of standard policy conditions;

(c) the common coverage of certain types of risks;

(d) the establishment of common rules on the testing and acceptance of security devices.

[1] OJ 13, 21.2.1962, p. 204/62.

TITLE II

Calculation of the premium

Article 2

The exemption provided for in Article 1(a) hereof shall apply to agreements, decisions and concerted practices which relate to:

(a) the calculation of the average cost of risk cover (pure premiums) or the establishment and distribution of mortality tables, and tables showing the frequency of illness, accident and invalidity, in connection with insurance involving an element of capitalization — such tables being based on the assembly of data, spread over a number of risk-years chosen as an observation period, which relate to identical or comparable risks in sufficient number to constitute a base which can be handled statistically and which will yield figures on (*inter alia*):

— the number of claims during the said period,

— the number of individual risks insured in each risk-year of the chosen observation period,

— the total amounts paid or payable in respect of claims arisen during the said period,

— the total amount of capital insured for each risk-year during the chosen observation period,

(b) the carrying-out of studies on the probable impact of general circumstances external to the interested undertakings on the frequency or scale of claims, or the profitability of different types of investment, and the distribution of their results.

Article 3

The exemption shall apply on condition that:

(a) the calculations, tables or study results referred to in Article 2, when compiled and distributed, include a statement that they are purely illustrative;

(b) the calculations or tables referred to in Article 2(a) do not include in any way loadings for contingencies, income deriving from reserves, administrative or commercial costs comprising commissions payable to intermediaries, fiscal or parafiscal contributions or the anticipated profits of the participating undertakings;

(c) the calculations, tables or study results referred to in Article 2 do not identify the insurance undertakings concerned.

Article 4

The exemption shall not benefit undertakings or associations of undertakings which enter into an undertaking or commitment among themselves, or which oblige other undertakings, not to use calculations or tables that differ from those established pursuant to Article 2(a), or not to depart from the results of the studies referred to in Article 2(b).

TITLE III

Standard policy conditions for direct insurance

Article 5

1. The exemption provided for in Article 1(b) shall apply to agreements, decisions and concerted practices which have as their object the establishment and distribution of standard policy conditions for direct insurance.

2. The exemption shall also apply to agreements, decisions and concerted practices which have as their object the establishment and distribution of common models illustrating the profits to be realized from an insurance policy involving an element of capitalization.

Article 6

1. The exemption shall apply on condition that the standard policy conditions referred to in Article 5(1):

(a) are established and distributed with an explicit statement that they are purely illustrative; and

(b) expressly mention the possibility that different conditions may be agreed; and

(c) are accessible to any interested person and provided simply upon request.

2. The exemption shall apply on condition that the illustrative models referred to in Article 5(2) are established and distributed only by way of guidance.

Article 7

1. The exemption shall not apply where the standard policy conditions referred to in Article 5(1) contain clauses which:

(a) exclude from the cover losses normally relating to the class of insurance concerned, without indicating explicitly that each insurer remains free to extend the cover to such events;

(b) make the cover of certain risks subject to specific conditions, without indicating explicitly that each insurer remains free to waive them;

(c) impose comprehensive cover including risks to which a significant number of policyholders is not simultaneously exposed, without indicating explicitly that each insurer remains free to propose separate cover;

(d) indicate the amount of the cover or the part which the policyholder must pay himself (the 'excess');

(e) allow the insurer to maintain the policy in the event that he cancels part of the cover, increases the premium without the risk or the scope of the cover being changed (without prejudice to indexation clauses), or otherwise alters the policy conditions without the express consent of the policyholder;

(f) allow the insurer to modify the term of the policy without the express consent of the policyholder;

(g) impose on the policyholder in the non-life insurance sector a contract period of more than three years;

(h) impose a renewal period of more than one year where the policy is automatically renewed unless notice is given upon the expiry of a given period;

(i) require the policyholder to agree to the reinstatement of a policy which has been suspended on account of the disappearance of the insured risk, if he is once again exposed to a risk of the same nature;

(j) require the policyholder to obtain cover from the same insurer for different risks;

(k) require the policyholder, in the event of disposal of the object of insurance, to make the acquirer take over the insurance policy.

2. The exemption shall not benefit undertakings or associations of undertakings which concert or undertake among themselves, or oblige other undertakings not to apply conditions other than those referred to in Article 5(1).

Article 8

Without prejudice to the establishment of specific insurance conditions for particular social or occupational categories of the population, the exemption shall not apply to agreements decisions and concerted practices which exclude the coverage of certain risk categories because of the characteristics associated with the policyholder.

Article 9

1. The exemption shall not apply where, without prejudice to legally imposed obligations, the illustrative models referred to in Article 5(2) include only specified interest rates or contain figures indicating administrative costs.

2. The exemption shall not benefit undertakings or associations of undertakings which concert or undertake among themselves, or oblige other undertakings not to apply models illustrating the benefits of an insurance policy other than those referred to in Article 5(2).

TITLE IV

Common coverage of certain types of risks

Article 10

1. The exemption under Article 1(c) hereof shall apply to agreements which have as their object the setting-up and operation of groups of insurance undertakings or of insurance undertakings and reinsurance undertakings for the common coverage of a specific category of risks in the form of co-insurance or co-reinsurance.

2. For the purposes of this Regulation:

(a) 'co-insurance groups' means groups set up by insurance undertakings which:

— agree to underwrite in the name and for the account of all the participants the insurance of a specified risk category, or

— entrust the underwriting and management of the insurance of a specified risk category in their name and on their behalf to one of the insurance undertakings, to a common broker or to a common body set up for this purpose;

(b) 'co-reinsurance groups' means groups set up by insurance undertakings, possibly with the assistance of one or more re-insurance undertakings:

— in order to reinsure mutually all or part of their liabilities in respect of a specified risk category,

— incidentally, to accept in the name and on behalf of all the participants the re-insurance of the same category of risks.

3. The agreements referred to in paragraph 1 may determine:

(a) the nature and characteristics of the risks covered by the co-insurance or co-reinsurance;

(b) the conditions governing admission to the group;

(c) the individual own-account shares of the participants in the risks co-insured or co-reinsured;

(d) the conditions for individual withdrawal of the participants;

(e) the rules governing the operation and management of the group.

4. The agreements alluded to in paragraph 2(b) may further determine:

(a) the shares in the risks covered which the participants do not pass on for co-reinsurance (individual retentions);

(b) the cost of co-reinsurance, which includes both the operating costs of the group and the remuneration of the participants in their capacity as co-reinsurers.

Article 11

1. The exemption shall apply on condition that:

(a) the insurance products underwritten by the participating undertakings or on their behalf do not, in any of the markets concerned, represent:

— in the case of co-insurance groups, more than 10% of all the insurance products that are identical or regarded as similar from the point of view of the risks covered and of the cover provided,

— in the case of co-reinsurance groups, more than 15% of all the insurance products that are identical or regarded as similar from the point of view of the risks covered and of the cover provided;

(b) each participating undertaking has the right to withdraw from the group, subject to a period of notice of not more than six months, without incurring any sanctions.

2. By way of derogation from paragraph 1, the respective percentages of 10 and 15% apply only to the insurance products brought into the group, to the exclusion of identical or similar products underwritten by the participating companies or on their behalf and which are not brought into the group, where this group covers:

— catastrophe risks where the claims are both rare and large,

— aggravated risks which involve a higher probability of claims because of the characteristics of the risk insured.

This derogation is subject to the following conditions:

— that none of the concerned undertakings shall participate in another group that covers risks on the same market, and

— with respect to groups which cover aggravated risks, that the insurance products brought into the group shall not represent more than 15% of all identical or similar products underwritten by the participating companies or on their behalf on the market concerned.

Article 12

Apart from the obligations referred to in Article 10, no restriction on competition shall be imposed on the undertakings participating in a co-insurance group other than:

(a) the obligation, in order to qualify for the co-insurance cover within the group, to:
   — take preventive measures into account,
   — use the general or specific insurance conditions accepted by the group,
   — use the commercial premiums set by the group;

(b) the obligation to submit to the group or approval any settlement of a claim relating to a co-insured risk;

(c) the obligation to entrust to the group the negotiation of reinsurance agreements on behalf of all concerned;

(d) a ban on reinsuring the individual share of the co-insured risk.

Article 13

Apart from the obligations referred to in Article 10, no restriction on competition shall be imposed on the undertakings participating in co-reinsurance group other than:

(a) the obligation, in order to qualify for the co-reinsurance cover, to:
   — take preventive measures into account,
   — use the general or specific insurance conditions accepted by the group,
   — use a common risk-premium tariff for direct insurance calculated by the group, regard being had to the probable cost of risk cover or, where there is not sufficient experience to establish such a tariff, a risk premium accepted by the group,
   — participate in the cost of the co-reinsurance;

(b) the obligation to submit to the group for approval the settlement of claims relating to the co-reinsured risks and exceeding a specified amount, or to pass such claims on to it for settlement;

(c) the obligation to entrust to the group the negotiation of retrocession agreements on behalf of all concerned;

(d) a ban on reinsuring the individual retention or retroceding the individual share.

TITLE V

Security devices

Article 14

The exemption provided for in Article 1(d) shall apply to agreements, decisions and concerted practices which have as their object the establishment, recognition and distribution of:

— technical specifications, in particular technical specifications intended as future European norms, and also procedures for assessing and certifying the compliance with such specifications of security devices and their installation and maintenance,

— rules for the evaluation and approval of installation undertakings or maintenance undertakings.

Article 15

The examption shall apply on condition that:

(a) the technical specifications and compliancy assessment procedures are precise, technically justified and in proportion to the performance to be attained by the security device concerned;

(b) the rules for the evaluation of installation undertakings and maintenance undertakings are objective, relate to their technical competence and are applied in a non-discriminatory manner;

(c) such specifications and rules are established and distributed with the statement that insurance undertakings are free to accept other security devices or approve other installation and maintenance undertakings which do not comply with these technical specifications or rules;

(d) such specifications and rules are provided simply upon request to any interested person;

(e) such specifications include a classification based on the level of performance obtained;

(f) a request for an assessment may be submitted at any time by any applicant;

(g) the evaluation of conformity does not impose on the applicant any expenses that are disproportionate to the costs of the approval procedure;

(h) the devices and installation undertakings and maintenance undertakings that meet the assessment criteria are certified to this effect in a non-discriminatory manner within a

period of six months of the date of application, except where technical considerations justify a reasonable additional period;

(i) the fact of compliance or approval is certified in writing;

(j) the grounds for a refusal to issue the certificate of compliance are given in writing by attaching a duplicate copy of the records of the tests and controls that have been carried out;

(k) the grounds for a refusal to take into account a request for assessment are provided in writing;

(l) the specifications and rules are applied by bodies observing the appropriate provisions of norms in the series EN 45000.

TITLE VI

Miscellaneous provisions

Article 16

1. The provisions of this Regulation shall also apply where the participating undertakings lay down rights and obligations for the undertakings connected with them. The market shares, legal acts or conduct of the connected undertakings shall be considered to be those of the participating undertakings.

2. 'Connected undertakings' for the purposes of this Regulation means:

(a) undertakings in which a participating undertaking, directly or indirectly:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs of the undertaking;

(b) undertakings which directly or indirectly have in or over a participating undertaking the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the participating undertakings or undertakings connected with them have directly or indirectly the rights or powers set out in pargraph 2(a) shall be considered to be connected with each of the participating undertakings.

Article 17

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 1534/91, where it finds in a particular case that an agreement, decision

or concerted practice exempted under this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3) of the EEC Treaty, and in particular where,

— in the cases referred to in Title II, the studies are based on unjustifiable hypotheses,

— in the cases referred to in Title III, the standard policy conditions contain clauses other than those listed in Article 7(1) which create, to the detriment of the policyholder, a significant imbalance between the rights and obligations arising from the contract,

— in the cases referred to in Title IV:

  (a) the undertakings participating in a group would not, having regard to the nature, characteristics and scale of the risks concerned, encounter any significant difficulties in operating individually on the relevant market without organizing themselves in a group;

  (b) one or more participating undertakings exercise a determining influence on the commercial policy of more than one group on the same market;

  (c) the setting-up or operation of a group may, through the conditions governing admission, the definition of the risks to be covered, the agreements on retrocession or by any other means, result in the sharing of the markets for the insurance products concerned or from neighbouring products;

  (d) an insurance group which benefits from the provisions of Article 11(2) has such a position with respect to aggravated risks that the policyholders encounter considerable difficulties in finding cover outside this group.

Article 18

1. As regards agreements existing on 13 March 1962 and notified before 1 February 1963 and agreements, whether notified or not, to which Article 4(2)(1) of Regulation No 17 applies, the declaration of inapplicability of Article 85(1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.

2. As regards all other agreements notified before this Regulation entered into force, the declaration of inapplicability of Article 85(1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled, or from the date of notification, whichever is later.

Article 19

If agreements existing on 13 March 1962 and notified before 1 February 1963, or agreements covered by Article 4(2)(1) of Regulation No 17 and notified before 1 January 1967, are amended before 31 December 1993 so as to fulfil the conditions for application of this Regulation, and if the amendment is communicated to the Commission before 1 April 1994, the prohibition in Article 85(1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication shall take effect from the time of its receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

Article 20

1. As regards agreements covered by Article 85 of the Treaty as a result of the accession of the United Kingdom, Ireland and Denmark, Articles 18 and 19 shall apply, on the understanding that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

2. As regards agreements covered by Article 85 of the Treaty as a result of the accession of Greece, Articles 18 and 19 shall apply, on the understanding that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

3. As regards agreements covered by Article 85 of the Treaty as a result of the accession of Spain and Portugal, Articles 18 and 19 shall apply, on the understanding that the relevant dates shall be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963 and 1 January 1967.

Article 21

This Regulation shall enter into force on 1 April 1993.

It shall apply until 31 March 2003.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

III — Commission notices of a general nature

Notice on exclusive dealing contracts with commercial agents[1]

I. The Commission considers that contracts made with commercial agents in which those agents undertake, for a specified part of the territory of the common market,

— to negotiate transactions on behalf on an enterprise,

or

— to conclude transactions in the name and on behalf on an enterprise,

or

— to conclude transactions in their own name and on behalf of this enterprise,

do not fall under the prohibition in Article 85(1) of the Treaty.

It is essential in this case that the contracting party, described as a commercial agent, should, in fact, be such, by the nature of his functions, and that he should neither undertake nor engage in activities proper to an independent trader in the course of commercial operations. The Commission regards as the decisive criterion which distinguishes the commercial agent from the independent trader, the agreement — express or implied — which deals with responsibility for the financial risks bound up with the sale or with the performance of the contract. Thus the Commission's assessment is not governed by the name used to describe the representative. Except for the usual *del credere* guarantee, a commercial agent must not by the nature of his functions assume any risk resulting from the transaction. If he does assume such risks, his function becomes economically akin to that of an independent trader and he must therefore be treated as such for the purposes of the rules of competition. In such a situation, the exclusive dealing contracts must be regarded as agreements made with independent traders.

The Commission considers that there is particular reason to assume that the function performed is that of an independent trader where the contracting party described as a commercial agent:

— is required to keep or does in fact keep, as his own property, a considerable stock of the products covered by the contract, or

— is required to organize, maintain or ensure at his own expense a substantial service to customers free of charge, or does in fact organize, maintain or ensure such a service, or

— can determine or does in fact determine prices or terms of business.

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[1] OJ 139, 24.12.1962, p. 2921/62.

II. Unlike the contracts with commercial agents covered here, exclusive dealing contracts with independent traders may well fall within Article 85(1). In the case of such exclusive contracts the restriction of competition lies either in the limitation of supply, when the vendor undertakes to supply a given product to one purchaser only, or in the limitation of demand, when the purchaser undertakes to obtain a given product from only one vendor. Where there are reciprocal undertakings competition is being restricted by both parties. The question whether a restriction of competition of this nature may affect trade between Member States depends on the circumstances of the particular case.

On the other hand, the Commission takes the view that the test for prohibition under Article 85(1) is not met by exclusive dealing contracts with commercial agents, since these contracts have neither the object nor the effect of preventing, restricting or distorting competition within the common market. The commercial agent only performs an auxiliary function in the market for goods. In that market he acts on the instructions and in the interest of the enterprise on whose behalf he is operating. Unlike the independent trader, he himself is neither a purchaser nor a vendor, but seeks purchasers or vendors in the interest of the other party to the contract, who is the person doing the buying or selling. In this type of exclusive dealing contract, the selling or buying enterprise does not cease to be a competitor; it merely uses an auxiliary, i.e. the commercial agent, to distribute or acquire products on the market.

The legal status of commercial agents is determined, more or less uniformly, by statute law in most of the Member States and by case-law in others. The characteristic feature which all commercial agents have in common is their function as auxiliaries in the transaction of business. The powers of commercial agents are subject to the civil law provisions of agency. Within the limits of these provisions, the other party to the contract — who is the person selling or buying — is free to decide the product and the territory in respect of which he is willing to give these powers to his agent.

In addition to the competitive situation on the markets where the commercial agent functions as an auxiliary for the other party to the contract, the particular market on which the commercial agents offer their services for the negotiation or conclusion of transactions has to be considered. The obligation assumed by the agent — to work exclusively for one principal for a certain period of time — entails a limitation of supply on that market; the obligation assumed by the other party to the contract — to appoint him sole agent for a given territory — involves a limitation of demand on the market. Nevertheless, the Commission views these restrictions as a result of the special obligation between the commercial agent and his principal to protect each other's interests and therefore considers that they involve no restriction of competition.

The object of this Notice is to give enterprises some indication of the considerations by which the Commission will be guided when interpreting Article 85(1) of the Treaty and applying it to exclusive dealing contracts with commercial agents. The situation having thus been clarified, it will as a general rule no longer be useful for enterprises to obtain negative clearance for the agreements mentioned, nor will it be necessary to have the legal position established through a Commission decision on an individual case; this also means that notification will no longer be necessry for agreements of this type. This Notice is without prejudice to any interpretation that may be given by other competent authorities and in particular by the courts.

Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises[1]

Questions are frequently put to the Commission of the European Communities on the attitude it intends to take up, for purposes of implementation of the competition rules contained in the Treaties of Rome and Paris, with regard to cooperation between enterprises.

In this Notice, it endeavours to provide guidance which, though it cannot be exhaustive, may prove useful to enterprises in the correct interpretation, in particular, of Article 85(1) of the EEC Treaty and Article 65(1) of the ECSC Treaty.

I. The Commission welcomes cooperation among small and medium-sized enterprises where such cooperation enables them to work more efficiently and increase their productivity and competitiveness on a larger market. While considering that its duty is to facilitate cooperation among small and medium-sized enterprises in particular the Commission recognizes that cooperation among large enterprises, too, can be economically desirable without presenting difficulties from the angle of competition policy.

Article 85(1) of the Treaty establishing the European Economic Community (EEC Treaty) and Article 65(1) of the Treaty establishing the European Coal and Steel Community (ECSC Treaty) provide that all agreements, decisions and concerted practices (hereafter referred to as 'agreements') which have as their object or effect the prevention, restriction or distortion of competition within the common market (hereafter referred to as 'restraints of competition') are prohibited as incompatible with the common market; under Article 85(1) of the EEC Treaty this applies, however, only if such agreements may affect trade between Member States.

The Commission feels that, in the interests of the small and medium-sized enterprises in particular, it should give some indication of the considerations by which it will be guided when interpreting Article 85(1) of the EEC Treaty and Article 65(1) of the ECSC Treaty and applying them to certain cooperation arrangements between enterprises, and should indicate which of these arrangements in its opinion do not come under these provisions. This Notice applies to all enterprises, irrespective of their size.

There may also be forms of cooperation between enterprises other than those listed below which are not prohibited by Article 85(1) of the EEC Treaty or Article 65(1) of the ECSC Treaty. This applies in particular if the market position of the enterprises cooperating with each other is in the aggregate too weak for the cooperation agreement between them to lead to an appreciable restraint of competition in the common market and — where the agreements fall within the scope of Article 85 of the EEC Treaty — to affect trade between Member States.

It is also pointed out that other forms of cooperation between enterprises or agreements containing additional clauses, to which the rules of competition of the Treaties apply, can be exempted pursuant to Article 85(3) of the EEC Treaty or be authorized pursuant to Article 65(2) of the ECSC Treaty.

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[1] OJ C 75, 29.7.1968, p. 3, corrected by OJ C 84, 28.8.1968, p. 14.

The Commission intends to clarify rapidly, by means of suitable decisions in individual cases or by general notices, the status of the various forms of cooperation in accordance with the provisions of the Treaties.

No general statement can be made at this stage on the application of Article 86 of the EEC Treaty on the abuse of dominant positions within the common market or in a part of it. The same applies to Article 66(7) of the ECSC Treaty.

As a result of this Notice, as a general rule, it should no longer be useful for enterprises to obtain negative clearance, as defined by Article 2 of Regulation No 17,[1] for the agreements listed, nor should it be necessary to have the legal position established through a Commission decision on an individual case. This also means that notification with this end in view will no longer be necessary for agreements of this type. However, if it is doubtful whether in an individual case an agreement between enterprises restricts competition or if other forms of cooperation between enterprises which, in the view of the enterprises, do not restrict competition are not listed here, the enterprises are free to apply, where the matter comes under Article 85(1) of the EEC Treaty, for negative clearance, or to file as a precautionary measure, where Article 65(1) of the ECSC Treaty is the relevant provision, an application on the basis of Article 65(2) of that Treaty.

This Notice is without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

II. The Commission takes the view that the following agreements do not restrict competition.

1. *Agreements having as their sole object:*

(a) an exchange of opinion or experience,

(b) joint market research,

(c) the joint carrying-out of comparative studies of enterprises or industries,

(d) the joint preparation of statistics and calculation models.

Agreements whose sole purpose is the joint procurement of information which the various enterprises need to determine their future market behaviour freely and independently, or the use by each of the enterprises of a joint advisory body, do not have as their object or effect the restriction of competition. But if the freedom of action of the enterprises is restricted or if their market behaviour is coordinated either expressly or through concerted practices, there may be restraint of competition. This is in particular the case where concrete recommendations are made or where conclusions are given such a form that they induce at least some of the participating enterprises to behave in an identical manner on the market.

The exchange of information may take place between the enterprises themselves or through a body acting as an intermediary. It is, however, particularly difficult to distinguish between information which has no bearing on competition on the one hand and behaviour in restraint of competition on the other, if there are special bodies which have to register orders, turnover figures, investments and prices, so that it can as a rule not be automatically

[1] OJ 13, 21.2.1962, p. 204/62.

assumed that Article 85(1) of the EEC Treaty or Article 65(1) of the ECSC Treaty do not apply to them. A restraint of competition may occur in particular on an oligopolistic market for homogeneous products.

In the absence of more far-reaching cooperation between the participating enterprises, joint market research and comparative studies of different enterprises and industries to collect information and ascertain facts and market conditions do not in themselves affect competition. Other arrangements of this type, as for instance the joint establishment of economic and structural analyses, so obviously do not affect competition that there is no need to mention them specifically.

Calculation models containing specified rates of calculation must be regarded as recommendations that may lead to restraints of competition.

2. *Agreements having as their sole object:*

(a) cooperation in accounting matters,

(b) joint provision of credit guarantees,

(c) joint debt-collecting associations,

(d) joint business or tax consultant agencies.

In such cases, the cooperation involved covers fields that are not concerned with the supply of goods and services or the economic decisions of the enterprises taking part, and thus does not lead to restraints of competition.

Cooperation in accounting matters is neutral from the point of view of competition as it only assists in the technical handling of the accounting work. Nor is the creation of credit guarantee associations affected by the competition rules, since it does not modify the relationship between supply and demand.

Joint debt-collecting associations whose work is not confined to the collection of outstanding payments in line with the intentions and conditions of the participating enterprises, or which fix prices or exert in any other way an influence on price formation, may restrict competition. Application of uniform terms by all participating firms may constitute a concerted practice, and the making of joint price comparisons may have the same result. In this connection, no objection can be raised against the use of standardized printed forms; their use must, however, not be combined with an understanding or tacit agreement on uniform prices, rebates or conditions of sale.

3. *Agreements having as their sole object:*

(a) the joint implementation of research and development projects,

(b) the joint placing of research and developments contracts,

(c) the sharing-out of research and development projects among participating enterprises.

In the field of research, too, the mere exchange of experience and results serves for information only and does not restrict competition. It therefore need not be mentioned expressly.

Agreements on the joint execution of research work or the joint development of the results of research up to the stage of industrial application do not affect the competitive position of the parties. This also applies to the sharing of research fields and development work if the results are available to all participating enterprises.

However, if the enterprises enter into commitments which restrict their own research and development activity or the utilization of the results of joint work so that they do not have a free hand with regard to their own research and development outside the joint projects, this may constitute an infringement of the Treaties' rules of competition. Where firms do not carry out joint research work, any contractual obligations or concerted practices binding them to refrain from research work of their own either completely or in certain sectors may result in a restraint of competition.

The sharing-out of sectors of research without an understanding providing for mutual access to the results is to be regarded as a case of specialization that may restrict competition.

There may also be a restraint of competition if agreements are concluded or corresponding concerted practices applied with regard to the practical exploitation of the results of research and development work carried out jointly, particularly if the participating enterprises undertake or agree to manufacture only the products or types of product developed jointly or to share out future production among themselves.

It is of the essence of joint research that the results should be exploited by the participating enterprises in proportion to their participation. If the participation of certain enterprises is confined to a specific sector of the joint research project or to the provision of only limited financial assistance, there is no restraint of competition — in so far as there has been any joint research at all — if the results of research are made available to these enterprises only in relation with the degree of their participation. There may, however, be a restraint of competition if certain participating enterprises are excluded from exploitation of the results, either entirely or to an extent not commensurate with their participation.

If the granting of licences to third parties is expressly or tacitly excluded, there may be a restraint of competition. However, the fact that research is carried out jointly warrants arrangements binding the enterprises to grant licences to third parties only by common agreement or by majority decision.

For the assessment of the compatibility of the agreement with the rules of competition, the legal status of the joint research and development work is immaterial.

4. *Agreements which have as their sole object the joint use of production facilities and storing and transport equipment*

These forms of cooperation do not restrict competition because they are confined to organization and technical arrangements for the use of the facilities. There may be a restraint of competition if the enterprises involved do not bear the cost of utilization of the installation of equipment themselves or if agreements are concluded or concerted practices applied regarding joint production or the sharing-out of production or the establishment or running of a joint enterprise.

5. *Agreements having as their sole object the setting-up of consortia for the joint execution of orders, where the participating enterprises do not compete with each other as regards the work to be done or where each of them by itself is unable to execute the orders*

Where enterprises do not compete with each other they cannot restrict competition between them by setting up consortia. This applies in particular to enterprises belonging to different industries but also to firms in the same industry to the extent that their contribution under the consortium consists only of goods or services which cannot be supplied by the other participating enterprises. It is not a question of whether the enterprises compete with each other in other sectors so much as whether in the light of the concrete circumstances of a particular case there is a possibility that in the foreseeable future they may compete with each other with regard to the products or services involved. If the absence of competition between the enterprises and the maintenance of this situation are based on agreements or concerted practices, there may be a restraint of competition.

But even in the case of consortia formed by enterprises which normally compete with each other there is no restraint of competition if the participating enterprises cannot execute a specific order by themselves. This applies in particular if, for lack of experience, specialized knowledge, capacity or financial resources, these enterprises, when working alone, have no chance of success or cannot finish the work within the required time-limit or cannot bear the financial risk.

Nor is there a restraint of competition if it is only by the setting-up of a consortium that the enterprises are put in a position to make an attractive offer. There may, however, be a restraint of competition if the enterprises undertake to work solely in the framework of a consortium.

6. *Agreements having as their sole object:*

(a) joint selling arrangements,

(b) joint after-sales and repairs service, provided the participating enterprises are not competitors with regard to the products or services covered by the agreement.

As already explained in detail under heading 5, cooperation between enterprises cannot restrict competition if the firms are not in competition with each other.

Very often joint selling by small or medium-sized enterprises — even if they are competing with each other — does not entail an appreciable restraint of competition; it is, however, impossible to establish in this Notice any general criteria or to specify what enterprises may be deemed 'small or medium-sized'.

There is no joint after-sales and repair service if several manufacturers, without acting in concert with each other, arrange for an after-sales and repair service for their products to be provided by an enterprise which is independent of them. In such a case there is no restraint of competition even if the manufacturers are competitors.

7. *Agreements having joint advertising as their sole object*

Joint advertising is designed to draw the buyers' attention to the products of an industry or to a common brand; as such it does not restrict competition between the participating enterprises. However, if the participating enterprises are partly or wholly prevented, by agreements or concerted practices, from themselves advertising or if they are subjected to other restrictions, there may be a restraint of competition.

8. *Agreements having as their sole object the use of a common label to designate a certain quality, where the label is available to all competitors on the same conditions*

Such associations for the joint use of a quality label do not restrict competition if other competitors, whose products objectively meet the stipulated quality requirements, can use the label on the same conditions as the members. Nor do the obligations to accept quality control of the products provided with the label, to issue uniform instructions for use, or to use the label for the products meeting the quality standards constitute restraints of competition. But there may be restraint of competition if the right to use the label is linked to obligations regarding production, marketing, price formation or obligations of any other type, as is for instance the case when the participating enterprises are obliged to manufacture or sell only products of guaranteed quality.

Notice concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty[1]

1. In this Notice the Commission of the European Communities gives its view as to subcontracting agreements in relation to Article 85(1) of the Treaty establishing the European Economic Community. This class of agreement is at the present time a form of work distribution which concerns firms of all sizes, but which offers opportunities for development in particular to small and medium-sized firms.

The Commission considers that agreements under which one firm, called 'the contractor', whether or not in consequence of a prior order from a third party, entrusts to another, called 'the subcontractor', the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf, are not of themselves caught by the prohibition in Article 85(1).

To carry out certain subcontracting agreements in accordance with the contractor's instructions, the subcontractor may have to make use of particular technology or equipment which the contractor will have to provide. In order to protect the economic value of such technology or equipment, the contractor may wish to restrict their use by the subcontractor to whatever is necessary for the purpose of the agreement. The question arises whether such restrictions are caught by Article 85(1). They are assessed in this Notice with due regard to the purpose of such agreements, which distinguishes them from ordinary patent and know-how licensing agreements.

2. In the Commission's view, Article 85(1) does not apply to clauses whereby:

— technology or equipment provided by the contractor may not be used except for the purposes of the subcontracting agreement,

— echnology or equipment provided by the contractor may not be made available to third parties,

— the goods, services or work resulting from the use of such technology or equipment may be supplied only to the contractor or performed on his behalf,

provided that and in so far as this technology or equipment is necessary to enable the subcontractor, under reasonable conditions to manufacture the goods, to supply the services or to carry out the work in accordance with the contractor's instructions. To that extent the subcontractor is providing goods, services or work in respect of which he is not an independent supplier in the market.

The above proviso is satisfied where performance of the subcontracting agreement makes necessary the use by the subcontractor of:

— industrial property rights of the contractor or at his disposal, in the form of patents, utility models, designs protected by copyright, registered designs or other rights, or

— secret knowledge or manufacturing processes (know-how) of the contractor or at his disposal, or

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[1] OJ C 1, 3.1.1979, p. 2.

— studies, plans or documents accompanying the information given which have been prepared by or for the contractor, or

— dies, patterns or tools, and accessory equipment that are distinctively the contractor's,

which, even though not covered by industrial property rights nor containing any element of secrecy, permit the manufacture of goods which differ in form, function or composition from other goods manufactured or supplied on the market.

However, the restrictions mentioned above are not justifiable where the subcontractor has at his disposal or could under reasonable conditions obtain access to the technology and equipment needed to produce the goods, provide the services or carry out the work. Generally, this is the case when the contractor provides no more than general information which merely describes the work to be done. In such circumstances the restrictions could deprive the subcontractor of the possibility of developing his own business in the fields covered by the agreement.

3. The following restrictions in connecting with the provision of technology by the contractor may in the Commission's view also be imposed by subcontracting agreements without giving grounds for objection under Article 85(1):

— an undertaking by either of the parties not to reveal manufacturing processes or other know-how of a secret character, or confidential information given by the other party during the negotiation and performance of the agreement, as long as the know-how or information in question has not become public knowledge,

— an undertaking by the subcontractor not to make use, even after expiry of the agreement, of manufacturing processes or other know-how of a secret character received by him during the currency of the agreement, as long as they have not become public knowledge,

— an undertaking by the subcontractor to pass on to the contractor on a non-exclusive basis any technical improvements which he has made during the currency of the agreement, or, where a patentable invention has been discovered by the subcontractor, to grant non-exclusive licences in respect of inventions relating to improvements and new applications of the original invention to the contractor for the term of the patent held by the latter.

This undertaking by the subcontractor may be exclusive in favour of the contractor in so far as improvements and intentions made by the subcontractor during the currency of the agreement are incapable of being used independently of the contractor's secret know-how or patent, since this does not constitute an appreciable restriction of competition.

However, any undertaking by the subcontractor regarding the right to dispose of the results of his own research and development work may restrain competition, where such results are capable of being used independently. In such circumstances, the subcontracting relationship is not sufficient to displace the ordinary competition rules on the disposal of industrial property rights or secret know-how.

4. Where the subcontractor is authorized by a subcontracting agreement to use a specified trade mark, trade name or get-up, the contractor may at the same time forbid such use by the subcontractor in the case of goods, services or work which are not to be supplied to the contractor.

5. Although this Notice should in general obviate the need for firms to obtain a ruling on the legal position by an individual Commission Decision, it does not affect the right of the firms concerned to apply for negative clearance as defined by Article 2 of Regulation No 17 or to notify the agreement to the Commission under Article 4(1) of that Regulation.[1]

The 1968 Notice on cooperation between enterprises,[2] which lists a number of agreements that by their nature are not to be regarded as anti-competitive, is thus supplemented in the subcontracting field. The Commission also reminds firms that, in order to promote cooperation between small and medium-sized businesses, it has published a Notice concerning agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community.[3]

This Notice is without prejudice to the view that may be taken of subcontracting agreements by the Court of Justice of the European Communities.

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[1] First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ 13, 21.2.1962, p. 204/62).
[2] Notice concerning agreements, decisions and concerted practices relating to cooperation between enterprises. (OJ C 75, 29.7.1968, p. 3).
[3] OJ C 313, 29.12.1977, p. 3.

Notice concerning imports into the Community of Japanese goods falling within the scope of the Rome Treaty[1]

There has recently been an increasing number of instances of Japanese industries preparing, sometimes independently and sometimes after consultation with their European counterparts, measures to restrict imports of Japanese goods into the Community or otherwise regulate quantities, prices, quality or the like.

The Commission considers that it should point out to those concerned that Article 85(1) of the Treaty establishing the European Economic Community 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.

The fact that the headquarters of some or all of the firms involved are located outside the Community does not vitiate this provision if the effects of such agreements, decisions or concerted practices are felt within the common market.

The Commission recommends those concerned to notify such agreements, decisions and practices in good time, as required by Council Regulation No 17 impementing Articles 85 and 86 of the Treaty.[2] The Commission will scrutinize these agreements, decisions and practices to determine whether they are compatible with the Community competition rules. At the same time the Commission will keep a close watch on developments in the industries concerned and propose such appropriate trade policy measures as may be required to resolve this type of problem.

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[1] OJ C 111, 21.10.1972, p. 13.
[2] OJ 13, 21.2.1962, p. 204/62.

Notice on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community[1, 2]

(86/C 231/02)

I

1. The Commission considers it important to facilitate cooperation between undertakings where such cooperation is economically desirable without presenting difficulties from the point of view of competition policy, which is particularly true of cooperation between small and medium-sized undertakings. To this end it published the 'Notice concerning agreements, decisions and concerted practices in the field of cooperation between undertakings'[3] listing a number of agreements that by their nature cannot be regarded as restraints of competition. Furthermore, in the Notice concerning its assessment of certain subcontracting agreements[4] the Commission considered that this type of contract which offers opportunities for development, in particular, to small and medium-sized undertakings is not in itself caught by the prohibition in Article 85(1). By issuing the present Notice, the Commission is taking a further step towards defining the field of application of Article 85(1), in order to facilitate cooperation between small and medium-sized undertakings.

2. In the Commission's opinion, agreements whose efffects on trade between Member States or on competition are negligible do not fall under the ban on restrictive agreements contained in Article 85(1). Only those agreements are prohibited which have an appreciable impact on market conditions, in that they appreciably alter the market position, in other words the sales or supply possibilities, of third undertakings and of users.

3. In the present Notice the Commission, by setting quantitative criteria and by explaining their application, has given a sufficiently concrete meaning to the concept 'appreciable' for undertakings to be able to judge for themselves whether the agreements they have concluded with other undertakings, being of minor importance, do not fall under Article 85(1). The quantitative definition of 'appreciable' given by the Commission is, however, not appreciable; in fact, in individual cases even agreements between undertakings which exceed these limits may still have only a negligible effect on trade between Member States or on competition, and are therefore not caught by Article 85(1).

4. As a result of this Notice, there should no longer be any point in undertakings obtaining negative clearance, as defined by Article 2 of Council Regulation No 17,[5] for the agreements covered, nor should it be necessary to have the legal position established through Commission decisions in individual cases; notification with this end in view will no longer be necessary for such agreements. However, if it is doubtful whether in an individual case an agreement appreciably affects trade between Member States or competition, the undertakings are free to apply for negative clearance or to notify the agreement.

5. In cases covered by the present Notice the Commission, as a general rule, will not open proceedings under Regulation No 17, either upon application or upon its own initiative.

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[1] OJ C 231, 12.9.1986, p. 2.
[2] The present Notice replaces the Commission Notice of 19 December 1977, OJ C 313, 29.12.1977, p. 3.
[3] OJ C 75, 29.7.1968, p. 3, corrected by OJ C 84, 28.8.1968, p. 14.
[4] OJ C 1, 3.1.1979, p. 2.
[5] OJ 13, 21.2.1962, p. 204/62.

Where, due to exceptional circumstances, an agreement which is covered by the present Notice nevertheless falls under Article 85(1), the Commission will not impose fines. Where undertakings have failed to notify an agreement falling under Article 85(1) because they wrongly assumed, owing to a mistake in calculating their market or aggregate turnover, that the agreement was covered by the present Notice, the Commission will not consider imposing fines unless the mistake was due to negligence.

6. This Notice is without prejudice to the competence of national courts to apply Article 85(1) on the basis of their own jurisdiction, although it constitutes a factor which such courts may take into account when deciding a pending case. It is also without prejudice to any interpretation which may be given by the Court of Justice of the European Communities.

II

7. The Commission holds the view that agreements between undertakings engaged in the production or distribution of goods or in the provision of services generally do not fall under the prohibition of Article 85(1) if:

— the goods or services which are the subject of the agreement (hereinafter referred to as 'the contract products') together with the participating undertakings' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not represent more that 5% of the total market for such goods or services (hereinafter refered to as 'products') in the area of the common market affected by the agreement, and

— the aggregate annual turnover of the participating undertakings does not exceed ECU 200 million.

8. The Commission also holds the view that the said agreements do not fall under the prohibition of Article 85(1) if the abovementioned market share or turnover is exceeded by not more than one tenth during two successive financial years.

9. For the purposes of this Notice, participating undertakings are:

(a) undertakings party to the agreement;

(b) undertakings in which a party to the agreement, directy or indirectly,

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertakings, or

— has to the right to manage the affairs;

(c) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (b);

(d) undertakings in or over which an undertaking referred to in (c) directly or indirectly has the rights or powers listed in (b).

Undertakings in which several undertakings as referred to in (a) to (d) jointly have, directly or indirectly, the rights or powers set out in (b) shall also be considered to be participating undertakings.

10. In order to calculate the market share, it is necessary to determine the relevant market. This implies the definition of the relevant product market and the relevant geographical market.

11. The relevant product market includes besides the contract products any other products which are identical or equivalent to them. This rule applies to the products of the participating undertakings as well as to the market for such products. The products in question must be interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price and intended use of the goods together. In certain cases, however, products can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed.

12. Where the contract products are components which are incorporated into another product by the participating undertakings, reference should be made to the market for the latter product, provided that the components represent a significant part of it. Where the contract products are components which are sold to third undertakings, reference should be made to the market for the components. In cases where both conditions apply, both markets should be considered separately.

13. The relevant geographical market is the area within the Community in which the agreement produces its effects. This area will be the whole common market where the contract products are regularly bought and sold in all Member States. Where the contract products cannot be bought and sold in a part of the common market, or are bought and sold only in limited quantities or at irregular intervals in such a part, that part should be disregarded.

14. The relevant geographical market will be narrower than the whole common market in particular where:

— the nature and characteristics of the contract product, e.g. high transport costs in relation to the value of the product, restrict its mobility, or

— movement of the contract product within the common market is hindered by barriers to entry to national markets resulting from State intervention, such as quantitative restrictions, severe taxation differentials and non-tariff barriers, e.g. type approvals or safety standard certifications. In such cases the national territory may have to be considered as the relevant geographical market. However, this will only be justified if the existing barriers to entry cannot be overcome by reasonable effort and at an acceptable cost.

15. Aggregate turnover includes the turnover in all goods and services, excluding tax, achieved during the last financial year by the participating undertaking. In cases where an undertaking has concluded similar agreements with various other undertakings in the relevant market, the turnover of all participating undertakings should be taken together. The aggregate turnover shall not include dealings between participating undertakings.

16. The present Notice shall not apply where in a relevant market competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers.

17. The present Notice is likewise applicable to decisions by associations of undertakings and to concerted practices.

Guidelines on the application of EEC competition rules in the telecommunications sector[1]

(91/C 233/02)

PREFACE

These guidelines aim at clarifying the application of Community competition rules to the market participants in the telecommunications sector. They must be viewed in the context of the special conditions of the telecommunications sector, and the overall Community telecommunications policy will be taken into account in their application. In particular, account will have to be taken of the actions the Commission will be in a position to propose for the telecommunications industry as a whole, actions deriving from the assessment of the state of play and issues at stake for this industry, as has already been the case for the European electronics and information technology industry in the communication of the Commission of 3 April 1991.[2]

A major political aim, as emphasized by the Commission, the Council, and the European Parliament, must be the development of efficient Europe-wide networks and services, at the lowest cost and of the highest quality, to provide the European user in the single market of 1992 with a basic infrastructure for efficient operation.

The Commission has made it clear in the past that in this context it is considered that liberalization and harmonization in the sector must go hand in hand.

Given the competition context in the telecommunications sector, the telecommunications operators should be allowed, and encouraged, to establish the necessary cooperation mechanisms, in order to create — or ensure — Community-wide full interconnectivity between public networks, and where required between services to enable European users to benefit from a wider rage of better and cheaper telecommunications services.

This can and has to be done in compliance with, and respect of, EEC competition rules in order to avoid the diseconomies which otherwise could result. For the same reasons, operators and other firms that may be in a dominant market position should be made aware of the prohibition of abuse of such positions.

The guidelines should be read in the light of this objective. They set out to clarify, *inter alia*, which forms of cooperation amount to undesirable collusion, and in this sense they list what is not acceptable. They should therefore be seen as one aspect of an overall Community policy towards telecommunications, and notably of policies and actions to encourage and stimulate those forms of cooperation which promote the development and availability of advanced communications for Europe.

The full application of competition rules forms a major part of the Community's overall approach to telecommunications. These guidelines should help market participants to shape their strategies and arrangements for Europe-wide networks and services from the outset in a

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[1] OJ C 233, 6.9.1991, p. 2.

[2] The European electronics and information technology industry: state of play, issues at stake and proposals for action, SEC(91) 565, 3 April 1991.

manner which allows them to be fully in line with these rules. In the event of significant changes in the conditions which prevailed when the guidelines were drawn up, the Commission may find it appropriate to adapt the guidelines to the evolution of the situation in the telecommunications sector.

I. SUMMARY

1. The Commission of the European Communities in its Green Paper on the development of the common market for telecommunications services and equipment (COM(87) 290) dated 30 June 1987 proposed a number of Community positions. Amongst these, positions (H) and (I) are as follows:

'(H) strict continuous review of operational (commercial) activities of telecommunications administrations according to Articles 85, 86 and 90 of the EEC Treaty. This applies in particular to practices of cross-subsidization of activities in the competitive services sector and of activities in manufacturing;

(I) strict continuous review of all private providers in the newly opened sectors according to Articles 85 and 86, in order to avoid the abuse of dominant positions.'

2. These positions were restated in the Commission's document of 9 February 1988 'Implementing the Green Paper on the development of the common market for telecommunications services and equipment/state of discussions and proposals by the Commission' (COM(88) 48). Among the areas where the development of concrete policy actions is now possible, the Commission indicated the following:

'Ensuring fair conditions of competition:

Ensuring an open competitive market makes continuous review of the telecommunications sector necessary.

The Commission intends to issue guidelines regarding the application of competition rules to the telecommunications sector and on the way that the review should be carried out.'

This is the objective of this communication.

The telecommunications sector in many cases requires cooperation agreements, *inter alia*, between telecommunications organizations (TOs) in order to ensure network and services interconnectivity, one-stop shopping and one-stop billing which are necessary to provide for Europe-wide services and to offer optimum service to users. These objectives can be achieved, *inter alia*, by TOs cooperating — for example, in those areas where exclusive or special rights for provision may continue in accordance with Community law, including competition law, as well as in areas where optimum service will require certain features of cooperation. On the other hand the overriding objective to develop the conditions for the market to provide European users with a greater variety of telecommunications services, of better quality and at lower cost requires the introduction and safeguarding of a strong competitive structure. Competition plays a central role for the Community, especially in view of the completion of the single market for 1992. This role has already been emphasized in the Green Paper.

The single market will represent a new dimension for telecoms operators and users. Competition will give them the opportunity to make full use of technological development and to

accelerate it, and encouraging them to restructure and reach the necessary economies of scale to become competitive not only on the Community market, but worldwide.

With this in mind, these guidelines recall the main principles which the Commission, according to its mandate under the Treaty's competition rules, has applied and will apply in the sector without prejudging the outcome of any specific case which will have to be considered on the facts.

The objective is, *inter alia*, to contribute to more certainty of conditions for investment in the sector and the development of Europe-wide services.

The mechanisms for creating certainty for individual cases (apart from complaints and *ex officio* investigations) are provided for by the notification and negative clearance procedures provided under Regulation No 17, which give a formal procedure for clearing cooperation agreements in this area whenever a formal clearance is requested. This is set out in further detail in this communication.

II. INTRODUCTION

3. The fundamental technological development worldwide in the telecommunications sector[1] has caused considerable changes in the competition conditions. The traditional monopolistic administrations cannot alone take up the challenge of the technological revolution. New economic forces have appeared on the telecoms scene which are capable of offering users the numerous enhanced services generated by the new technologies. This has given rise to and stimulated a wide deregulation process propagated in the Community with various degrees of intensity.

This move is progressively changing the face of the European market structure. New private suppliers have penetrated the market with more and more transnational value-added services and equipment. The telecommunications administrations, although keeping a central role as public services providers, have acquired a business-like way of thinking. They have started competing dynamically with private operators in services and equipment. Wide restructuring, through mergers and joint ventures, is taking place in order to compete more effectively on the deregulated market through economies of scale and rationalization. All these events have a multiplier effect on technological progress.

4. In the light of this, the central role of competition for the Community appears clear, especially in view of the completion of the single market for 1992. This role has already been emphasized in the Green Paper.

5. In the application of competition rules the Commission endeavours to avoid the adopting of State measures or undertakings erecting or maintaining artificial barriers incompatible with the single market. But it also favours all forms of cooperation which foster innovation and economic progress, as contemplated by competition law. Pursuing effective competition in telecoms is not a matter of political choice. The choice of a free market and a competi-

[1] Telecommunications embraces any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical and other electromagnetic systems (Article 2 of WATTC Regulation of 9 December 1988).

tion-oriented economy was already envisaged in the EEC Treaty, and the competition rules of the Treaty are directly applicable within the Community. The abovementioned fundamental changes make necessary the full application of competition law.

6. There is a need for more certainty as to the application of competition rules. The telecommunication administrations, together with keeping their duties of public interest, are now confronted with the application of these rules practically without transition from a long tradition of legal protection. Their scope and actual implications are often not easily perceivable. As the technology is fast-moving and huge investments are necessary, in order to benefit from the new possibilities on the market-place, all the operators, public or private, have to take quick decisions, taking into account the competition regulatory framework.

7. This need for more certainty regarding the application of competition rules is already met by assessments made in several individual cases. However, assessments of individual cases so far have enabled a response to only some of the numerous competition questions which arise in telecommunications. Future cases will further develop the Commission's practice in this sector.

Purpose of these guidelines

8. These guidelines are intended to advise public telecommunications operators, other telecommunications service and equipment suppliers and users, the legal profession and the interested members of the public about the general legal and economic principles which have been and are being followed by the Commission in the application of competition rules to undertakings in the telecommunications sector, based on experience gained in individual cases in compliance with the rulings of the Court of Justice of the European Communities.

9. The Commission will apply these principles also to future individual cases in a flexible way, and taking the particular context of each case into account. These guidelines do not cover all the general principles governing the application of competition rules, but only those which are of specific relevance to telecommunication issues. The general principles of competition rules not specifically connected with telecommunications but entirely applicable to these can be found, *inter alia*, in the regulatory acts, the Court judgments and the Commission decisions dealing with the individual cases, the Commission's yearly reports on competition policy, press releases and other public information originating from the Commission.

10. These guidelines do not create enforceable rights. Moreover, they do not prejudice the application of EEC competition rules by the Court of Justice of the European Communities and by national authorities (as these rules may be directly applied in each Member State, by the national authorities, administrative or judicial).

11. A change in the economic and legal situation will not automatically bring about a simultaneous amendment to the guidelines. The Commission, however, reserves the possibility to make such an amendment when it considers that these guidelines no longer satisfy their purpose, because of fundamental and/or repeated changes in legal precedents, methods of applying competition rules, and the regulatory, economic and technical context.

12. These guidelines essentially concern the direct application of competition rules to undertakings, i.e. Articles 85 and 86 of the EEC Treaty. They do not concern those applicable to the Member States, in particular Articles 5 and 9(1) and (3). Principles ruling the application of Article 90 in telecommunications are expressed in Commission Directives adopted under Article 90(3) for the implementation of the Green Paper.[1]

Relationship between competition rules applicable to undertakings and those applicable to Member States

13. The Court of Justice of the European Communities[2] has ruled that while it is true that Articles 85 and 86 of the Treaty concern the conduct of undertakings and not the laws or regulations of the Member States, by virtue of Article 5(2) of the EEC Treaty, Member States must not adopt or maintain in force any measure which could deprive those provisions of their effectiveness. The Court has stated that such would be the case, in particular, if a Member State were to require or favour prohibited cartels or reinforce the effects thereof or to encourage abuses by dominant undertakings.

If those measures are adopted or maintained in force *vis-à-vis* public undertakings or undertakings to which a Member State grants special or exclusive rights, Artice 90 might also apply.

14. When the conduct of a public undertaking or an undertaking to which a Member State grants special or exclusive rights entirely as a result of the exercise of the undertaking's autonomous behaviour, it can only be caught by Articles 85 and 86.

When this behaviour is imposed by a mandatory State measure (regulative or administrative), leaving no discretionary choice to the undertakings concerned, Article 90 may apply to the State involved in association with Articles 85 and 86. In this case Articles 85 and 86 apply to the undertakings' behaviour taking into account the constraints to which the undertakings are submitted by the mandatory State measure.

Ultimately, when the behaviour arises from the free choice of the undertakings involved, but the State has taken a measure which encourages the behaviour or strengthens its effects, Articles 85 and/or 86 apply to the undertakings' behaviour and Article 90 may apply to the State measure. This could be the case, *inter alia*, when the State has approved and/or legally endorsed the result of the undertakings' behaviour (for instance tariffs).

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[1] Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ L 131, 27.5.1988, p. 73).
Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10).

[2] Judgment of 10.1.1985 in Case 229/83, Leclerc/gasoline [1985] ECR 17; Judgment of 11.7.1985 in Case 299/83, Leclerc/books [1985] ECR 2517; Judgment of 30.4.1986 in Cases from 209 to 213/84, *Ministère public v Asjes* [1986] ECR 1425; Judgment of 1.10.1987 in Case 311/85, *Vereniging van Vlaamse Reisbureaus* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801.

These guidelines and the Article 90 Directives complement each other to a certain extent in that they cover the principles governing the application of the competition rules: Articles 85 and 86 on the one hand, Article 90 on the other.

Application of competition rules and other Community law, including open network provision (ONP) rules

15. Articles 85 and 86 and Regulations implementing those Articles in application of Article 87 of the EEC Treaty constitute law in force and enforceable throughout the Community. Conflicts should not arise with other Community rules because Community law forms a coherent regulatory framework. Other Community rules, and in particular those specifically governing the telecommunications sector, cannot be considered as provisions implementing Articles 85 and 86 in this sector. However it is obvious that Community acts adopted in the telecommunications sector are to be interpreted in a way consistent with competition rules, so as to ensure the best possible implementation of all aspects of the Community telecommunications policy.

16. This applies, *inter alia*, to the relationship between competition rules applicable to undertakings and the ONP rules. According to the Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992,[1] ONP comprises the 'rapid definition, by Council Directives, of technical conditions, usage conditions, and tariff principles for open network provision, starting with harmonized conditions for the use of leased lines'. The details of the ONP procedures have been fixed by Directive 90/387/EEC[2] on the establishment of the internal market for telecommunications services through the implementation of open network provision, adopted by Council on 28 June 1990 under Article 100a of the EEC Treaty.

17. ONP has a fundamental role in providing European-wide access to Community-wide interconnected public networks. When ONP harmonization is implemented, a network user will be offered harmonized access conditions throughout the EEC, whichever country they address. Harmonized access will be ensured in compliance with the competition rules as mentioned above, as the ONP rules specifically provide.

ONP rules cannot be considered as competition rules that apply to States and/or to undertakings' behaviour. ONP and competition rules therefore constitute two different but coherent sets of rules. Hence, the competition rules have full application, even when all ONP rules have been adopted.

18. Competition rules are and will be applied in a coherent manner with Community trade rules in force. However, competition rules apply in a non-discriminatory manner to EEC undertakings and to non-EEC ones which have access to the EEC market.

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[1] OJ C 257, 4.10.1988, p. 1.
[2] OJ L 192, 24.7.1990, p. 1.

III. COMMON PRINCIPLES OF APPLICATION OF ARTICLES 85 AND 86

Equal application of Articles 85 and 86

19. Articles 85 and 86 apply directly and throughout the Community to all undertakings, whether public or private, on equal terms and to the same extent, apart from the exception provided in Article 90(2).[1]

The Commission and national administrative and judicial authorities are competent to apply these rules under the conditions set out in Council Regulation No 17[2].

20. Therefore, Articles 85 and 86 apply both to private enterprises and public telecommunications operators embracing telecommunications administrations and recognized private operating agencies, hereinafter called 'telecommunications organizations' (TOs).

TOs are undertakings within the meaning of Articles 85 and 86 to the extent that they exert an economic activity, for the manufacturing and/or sale of telecommunications equipment and/or for the provision of telecommunications services, regardless of other facts such as, for example, whether their nature is economic or not and whether they are legally distinct entities or form part of the State organization[3]. Associations of TOs are associations of undertakings within the meaning of Article 85, even though TOs participate as undertakings in organizations in which governmental authorities are also represented.

Articles 85 and 86 apply also to undertakings located outside the EEC when restrictive agreements are implemented or intended to be implemented or abuses are committed by those undertakings within the common market to the extent that trade between Member States is affected[4].

Competition restrictions justified under Article 90(2) or by essential requirements

21. The exception provided in Article 90(2) may apply both to State measures and to practices by undertakings. The Services Directive 90/388/EEC, in particular in Article 3, makes provision for a Member State to impose specified restrictions in the licences which it can grant for the provision of certain telecommunications services. These restrictions may be imposed under Article 90(2) or in order to ensure the compliance with State essential requirements specified in the Directive.

22. As far as Article 90(2) is concerned, the benefit of the exception provided by this provision may still be invoked for a TO's behaviour when it brings about competition

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[1] Article 90(2) states: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

[2] OJ 13, 21.2.1962, p. 204/62 (Special Edition 1959-62, p. 87).

[3] See Judgment of the Court 16.6.1987 in Case 118/85, *Commission* v *Italy* — Transparency of Financial Relations between Member States and Public Undertakings [1987] ECR 2599.

[4] See Judgment of the Court of 27.9.1988 in Joined Cases 89, 104, 114, 116, 117, 125, 126, 127, 129/85, *Ålström & Others* v *Commission* ('Woodpulp'), [1988] ECR 5193.

restrictions which its Member State did not impose in application of the Services Directive. However, the fact should be taken into account that in this case the State whose function is to protect the public and the general economic interest, did not deem it necessary to impose the said restrictions. This makes particularly hard the burden of proving that the Article 90(2) exception still applies to an undertaking's behaviour involving these restrictions.

23. The Commission infers from the case-law of the Court of Justice[1] that it has exclusive competence, under the control of the Court, to decide that the exception of Article 90(2) applies. The national authorities including judicial authorities can assess that this exception does not apply, when they find that the competition rules clearly do not obstruct the performance of the task of general economic interest assigned to undertakings. When those authorities cannot make a clear assessment in this sense they should suspend their decision in order to enable the Commission to find that the conditions for the application of that provision are fulfilled.

24. As to measures aiming at the compliance with 'essential requirements' within the meaning of the Services Directive, under Article 1 of the latter,[2] they can only be taken by Member States and not by undertakings.

The relevant market

25. In order to assess the effects of an agreement on competition for the purposes of Article 85 and whether there is a dominant position on the market for the purposes of Article 86, it is necessary to define the relevant market(s), product or service market(s) and geographic market(s), within the domain of telecommunications. In a context of fast-moving technology the relevant market definition is dynamic and variable.

(a) The product market

26. A product market comprises the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products in terms of price, usage and consumer preference. An examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.[3]

The Commission can precisely define these markets only within the framework of individual cases.

27. For the guidelines' purpose it can only be indicated that distinct service markets could exist at least for terrestrial network provision, voice communication, data communication and satellites. With regard to the equipment market, the following areas could all be taken into account for the purposes of market definition: public switches, private switches, trans-

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[1] Case 10/71, *Mueller-Hein* [1971] ECR 723; Judgment of 11.4.1989 in Case 66/86, *Ahmed Saeed* [1989] ECR 803.

[2] '... the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services.'

[3] Case 322/81, *Michelin v Commission*, 9 November 1983 [1983] ECR 3529, Ground 37.

mission systems and more particularly, in the field of terminals, telephone sets, modems, telex terminals, data transmission terminals and mobile telephones. The above indications are without prejudice to the definition of further narrower distinct markets. As to other services — such as value-added ones — as well as terminal and network equipment, it cannot be specified here whether there is a market for each of them or for an aggregate of them, or for both, depending upon the interchangeability existing in different geographic markets. This is mainly determined by the supply and the requirements in those markets.

28. Since the various national public networks compete for the installation of the telecommunication hubs of large users, market definition may accordingly vary. Indeed, large telecommunications users, whether or not they are service providers, locate their premises depending, *inter alia*, upon the features of the telecommunications services supplied by each TO. Therefore, they compare national public networks and other services provided by the TOs in terms of characteristics and prices.

29. As to satellite provision, the question is whether or not it is substantially interchangeable with terrestrial network provision:

(a) communication by satellite can be of various kinds: fixed service (point to point communication), multipoint (point to multipoint and multipoint to multipoint), one-way or two-way;

(b) satelites' main characteristics are: coverage of a wide geographic area not limited by national borders, insensitivity of costs to distance, flexibility and ease of networks deployment, in particular in the very small aperture terminals (VSAT) systems;

(c) satellites' uses can be broken down into the following categories: public switched voice and data transmission, business value-added services and broadcasting;

(d) a satellite provision presents a broad interchangeability with the terrestrial transmission link for the basic voice and data transmission on long distance. Conversely, because of its characteristics it is not substantially interchangeable but rather complementary to terrestrial transmission links for several specific voice and data transmission uses. These uses are: services to peripheral or less-developed regions, links between non-contiguous countries, reconfiguration of capacity and provision of routing for traffic restoration. Moreover, satellites are not currently substantially interchangeable for direct broadcasting and multipoint private networks for value-added business services. Therefore, for all those uses satellites should constitute distinct product markets. Within satellites, there may be distinct markets.

30. In mobile communications distinct services seem to exist such as cellular telephone, paging, telepoint, cordless voice and cordless data communication. Technical development permits providing each of these systems with more and more enhanced features. A consequence of this is that the differences between all these systems are progressively blurring and their interchangeability increasing. Therefore, it cannot be excluded that in future for certain uses several of those systems be embraced by a single product market. By the same token, it is likely that, for certain uses, mobile systems will be comprised in a single market with certain services offered on the public switched network.

(b) The geographic market

31. A geographic market is an area:

— where undertakings enter into competition with each other, and

— where the objective conditions of competition applying to the product or service in question are similar for all traders.[1]

32. Without prejudice to the definition of the geographic market in individual cases, each national territory within the EEC seems still to be a distinct geographic market as regards those relevant services or products, where:

— the customer's needs cannot be satisfied by using a non-domestic service,

— there are different regulatory conditions of access to services, in particular special or exclusive rights which are apt to isolate national territories,

— as to equipment and network, there are no Community-common standards, whether mandatory or voluntary, whose absence could also isolate the national markets. The absence of voluntary Community-wide standards shows different national customers' requirements.

However, it is expected that the geographic market will progressively extend to the EEC territory at the pace of the progressive realization of a single EEC market.

33. It has also to be ascertained whether each national market or a part thereof is a substantial part of the common market. This is the case where the services of the product involved represent a substantial percentage of volume within the EEC. This applies to all services and products involved.

34. As to satellite uplinks, for cross-border communication by satellite the uplink could be provided from any of several countries. In this case, the geographic market is wider than the national territory and may cover the whole EEC.

As to space segment capacity, the extension of the geographic market will depend on the power of the satellite and its ability to compete with other satellites for transmission to a given area, in other words on its range. This can be assessed only case by case.

35. As to services in general as well as terminal and network equipment, the Commission assesses the market power of the undertakings concerned and the result for EEC competition of the undertakings' conduct, taking into account their interrelated activities and interaction between the EEC and world markets. This is even more necessary to the extent that the EEC market is progressively being opened. This could have a considerable effect on the structure of the markets in the EEC, on the overall competitiveness of the undertakings operating in those markets, and in the long run, on their capacity to remain independent operators.

IV. APPLICATION OF ARTICLE 85

36. The Commission recalls that a major policy target of the Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992 was that of:

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[1] Judgment of 14.2.1978 in Case 27/76, *United Brands v Commission* [1978] ECR 207, Ground 44. In the telecommunications sector: Judgment of 5.10.1988 in Case 247/86, *Alsatel-Novasam* [1988] ECR 5987.

'... stimulating European cooperation at all levels, as far as compatible with Community competition rules, and particularly in the field of research and development, in order to secure a strong European presence on the telecommunications markets and to ensure the full participation of all Member States'.

In many cases Europe-wide services can be achieved by TOs' cooperation — for example, by ensuring interconnectivity and interoperability

(i) in those areas where exclusive or special rights for vision may continue in accordance with Community law and in particular with the Services Directive 90/388/EEC; and

(ii) in areas where optimum service wil require certain features of cooperation, such as so-called 'one-stop shopping' arrangements, i.e. the possibility of acquiring Europe-wide services at a single sales point.

The Council is giving guidance, by directives, decisions, recommendations and resolutions on those areas where Europe-wide services are most urgently needed: such as by recommendation 86/659/EEC on the coordinated introduction of the integrated services digital network (ISDN) in the European Community[1] and by recommendation 87/371/EEC on the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community.[2]

The Commission welcomes and fully supports the necessity of cooperation particularly in order to promote the development of trans-European services and strengthen the competitiveness of the EEC industry throughout the Community and in the world markets. However, this cooperation can only attain that objective if it complies with Community competition rules. Regulation No 17 provides well-defined clearing procedures for such cooperation agreements. The procedures foreseen by Regulation No 17 are:

(i) the application for negative clearance, by which the Commission certifies that the agreements are not caught by Article 85, because they do not restrict competition and/or do not affect trade between Member States; and

(ii) the notification of agreements caught by Article 85 in order to obtain an exemption under Article 85(3). Although if a particular agreement is caught by Article 85, an exemption can be granted by the Commission under Article 85(3), this is only so when the agreement brings about economic benefits — assessed on the basis of the criteria in the said paragraph 3 — which outweigh its restrictions on competition. In any event competition may not be eliminated for a substantial part of the products in question. Notification is not an obligation; but if, for reasons of legal certainty, the parties decide to request an exemption pursuant to Article 4 of Regulation No 17 the agreements may not be exempted until they have been notified to the Commission.

37. Cooperation agreements may be covered by one of the Commission block exemption Regulations or Notices.[3] In the first case the agreement is automatically exempted under Article 85(3). In the latter case, in the Commission's view, the agreement does not appreciably

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[1] OJ L 382, 31.12.1986, p. 36.
[2] OJ L 196, 17.7.1987, p. 81.
[3] Reported in *Competition Law in the European Communities*, Volume I (situation at 31.12.1989), published by the Commission.

restrict competition and trade between Member States and therefore does not justify a Commission action. In either case, the agreement does not need to be notified; but it may be notified in case of doubt. If the Commission receives a multitude of notifications of similar cooperation agreements in the telecommunications sector, it may consider whether a specific block exemption regulation for such agreements would be appropriate.

38. The categories of agreements[1] which seem to be typical in telecommunications and may be caught by Article 85 are listed below. This list provides examples only and is, therefore, not exhaustive. The Commission is thereby indicating possible competition restrictions which could be caught by Article 85 and cases where there may be the possibility of an exemption.

39. These agreements may affect trade between Member States for the following reasons:

(i) services other than services reserved to TOs, equipment and spatial segment facilities are traded throughout the EEC; agreements on these services and equipment are therefore likely to affect trade. Although at present cross-frontier trade is limited, there is potentially no reason to suppose that suppliers of such facilities will in future confine themselves to their national market;

(ii) as to reserved network services, one can consider that they also are traded throughout the Community. These services could be provided by an operator located in one Member State to customers located in other Member States, which decide to move their telecommunications hub into the first one because it is economically or qualitatively advantageous. Moreover, agreements on these matters are likely to affect EEC trade at least to the extent they influence the conditions under which the other services and equipment are supplied throughout the EEC.

40. Finally, to the extent that the TOs hold dominant positions in facilities, services and equipment markets, their behaviour leading to — and including the conclusion of — the agreements in question could also give rise to a violation of Article 86, if agreements have or are likely to have as their effect hindering the maintenance of the degree of competition still existing in the market or the growth of that competition, or causing the TOs to reap trading benefits which they would not have reaped if there had been normal and sufficiently effective competition.

A. *Horizontal agreements concerning the provision of terrestrial facilities and reserved services*

41. Agreements concerning terrestrial facilities (public switched network or leased circuits) or services (e.g. voice telephony for the general public) can currently only be concluded between TOs because of this legal regime providing for exclusive or special rights. The fact that the Services Directive recognizes the possibility for a Member State to reserve this provision to certain operators does not exempt those operators from complying with the competition rules in providing these facilities or services. These agreements may restrict competition within a Member State only where such exclusive rights are granted to more than one provider.

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[1] For simplification's sake this term stands also for 'decisions by associations' and 'concerted practices' within the meaning of Article 85.

42. These agreements may restrict the competition between TOs for retaining or attracting large telecommunications users for their telecommunications centres. Such 'hub competition' is substantially based upon favourable rates and other conditions as well as the quality of the services. Member States are not allowed to prevent such competition since the Directive allows only the granting of exclusive and special rights by each Member State in its own territory.

43. Finally, these agreements may restrict competition in non-reserved services from third party undertakings, which are supported by the facilities in question, for example if they impose discriminatory or inequitable trading conditions on certain users.

44. (aa) *Price agreements*: all TOs' agreements on prices, discounting or collection charges for international services, are apt to restrict the hub competition to an appreciable extent. Coordination on or prohibition of discounting could cause particularly serious restrictions. In situations of public knowledge such as exists in respect of the tariff level, discounting could remain the only possibility of effective price competition.

45. In several cases the Court of Justice and the Commission have considered price agreements among the most serious infringements of Article 85.[1]

While harmonization of tariff structures may be a major element for the provision of Community-wide services, this goal should be pursued as far as compatible with Community competition rules and should include definition of efficient pricing principles throughout the Community. Price competition is a crucial if not the principal, element of customer choice and is apt to stimulate technical progress. Without prejudice to any application for individual exemption that may be made, the justification of any price agreement in terms of Article 85(3) would be the subject of very rigorous examination by the Commission.

46. Conversely, where the agreements concern only the setting-up of common tariff structures or principles, the Commission may consider whether this would not constitute one of the economic benefits under Article 85(3) which outweigh the competition restriction. Indeed, this could provide the necessary transparency on tariff calculations and facilitate users' decisions about traffic flow or the location of headquarters or premises. Such agreements could also contribute to achieving one of the Green Paper's economic objectives — more cost-oriented tariffs.

In this connection, following the intervention of the Commission, the CEPT has decided to abolish recommendation PGT/10 on the general principles for the lease of international telecommunications circuits and the estblishment of private international networks. This recommendation recommended, *inter alia*, the imposition of a 30% surcharge or an access charge where third-party traffic was carried on an international telecommunications leased circuit, or if such a circuit was interconnected to the public telecommunications network. It also recommended the application of uniform tariff coefficients in order to determine the relative price level of international telecommunications leased circuits. Thanks to the CEPT's cooperation with the Commission leading to the abolition of the recommendation, competition between telecoms operators for the supply of international leased circuits is

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[1] PVC, Commission Decision 89/190/EEC, OJ L 74, 17.3.1989, p. 1; Case 123/85, *BNIC* v *Clair* [1985] ECR 391; Case 8/72, *Cementhandelaren* v *Commission* [1972] ECR 977; Polypropylene, Commission Decision 86/398/EEC (OJ L 230/1, 18.8.1986, p. 1) on appeal Case 179/86.

re-established, to the benefit of users, especially suppliers of non-reserved services. The Commission had found that the recommendation amounted to a price agreement between undertakings under Article 85 of the treaty which substantially restricted competition within the European Community.[1]

47. (ab) *Agreements on other conditions for the provision of facilities*

These agreements may limit hub competition between the partners. Moreover, they may limit the access of users to the network, and thus restrict third undertakings' competition as to non-reserved services. This applies especially to the use of leased circuits. The abolished CEPT recommendation PGT/10 on tariffs had also recommended restrictions on conditions of sale which the Commission objected to. These restrictions were mainly:

— making the use of leased circuits between the customer and third parties subject to the condition that the communication concern exclusively the activity for which the circuit has been granted,

— a ban on subleasing,

— authorization of private networks only for customers tied to each other by economic links and which carry out the same activity,

— prior consultation between the TOs for any approval of a private network and of any modification of the use of the network, and for any interconnection of private networks.

For the purpose of an exemption under Article 85(3), the granting of special conditions for a particular facility in order to promote its development could be taken into account among other elements. This could foster technologies which reduce the costs of services and contribute to increasing competitiveness of European industry structures. Naturally, the other Article 85(3) requirements should also be met.

48. (ac) *Agreements on the choice of telecommunications routes*

These may have the following restrictive effects:

(i) to the extent that they coordinate the TOs' choice of the routes to be set up in international services, they may limit competition between TOs as suppliers to users' communications hubs, in terms of investments and production, with a possible effect on tariffs. It should be determined whether this restriction of their business autonomy is sufficiently appreciable to be caught by Article 85. In any event, an argument for an exemption under Article 85(3) could be more easily sustained if common routes designation were necessary to enable interconnections and, therefore the use of a Europe-wide network;

(ii) to the extent that they reserve the choice of routes already set up to the TOs, and this choice concerns one determined facility, they could limit the use of other facilities and thus services provision possibly to the detriment of technological progress. By contrast, the choice of routes does not seem restrictive in principle to the extent that it constitutes a technical requirement.

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[1] See Commission press release IP(90) 188 of 6 March 1990.

49. (ad) *Agreements on the imposition of technical and quality standards on the services provided on the public network*

Standardization brings substantial economic benefits which can be relevant under Article 85(3). It facilitates *inter alia* the provision of pan-European telecommunications services. As set in the framework of the Community's approach to standardization, products and services complying with standards may be used Community-wide. In the context of this approach, European standards institutions have developed in this field (ETSI and CEN-Cenelec). National markets in the EC would be opened up and form a Community market. Service and equipment markets would be enlarged, hence favouring economies of scale. Cheaper products and services are thus available to users. Standardization may also offer an alternative to specifications controlled by undertakings dominant in the network architecture and in non-reserved services. Standardization agreements may, therefore, lessen the risk of abuses by these undertakings which could block the access to the markets for non-reserved services and for equipment. However, certain standardization agreements can have restrictive effects on competition: hindering innovation, freezing a particular stage of technical development, blocking the network access of some users/service providers. This restriction could be appreciable, for example when deciding to what extent intelligence will in future be located in the network or continue to be permitted in customers' equipment. The imposition of specifications other than those provided for by Community law could have restrictive effects on competition. Agreements having these effects are, therefore, caught by Article 85.

The balance between economic benefits and competition restrictions is complex. In principle, an exemption could be granted if an agreement brings more openness and facilitates access to the market, and these benefits outweigh the restrictions caused by it.

50. Standards jointly developed and/or published in accordance with the ONP procedures carry with them the presumption that the cooperating TOs which comply with those standards fulfil the requirement of open and efficient access (see the ONP Directive mentioned in paragraph 16). This presumption can be rebutted, *inter alia*, if the agreement contains restrictions which are not foreseen by Community law and are not indispensabe for the standardization sought.

51. One important Article 85(3) requirement is that users must also be allowed a fair share of the resulting benefit. This is more likely to happen when users are directly involved in the standardization process in order to contribute to deciding what products or services will meet their needs. Also, the involvement of manufacturers or service providers other than TOs seems a positive element for Article 85(3) purposes. However, this involvement must be open and widely representative in order to avoid competition restrictions to the detriment of excluded manufacturers or service providers. Licensing other manufacturers may be deemed necessary, for the purpose of granting an exemption to these agreements under Article 85(3).

52. (ae) *Agreements foreseeing special treatment for TOs' terminal equipment or other companies' equipment for the interconnection or interoperation of terminal equipment with reserved services and facilities*

53. (af) *Agreements on the exchange of information*

A general exchange of information could indeed be necessary for the good functioning of international telecommunications services, and for cooperation aimed at ensuring intercon-

nectivity or one-stop shopping and billing. It should not be extended to competition-sensitive information, such as certain tariff information which constitutes business secrets, discounting, customers and commercial strategy, including that concerning new products. The exchange of this information would affect the autonomy of each TO's commercial policy and it is not necessary to attain the said objectives.

B. *Agreements concerning the provision of non-reserved services and terminal equipment*

54. Unlike facilities markets, where only the TOs are the providers, in the services markets the actual or potential competitors are numerous and include, besides the TOs, international private companies, computer companies, publishers and others. Agreements on services and terminal equipment could therefore be concluded between TOs, between TOs and private companies, and between private companies.

55. The liberalizing process has led mostly to stragegic agreements between (i) TOs, and (ii) TOs and other companies. These agreements usually take the form of joint ventures.

56. (ba) *Agreements between TOs*

The scope of these agreements, in general, is the provision by each partner of a valaue-added service including the management of the service. Those agreements are mostly based on the 'one-stop shopping' principle, i.e. each partner offers to the customer the entire package of services which he needs. These managed services are called managed data network services (MDNS). An MDNS essentially consists of a broad package of services including facilities, value-added services and management. The agreements may also concern such basic services as satellite uplink.

57. These agreements could restrict competition in the MDNS market and also in the markets for a service or a group of services included in the MDNS:

(i) between the participating TOs themselves; and

(ii) *vis-à-vis* other actual or potential third-party providers.

58. (i) *Restrictions of competition between TOs*

Cooperation between TOs could limit the number of potential individual MDNS offered by each participating TO.

The agreements may affect competition at least in certain aspects which are contemplated as specific examples of prohibited practices under Article 85(1)(a) to (c), in the event that:

— they fix or recommend, or at least lead (through the exchange of price information) to coordination of, prices charged by each participant to customers,

— they provide for joint specification of MDNS products, quotas, joint delivery, specification of customers' systems; all this would amount to controlling production, markets, technical development and investments,

— they contemplate joint purchase of MDNS hardware and/or software, which would amount to sharing markets or sources of supply.

59. (ii) Restrictive effects on third party undertakings

Third parties' market entry could be precluded or hampered if the participating TOs:

— refuse to provide facilities to third party suppliers of services,

— apply usage restrictions only to third parties and not to themselves (e.g. a private provider is precluded from placing multiple customers on a leased line facility to obtain lower unit costs),

— favour their MDNS offerings over those of private suppliers with respect to access, availability, quality and price of leased circuits, maintenance and other services,

— apply especially low rates to their MDNS offerings, cross-subsidizing them with higher rates for monopoly services.

Examples of this could be the restrictions imposed by the TOs on private network operators as to the qualifications of the users, the nature of the messages to be exchanged over the network or the use of international private leased circuits.

60. Finally, as the participating TOs hold, individually or collectively, a dominant position for the creation and the exploitation of the network in each national market, any restrictive behaviour described in paragraph 59 could amount to an abuse of a dominant position under Article 86 (see V below).

61. On the other hand, agreements between TOs may bring economic benefits which could be taken into account for the possible granting of an exemption under Article 85(3). *Inter alia*, the possible benefits could be as follows:

— a European-wide service and 'one-stop shopping' could favour business in Europe. Large multinational undertakings are provided with a European communication service using only a single point of contact,

— the cooperation could lead to a certain amount of European-wide standardization even before further EEC legislation on this matter is adopted,

— the cooperation could bring a cost reduction and consequently cheaper offerings to the advantage of consumers,

— a general improvement of public infrastructure could arise from a joint service provision.

62. Only by notification of the cases in question, in accordance with the appropriate procedures under Regulation No 17, will the Commission be able, where requested, to ascertain, on the merits, whether these benefits outweigh the competition restrictions. But in any event, restrictions on access for third parties seem likely to be considered as not indispensable and to lead to the elimination of competition for a substantial part of the products and services concerned within the meaning of Article 85(3), thus excluding the possibility of an exemption. Moreover, if an MDNS agreement strengthens appreciably a dominant position which a participating TO holds in the market for a service included in the MDNS, this is also likely to lead to a rejection of the exemption.

63. The Commission has outlined the conditions for exempting such forms of cooperation in a case concerning a proposed joint venture between 22 TOs for the provision of a Europe-wide MDNS, later abandoned for commercial reasons,[1] the Commission considered that the MDNS project presented the risks of restriction of competition between the operators themselves and private service suppliers but it accepted that the project also offered economic benefits to telecommunications users such as access to Europe-wide services through a single operator. Such cooperation could also have accelerated European standardization, reduced costs and increased the quality of the services. The Commission had informed the participants that approval of the project would have to be subject to guarantees designed to prevent undue restriction of competition in the telecommunications services markets, such as discrimination against private services suppliers and cross-subsidization. Such guarantees would be essential conditions for the granting of an exemption under the competition rules to cooperation agreements involving TOs. The requirement for an appropriate guarantee of non-discrimination and non-cross-subsidization will be specified in individual cases according to the examples of discrimination indicated in Section V below concerning the application of Article 86.

64. (bb) *Agreements between TOs and other service providers*

Cooperation between TOs and other operators is increasing in telecommunications services. It frequently takes the form of a joint venture. The Commission recognizes that it may have beneficial effects. However, this cooperation may also adversely affect competition and the opening-up of services markets. Beneficial and harmful effects must therefore be carefully weighed.

65. Such agreements may restrict competition for the provision of telecommunications services:

(i) between the partners; and

(ii) from third parties.

66. (i) Competition between the partners may be restricted when these are actual or potential competitors for the relevant telecommunications service. This is generally the case, even when only the other partners and not the TOs are already providing the services. Indeed, TOs may have the required financial capacity, technical and commercial skills to enter the market for non-reserved services and could reasonably bear the technical and financial risk of doing it. This is also generally the case as far as private operators are concerned, when they do not yet provide the service in the geographical market covered by the cooperation, but do provide this service elsewhere. They may therefore be potential competitors in this geographic market.

67. (ii) The cooperation may restrict competition from third parties because:

— there is an appreciable risk that the participant TO, i.e. the dominant network provider, will give more favourable network access to its cooperation partners than to other service providers in competition with the partners,

— potential competitors may refrain from entering the market because of this objective risk or, in any event, because of the presence on the market-place of a cooperation involving the monopolist for the network provision. This is especially the case when market entry

[1] Commission press release IP(89) 948 of 14.12.1989.

barriers are high: the market structure allows only few suppliers and the size and the market power of the partners are considerable.

68. On the other hand, the cooperation may bring economic benefits which outweigh its harmful effect and therefore justify the granting of an exemption under Article 85(3). The economic benefits can consist, *inter alia*, of the rationalization of the production and distribution of telecommunications services, in improvements in existing services or development of new services, or transfer of technology which improves the efficiency and the competitiveness of the European industrial structures.

69. In the absence of such economic benefits a complementarity between partners, i.e. between the provision of a reserved activity and that of a service under competition, is not a benefit as such. Considering it as a benefit would be equal to justifying an involvement through restrictive agreements of TOs in any non-reserved service provision. This would be to hinder a competitive structure in this market.

In certain cases, the cooperation could consolidate or extend the dominant position of the TOs concerned to a non-reserved services market, in violation of Article 86.

70. The imposition or the proposal of cooperation with the service provider as a condition for the provision of the network may be deemed abusive (see paragraph 98(vi)).

71. (bc) *Agreements between service providers other than TOs*

The Commission will apply the same principles indicated in (ba) and (bb) above also to agreements between private service providers, *inter alia*, agreements providing quotas, price fixing, market and/or customer allocation. In principle, they are unlikely to qualify for an exemption. The Commission will be particularly vigilant in order to avoid cooperation on services leading to a strengthening of dominant positions of the partners or restricting competition from third parties. There is a danger of this occuring for example when an undertaking is dominant with regard to the network architecture and its proprietary standard is adopted to support the service contemplated by the cooperation. This architecture enabling interconnection between computer systems of the partners could attract some partners to the dominant partner. The dominant position for the network architecture will be strengthened and Article 86 may apply.

72. In any exemption of agreements between TOs and other services and/or equipment providers, or between these providers, the Commission will require from the partners appropriate guarantees of non-cross-subsidization and non-discrimination. The risk of cross-subsidization and discrimination is higher when the TOs or the other partners provide both services and equipment, whether within or outside the Community.

C. *Agreements on research and development (R & D)*

73. As in other high technology-based sectors, R & D in telecommunications is essential for keeping pace with technological progress and being competitive on the market-place to the benefit of users. R & D requires more and more important financial, technical and human resources which only few undertakings can generate individually. Cooperation is therefore crucial for attaining the above objectives.

74. The Commission has adopted a Regulation for the block exemption under Article 85(3) of R & D agreements in all sectors, including telecommunications[1].

[1] Regulation (EEC) No 418/85, OJ L 53, 22.2.1985, p. 5.

75. Agreements which are not covered by this Regulation (or the other Commission block exemption Regulations) could still obtain an individual exemption from the Commission if Article 85(3) requirements are met individually. However, not in all cases do the economic benefits of an R & D agreement outweigh its competition restrictions. In telecommunications, one major esset, enabling access to new markets, is the launch of new products or services. Competition is based not only on price, but also on technology. R & D agreements could constitute the means for powerful undertakings with high market shares to avoid or limit competition from more innovative rivals. The risk of excessive restrictions of competition increases when the cooperation is extended from R & D to manufacturing and even more to distribution.

76. The importance which the Commission attaches to R & D and innovation is demonstrated by the fact that it has launched several programmes for this purpose. The joint companies' activities which may result from these programmes are not automatically cleared or exempted as such in all aspects from the application of the competition rules. However, most of those joint activities may be covered by the Commission's block exemption regulations. If not, the joint activities in question may be exempted, where required, in accordance with the appropriate criteria and procedures.

77. In the Commission's experience joint distribution linked to joint R & D which is not covered by the Regulation on R & D does not play the crucial role in the exploitation of the results of R & D. Nevertheless, in individual cases, provided that a competitive environment is maintained, the Commission is prepared to consider full-range cooperation even between large firms. This should lead to improving the structure of European industry and thus enable it to meet strong competition in the world market place.

V. APPLICATION OF ARTICLE 86

78. Article 86 applies when:

(i) the undertaking concerned holds an individual or a joint dominant position;

(ii) it commits an abuse of that dominant position; and

(iii) the abuse may affect trade between Member States.

Dominant position

79. In each national market the TOs hold individually or collectively a dominant position for the creation and the exploitation of the network, since they are protected by exclusive or special rights granted by the State. Moreover, the TOs hold a dominant position for some telecommunications services, in so far as they hold exclusive or special rights with respect to those services.[1]

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[1] Commission Decision 82/861/EEC in the 'British Telecommunications' case, point 26, OJ L 360, 21.12.1982, p. 36, confirmed in the Judgment of 20.3.1985 in Case 41/83, *Italian Republic* v *Commission* [1985] ECR 873, generally known as 'British Telecom'.

80. The TOs may also hold dominant positions on the markets for certain equipment or services, even though they no longer hold any exclusive rights on those markets. After the elimination of these rights, they may have kept very important market shares in this sector. When the market share in itself does not suffice to give the TOs a dominant position, it could do it in combination with the other factors such as the monopoly for the network or other related services and a powerful and wide distribution network. As to the equipment, for example terminal equipment, even if the TOs are not involved in the equipment manufacturing or in the services provision, they may hold a dominant position in the market as distributors.

81. Also, firms other than TOs may hold individual or collective dominant positions in markets where there are no exclusive rights. This may be the case especially for certain non-reserved services because of either the market shares alone of those undertakings, or because of a combination of several factors. Among these factors, in addition to the market shares, two of particular importance are the technological advance and the holding of the information concerning access protocols or interfaces necessary to ensure interoperability of software and hardware. When this information is covered by intellectual property rights this is a further factor of dominance.

82. Finally, the TOs hold, individually or collectively, dominant positions in the demand for some telecommunication equipment, works or software services. Being dominant for the network and other services provisions they may account for a purchaser's share high enough to give them dominance as to the demand, i.e. making suppliers dependent on them. Dependence could exist when the supplier cannot sell to other customers a substantial part of its production or change a production. In certain national markets, for example in large switching equipment, big purchasers such as the TOs face big suppliers. In this situation, it should be weighed up case by case whether the supplier or the customer position will prevail on the other to such an extent as to be considered dominant under Article 86.

With the liberalization of services and the expansion of new forces on the services markets, dominant positions of undertakings other than the TOs may arise for the purchasing of equipment.

Abuse

83. Commission's activity may concern mainly the following broad areas of abuses:

A. *TOs' abuses:* in particular, they may take advantage of their monopoly or at least dominant position to acquire a foothold or to extend their power in non-reserved neighbouring markets, to the detriment of competitors and customers.

B. *Abuses by undertaking other than TOs:* these may take advantage of the fundamental information they hold, whether or not covered by intellectual property rights, with the object and/or effect of restricting competition.

C. *Abuses of a dominant purchasing position:* for the time being this concerns mainly the TOs, especially to the extent that they hold a dominant position for reserved activities in the national market. However, it may also increasingly concern other undertakings which have entered the market.

A. *TOs' abuses*

84. The Commission has recognized in the Green Paper the central role of the TOs, which justifies the maintenance of certain monopolies to enable them to perform their public task. This public task consists in the provision and exploitation of a universal network or, where appropriate, universal service, i.e. one having general coverage and available to all users (including service providers and the TOs themselves) upon request on reasonable and non-discriminatory conditions.

This fundamental obligation could justify the benefit of the exception provided in Article 90(2) under certain circumstances, as laid down in the Services Directive.

85. In most cases, however, the competition rules, far from obstructing the fulfilment of this obligation, contribute to ensuring it. In particular, Article 86 can apply to behaviour of dominant undertakings resulting in a refusal to supply, discrimination, restrictive tying clauses, unfair prices or other inequitable conditions.

If one of these types of behaviour occurs in the provision of one of the monopoly services, the fundamental obligation indicated above is not performed. This could be the case when a TO tries to take advantage of its monopoly for certain services (for instance: network provision) in order to limit the competition they have to face in respect of non-reserved services, which in turn are supported by those monopoly services.

It is not necessary for the purpose of the application of Article 86 that competition be restricted as to a service which is supported by the monopoly provision in question. It would suffice that the behaviour results in an appreciable restriction of competition in whatever way. This means that an abuse may occur when the company affected by the behaviour is not a service provider but an end user who could himself be disadvantaged in competition in the course of his own business.

86. The Court of Justice has set out this fundamental principle of competition in telecommunications in one of its judgments.[1] An abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

The Commission believes that this principle applies, not only when a dominant undertaking monopolizes other markets, but also when by anti-competitive means it extends its activity to other markets.

Hampering the provision of non-reserved services could limit production, markets and above all the technical progress which is a key factor of telecommunications. The Commission has already shown these adverse effects of usage restrictions on monopoly provision in its decision in the 'British Telecom' case.[2] In this Decision it was found that the restrictions imposed by British Telecom on telex and telephone networks usage, namely on the transmission of international messages on behalf of third parties:

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[1] Case 311/84, *Centre belge d'études de marché Télémarketing (CBEM) SA* v *Compagnie luxembourgeoise de télédiffusion SA and Information Publicité Benelux SA*, 3 October 1985 [1985] ECR 3261, Grounds 26 and 27.

[2] See footnote 1, page 243.

(i) limited the activity of economic operators to the detriment of technological progress;

(ii) discriminated against these operators, thereby placing them at a competitive disadvantage *vis-à-vis* TOs not bound by these restrictions; and

(iii) made the conclusion of the contracts for the supply of telex circuits subject to acceptance by the other parties of supplementary obligations which had no connection with such contracts. These were considered abuses of a dominant position identified respectively in Article 86 (b), (c) and (d).

This could be done:

(a) as above, by refusing or restricting the usage of the service provided under monopoly so as to limit the provision of non-resrved services by third parties; or

(b) by predatory behaviour, as a result of cross-subsidization.

87. The separation of the TOs' regulatory power from their business activity is a crucial matter in the context of the application of Article 86. This separation is provided in the Article 90 Directives on terminals and on services mentioned in Note 1 page 228.

(a) Usage restrictions

88. Usage restrictions on provisions of reserved services are likely to correspond to the specific examples of abuses indicated in Article 86. In particular:

— they may limit the provision of telecommunications services in free competition, the investments and the technical progress, to the prejudice of telecommunications consumers (Article 86 (b)),

— to the extent that these usage restrictions are not applied to all users, including the TOs themselves as users, they may result in discrimination against certain users, placing them at a competitive disadvantage (Article 86 (c)),

— they may make the usage of the reserved services subject to the acceptance of obligations which have no connection with this usage (Article 86 (d)).

89. The usage restrictions in question mainly concern public networks (public switched telephone network (PSTN) or public switched data networks (PSDN)) and especially leased circuits. They may also concern other provisions such as satellite uplink, and mobile communication networks. The most frequent types of behaviour are as follows:

(i) *Prohibition imposed by TOs on third parties:*

(a) to connect private leased circuits by means of concentrator, multiplexer or other equipment to the public switched network; and/or

(b) to use private leased circuits for providing services, to the extent that these services are not reserved, but under competition.

90. To the extent that the user is granted a lincence by State regulatory authorities under national law in compliance with EEC law, these prohibitions limit the user's freedom of access to the leased circuits, the provision of which is a public service. Moreover, it discriminates between users, depending upon the usage (Article 86(c)). This is one of the

most serious restrictions and could substantially hinder the development of international telecommunications services (Article 86(b)).

91. When the usage restriction limits the provision of non-reserved service in competition with that provided by the TO itself the abuse is even more serious and the principles of the abovementioned 'Télémarketing' judgement[1] apply.

92. In individual cases, the Commission will assess whether the service provided on the leased circuit is reserved or not, on the basis of the Community regulatory acts interpreted in the technical and economic context of each case. Even though a service could be considered reserved according to the law, the fact that a TO actually prohibits the usage of the eased circuit only to some users and not to others could constitute a discrimination under Article 86(c).

93. The Commission has taken action in respect of the Belgian Régie des télégraphes et téléphones after receiving a complaint concerning alleged abuse of dominant position from a private supplier of value-added telecommunications services relating to the conditions under which telecommunications circuits were being leased. Following discussions with the Commission, the RTT authorized the private supplier concerned to use the leased telecommunications circuits subject to no restrictions other than that they should not be used for the simple transport of data.

Moreover, pending the possible adoption of new rules in Belgium, and without prejudice to any such rules, the RTT undertook that all its existing and potential clients for leased telecommunications circuits to which third parties may have access shall be governed by the same conditions as those which were agreed with the private sector supplier mentioned above.[2]

(ii) *Refusal by TOs to provide reserved services (in particular the network and leased circuits) to third parties*

94. Refusal to supply has been considered an abuse by the Commission and the Court of Justice.[3] This behaviour would make it impossible or at least appreciably difficult for third parties to provide non-reserved services. This, in turn, would lead to a limitation of services and of technical development (Article 86(b)) and, if applied only to some users, result in discrimination (Article 86(c)).

(iii) *Imposition of extra charges or other special conditions for certain usages of reserved services*

95. An example would be the imposition of access charges to leased circuits when they are connected to the public switched network or other special prices and charges for services provision to third parties. Such access charges may discriminate between users of the same service (leased circuits provision) depending upon the usage and result in imposing unfair trading conditions. This will limit the usage of leased circuits and finally non-reserved service provision. Conversely, it does not constitute an abuse provided that it is shown, in

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[1] See footnote 1, page 245.
[2] Commission Press release IP(90) 67 of 29.1.1990.
[3] Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223; *United Brands* v *Commission* (See footnote, page 233).

each specific case, that the access charges correspond to costs which are entailed directly for the TOs for the access in question. In this case, access charges can be imposed only on an equal basis to all users, including TOs themselves.

96. Apart from these possible additional costs which should be covered by an extra charge, the interconnection of a leased circuit to the public switched network is already remunerated by the price related to the use of this network. Certainly, a leased circuit can represent a subjective value for a user depending on the profitability of the enhanced service to be provided on that leased circuit. However, this cannot be a criterion on which a dominant undertaking, and above all a public service provider, can base the price of this public service.

97. The Commission appreciates that the substantial difference between leased circuits and the public switched network causes a problem of obtaining the necessary revenues to cover the costs of the switched network. However, the remedy chosen must not be contrary to law, i.e. the EEC Treaty, as discriminatory pricing between customers would be.

(iv) *Discriminatory price or quality of the service provided*

98. This behaviour may relate, *inter alia*, to tariffs or to restrictions or delays in connection to the public switched network or leased circuits provision, in installation, maintenance and repair, in effecting interconnection of systems or in providing information concerning network planning, signalling protocols, technical standards and all other information necessary for an appropriate interconnection and interoperation with the reserved service and which may affect the interworking of competitive services or terminal equipment offerings.

(v) *Tying the provision of the reserved service to the supply by the TOs or others of terminal equipment to be interconnected or interoperated, in particular through imposition, pressure, offer of special prices or other trading conditions for the reserved service linked to the equipment*

(vi) *Tying the provision of the reserved service to the agreement of the user to enter into cooperation with the reserved service provider himself as to the non-reserved service to be carried on the network*

(vii) *Reserving to itself for the purpose of non-reserved service provision or to other service providers information obtained in the exercise of a reserved service in particular information concerning users of a reserved services providers more favourable conditions for the supply of this information*

This latter information could be important for the provision of services under competition to the extent that it permits the targeting of customers of those services and the definition of business strategy. The behaviour indicated above could result in a discrimination against undertakings to which the use of this information is denied in violation of Article 86(c). The information in question can only be disclosed with the agreement of the users concerned and in accordance with relevant data protection legislation (see the proposal for a Council Directive concerning the protection of personal data and privacy in the context of public digital telecommunications networks, in particular the integrated services digital network (ISDN) and public digital mobile networks).[1]

[1] Commission document COM(90) 314 of 13.9.1990.

(viii) *Imposition of unneeded reserved services by supplying reserved and/or non-reserved services when the former reserved services are reasonably separable from the others*

99. The practices under (v) (vi) (vii) and (viii) result in applying conditions which have no connection with the reserved service, contravening Article 86(d).

100. Most of these practices were in fact identified in the Services Directive as restrictions on the provision of services within the meaning of Articles 59 and 86 of the Treaty brought about by State measures. They are therefore covered by the broader concept of 'restrictions' which under Article 6 of the Directive have to be removed by Member States.

101. The Commission believes that the Directives on terminals and on services also clarify some principles of application of Articles 85 and 86 in the sector.

The Services Directive does not apply to important sectors such as mobile communications and satellites; however, competition rules apply fully to these sectors. Moreover, as to the services covered by the Directive it will depend very much on the degree of precision of the licences given by the regulatory body whether the TOs still have a discretionary margin for imposing conditions which should be scrutinized under competition rules. Not all the conditions can be regulated in licences: consequently, there could be room for discretionary action. The application of competition rules to companies will therefore depend very much on a case-by-case examination of the licences. Nothing more than a class licence can be required for terminals.

(b) Cross-subsidization

102. Cross-subsidization means that an undertaking allocates all or part of the costs of its activity in one product or geographic market to its activity in another product or geographic market. Under certain circumstances, cross-subsidization in telecommunications could distort competition, i.e. lead to beating other competitors with offers which are made possible not by efficiency and performance but by artificial means such as subsidies. Avoiding cross-subsidization leading to unfair competition is crucial for the development of service provision and equipment supply.

103. Cross-subsidization does not lead to predatory pricing and does not restrict competition when it is the costs of reserved activities which are subsidized by the revenue generated by other reserved activities since there is no competition possible as to these activities. This form of subsidization is even necessary, as it enbables the TOs holders of exclusive rights to perform their obligation to provide a public service universally and on the same conditions to everybody. For instance, telephone provision in unprofitable rural areas is subsidized through revenues from telephone provision in profitable urban areas or long-distance calls. The same could be said of subsidizing the provision of reserved services through revenues generated by activities under competition. The application of the general principle of cost-orientation should be the ultimate goal, in order, *inter alia*, to ensure that prices are not inequitable as between users.

104. Subsidizing activities under competition, whether concerning services or equipment, by allocating their costs to monopoly activities, however, is likely to distort competition in violation of Article 86. It could amount to an abuse by an undertaking holding a dominant position within the Community. Moreover, users of activities under monopoly have to bear unrelated costs for the provision of these activities. Cross-subsidization can also exist

between monopoly provision and equipment manufacturing and sale. Cross-subsidization can be carried out through:

— funding the operation of the activities in question with capital remunerated substantially below the market rate,

— providing for those activities premises, equipment, experts and/or services with a remuneration substantially lower than the market price.

105. As to funding through monopoly revenues or making available monopoly material and intellectual means for the starting-up of new activities under competition, this constitutes an investment whose costs should be allocated to the new activity. Offering the new product or service should normally include a reasonable remuneration of such investment in the long run. If it does not, the Commission will assess the case on the basis of the remuneration plans of the undertaking concerned and of the economic context.

106. Transparency in the TOs' accounting should enable the Commission to ascertain whether there is cross-subsidization in the cases in which this question arises. The ONP Directive provides in this respect for the definition of harmonized tariff principles which should lessen the number of these cases.

This transparency can be provided by an accounting system which ensures the fully proportionate distribution of all costs between reserved and non-reserved activities. Proper allocation of costs is more easily ensured in cases of structural separation, i.e. creating distinct entities for running each of these two categories of activities.

An appropriate accounting system approach should permit the identification and allocation of all costs between the activities which they support. In this system all products and services should bear proportionally all the relevant costs, including costs of research and development, facilities and overheads. It should enable the production of recorded figures which can be verified by accountants.

107. As indicated above (paragraph 59), in cases of cooperation agreements involving TOs a guarantee of no cross-subsidization is one of the conditions required by the Commission for exemption under Article 85(3). In order to monitor properly compliance with that guarantee, the Commission now envisages requesting the parties to ensure an appropriate accounting system as described above, the accounts being regularly submitted to the Commission. Where the accounting method is chosen, the Commission will reserve the possibility of submitting the accounts to independent audit, especially if any doubt arises as to the capability of the system to ensure the necessary transparency or to detect any cross-subsidization. If the guarantee cannot be properly monitored, the Commission may withdraw the exemption.

108. In all other cases, the Commission does not envisage requiring such transparency of the TOs. However, if in a specific case there are substantial elements converging in indicating the existence of an abusive cross-subsidization and/or predatory pricing, the Commission could establish a presumption of such cross-subsidization and predatory pricing. An appropriate separate accounting system could be important in order to counter this presumption.

109. Cross-subsidization of a reserved activity by a non-reserved one does not in principle restrict competition. However, the application of the exception provided in Article 90(2) to

this non-reserved activity could not as a rule be justified by the fact that the financial viability of the TO in question rests on the non-reserved activity. Its financial viability and the performance of its task of general economic interest can only be ensured by the State where appropriate by the granting of an exclusive or special right and by imposing restrictions on activities competing with the reserved ones.

110. Also cross-subsidization by a public or private operator outside the EEC may be deemed abusive in terms of Article 86 if that operator holds a dominant position for equipment or non-reserved services within the EEC. The existence of this dominant position, which allows the holder to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers, will be assessed in the light of all elements in the EEC and outside.

B. *Abuses by undertakings other than the TOs*

111. Further to the liberalization of services, undertakings other than the TOs may increasingly extend their power to acquire dominant positions in non-reserved markets. They may already hold such a position in some services markets which had not been reserved. When they take advantage of their dominant position to restrict competition and to extend their power, Article 86 may also apply to them. The abuses in which they might indulge are broadly similar to most of those previously described in relation to the TOs.

112. Infringements of Article 86 may be committed by the abusive exercise of industrial property rights in relation with standards, which are of crucial importance for telecommunications. Standards may be either the results of international standardization, or *de facto* standards and the property of undertakings.

113. Producers of equipment or suppliers of services are dependent on proprietary standards to ensure the interconnectivity of their computer resources. An undertaking which owns a dominant network architecture may abuse its dominant position by refusing to provide the necessary information for the interconnection of other architecture resources to its architecture products. Other possible abuses — similar to those indicated as to the TOs — are, *inter alia*, delays in providing the information, discrimination in the quality of the information, discriminatory pricing or other trading conditions, and making the information provision subject to the acceptance by the producer, supplier or user of unfair trading conditions.

114. On 1 August 1984, the Commission accepted a unilateral undertaking from IBM to provide other manufacturers with the technical interface information needed to permit competitive products to be used with IBM's then most powerful range of computers, the System/370. The Commission thereupon suspended the proceedings under Article 86 which it had initiated against IBM in December 1980. The IBM undertaking[1] also contains a commitment relating to SNA formats and protocols.

115. The question how to reconcile copyrights on standards with the competition requirements is particularly difficult. In any event, copyright cannot be used unduly to restrict competition.

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[1] Reproduced in full in *Bulletin of the European Communities* 10-1984 (point 3.4.1). As to its continued application, see Commission press release No IP(88) 814 of 15 December 1988.

C. Abuses of dominant purchasing position

116. Article 86 also applies to behaviour of undertakings holding a dominant purchasing position. The examples of abuses indicated in that Article may therefore also concern that behaviour.

117. The Council Directive 90/531/EEC[1] based on Articles 57(2), 66, 100a and 113 of the EEC Treaty on the procurement procedures of entities operating in *inter alia* the telecommunications sector regulates essentially:

(i) procurement procedures in order to ensure on a reciprocal basis non-discrimination on the basis of natinality; and

(ii) for products or services for use in reserved markets, not in competitive markets. That Directive, which is addressed to States, does not exclude the application of Article 86 to the purchasing of products within the scope of the Directive. The Commission will decide case by case how to ensure that these different sets of rules are applied in a coherent manner.

118. Furthermore, both in reserved and competitive markets, practices other than those covered by the Directive may be established in violation of Article 86. One example is taking advantage of a dominant purchasing position for imposing excessively favourable prices or other trading conditions, in comparison with other purchasers and suppliers (Article 86(a)). This could result in discrimination under Article 86(c). Also obtaining, whether or not through imposition, an exclusive distributorship for the purchased product by the dominant purchaser may constitute an abusive extension of its economic power to other markets (see 'Télémarketing' Court judgment (See footnote 1, page 245).

119. Another abusive practice could be that of making the purchase subject to licensing by the supplier of standards for the product to be purchased or for other products, to the purchaser itself, or to other suppliers (Article 86(d)).

120. Moreover, even in competitive markets, discriminatory procedures on the basis of nationality may exist, because national pressures and traditional links of a non-economic nature do not always disappear quickly after the liberalization of the markets. In this case, a systematic exclusion or considerably unfavourable treatment of a supplier, without economic necessity, could be examined under Article 86, especially (b) (limitation of outlets) and (c) (discrimination). In assessing the case, the Commission will substantially examine whether the same criteria for awarding the contract have been followed by the dominant undertaking for all suppliers. The Commission will normally take into account criteria similar to those indicated in Article 27(1) of the Directive.[2] The purchases in question being outside the scope of the Directive, the Commission will not require that transparent purchasing procedures be pursued.

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[1] OJ L 297, 29.10.1990, p. 1.

[2] Article 27(1)(a) and (b). The criteria on which the contracting entities shall base the award of the contracts shall be: (a) the most economically advantageous tender involving various criteria such as delivery date, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales services and technical assistance, commitments with regard to spare parts, security of supplies and price; or (b) the lowest price only.

D. *Effect on trade between Member States*

121. The same principle outlined regarding Article 85 applies here. Moreover, in certain circumstances, such as the case of the elimination of a competitor by an undertaking holding a dominant position, although trade between Member States is not directly affected, for the purposes of Article 86 it is sufficient to show that there will be repercussions on the competitive structure of the common market.

VI. APPLICATION OF ARTICLES 85 AND 86 IN THE FIELD OF SATELLITES

122. The development of this sector is addressed globally by the Commission in the 'Green Paper on a common approach in the field of satellite communications in the European Community' of 20 November 1990 (Doc. COM(90) 490 final). Due to the increasing importance of satellites and the particular uncertainty among undertakings as to the application of competition rules to individual cases in this sector, it is appropriate to address the sector in a distinct section in these guidelines.

123. State regulations on satellites are not covered by the Commission Directives under Article 90 of the EEC Treaty respectively on terminals and services mentioned above except in the Directive on terminals which contemplates receive-only satellite stations not connected to a public network. The Commission's position on the regulatory framework compatible with the Treaty competition rules is stated in the Commission Green Paper on satellites mentioned above.

124. In any event the Treaty competition rules fully apply to the satellites domain, *inter alia*, Articles 85 and 86 to undertakings. Below is indicated how the principles set out above, in particular in Sections IV and V, apply to satellites.

125. Agreements between European TOs in particular within international conventions may play an important role in providing European satellites systems and a harmonious development of satellite services throughout the Community. These benefits are taken into consideration under competition rules, provided that the agreements do not contain restrictions which are not indispensable for the attainment of these objectives.

126. Agreements between TOs concerning the operation of satellite systems in the broadest sense may be caught by Article 85. As to space segment capacity, the TOs are each other's competitors, whether actual or potential. In pooling together totally or partially their supplies of space segment capacity they may restrict competition between themselves. Moreover, they are likely to restrict competiton *vis-à-vis* third parties to the extent that their agreements contain provisions with this object or effect: for instance provisions limiting their supplies in quality and/or quantity, or restricting their business autonomy by imposing directly or indirectly a coordination between these third parties and the parties to the agreements. It should be examined whether such agreements could qualify for an exemption under Article 85(3) provided that they are notified. However, restrictions on third parties' ability to compete are likely to preclude such an exemption. It should also be examined whether such agreements strengthen any individual or collective dominant position of the parties, which also would exclude the granting of an exemption. This could be the case in particular if the agreement provides that the parties are exclusive distributors of the space segment capacity provided by the agreement.

127. Such agreements between TOs could also restrict competition as to the uplink with respect to which TOs are competitors. In certain cases the customer for satellite communication has the choice between providers in several countries, and his choice will be substantially determined by the quality, price and other sales conditions of each provider. This choice will be even ampler since uplink is being progressively liberalized and to the extent that the application of EEC rules to State legislations will open up the uplink markets. Community-wide agreements providing directly or indirectly for coordination as to the parties' uplink provision are therefore caught by Article 85.

128. Agreements between TOs and private operators on space segment capacity may be also caught by Article 85, as that provision applies, *inter alia*, to cooperation, and in particular joint venture agreements. These agreements could be exempted if they bring specific benefits such as technology transfer, improvement of the quality of the service or enabling better marketing, especially for a new capacity, outweighing the restrictions. In any event, imposing on customers the bundled uplink and space segment capacity provision is likely to exclude an exemption since it limits competition in uplink provision to the detriment of the customer's choice, and in the current market situation will almost certainly strengthen the TOs' dominant position in violation of Article 86. An exemption is unlikely to be granted also when the agreement has the effect of reducing substantially the supply in an oligopolistic market, and even more clearly when an effect of the agreement is to prevent the only potential competitor of a dominant provider in a given market from offering its services independently. This could amount to a violation of Article 86. Direct or indirect imposition of any kind of agreement by a TO, for instance by making the uplink subject to the conclusion of an agreement with a third party, would constitute an infringement of Article 86.

VII. RESTRUCTURING IN TELECOMMUNICATIONS

129. Deregulation, the objective of a single market for 1992 and the fundamental changes in the telecommunications technology have caused wide strategic restructuring in Europe and throughout the world as well. They have mostly taken the form of mergers and joint ventures.

(a) Mergers

130. In assessing telecom mergers in the framework of Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings[1] the Commission will take into account, *inter alia*, the following elements.

131. Restructuring moves are, in general, beneficial to the European telecommunications industry. They may enable the companies to rationalize and to reach the critical mass necessary to obtain the economies of scale needed to make the important investments in research and development. These are necessary to develop new technologies and to remain competitive in the world market.

However, in certain cases they may also lead to the anti-competitive creation or strengthening of dominant positions.

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[1] OJ L 395, 30.12.1989, p. 1; Corrigendum OJ L 257, 21.9.1990, p. 13.

132. The economic benefits resulting from critical mass must be demonstrated. The concentration operation could result in a mere aggregation of market shares, unaccompanied by restructuring measures or plans. This operation may create or strengthen Community or national dominant positions in a way which impedes competition.

133. When concentration operations have this sole effect, they can hardly be justified by the objective of increasing the competitiveness of Community industry in the world market. This objective, strongly pursued by the Commission, rather requires competition in EEC domestic markets in order that the EEC undertakings acquire the competitive structure and attitude needed to operate in the world market.

134. In assessing concentration cases in telecommunications, the Commission will be particularly vigilant to avoid the strengthening of dominant positions through integration. If dominant service providers are allowed to integrate into the equipment market by way of mergers, access to this market by other equipment suppliers may be seriously hindered. A dominant service provider is likely to give preferential treatment to its own equipment subsidiary.

Moreover, the possibility of disclosure by the service provider to its subsidiary of sensitive information obtained from competing equipment manufacturers can put the latter at a competitive disadvantage.

The Commission will examine case by case whether vertical integration has such effects or rather is likely to reinforce the competitive structure in the Community.

135. The Commission has enforced principles on restructuring in a case concerning the GEC and Siemens joint bid for Plessey.[1]

136. Article 85(1) applies to the acquisition by an undertaking of a minority shareholding in a competitor where, *inter alia*, the arrangements involve the creation of a structure of cooperation between the investor and the other undertakings, which will influence these undertakings' competitive conduct.[2]

(b) Joint ventures

137. A joint venture can be of a cooperative or a concentrative nature. It is of a cooperative nature when it has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent. The principles governing cooperative joint ventures are to be set out in Commission guidelines to that effect. Concentrative joint ventures fall under Regulation (EEC) No 4064/89.[3]

138. In some of the latest joint venture cases the Commission granted an exemption under Article 85(3) on grounds which are particularly relevant to telecommunications. Precisely in a decision concerning telecommunications, the 'Optical fibres' case,[4] the Commission considered that the joint venture enabled European companies to produce a high technology product, promoted technical progress, and facilitated technology transfer. Therefore, the joint

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[1] Commission Decision rejecting Plessey's complaint against the GEC-Siemens bid (Case IV/33.018 GEC-Siemens/ Plessey), OJ C 239, 25.9.1990, p. 2.

[2] *British American Tobacco Company Ltd and RJ Reynolds Industries Inc.* v *Commission* (Joined Cases 142 and 156/84) of 17.11.1987 [1987] ECR 4487.

[3] OJ C 203, 14.8.1990, p. 10.

[4] Decision 86/405/EEC, OJ L 236, 22.8.1986, p. 30.

venture permits European companies to withstand competition from non-Community producers, especially in the USA and Japan, in an area of fast-moving technology characterized by international markets. The Commission confirmed this approach in the 'Canon-Olivetti' case.[1]

VIII. IMPACT OF THE INTERNATIONAL CONVENTIONS ON THE APPLICATION OF EEC COMPETITION RULES TO TELECOMMUNICATIONS

139. International conventions (such as the Convention of International Telecommunication Union (ITU) or Conventions on Satellites) play a fundamental role in ensuring worldwide cooperation for the provision of international services. However, application of such international conventions on telecommunications by EEC Member States must not affect compliance with the EEC law, in particular with competition rules.

140. Article 234 of the EEC Treaty regulates this matter.[2] The relevant obligations provided in the various conventions or related Acts do not pre-date the entry into force of the Treaty. As to the ITU and World Administrative Telegraph and Telephone Conference (WATTC), whenever a revision or a new adoption of the ITU Convention or of the WATTC Regulations occurs, the ITU or WATTC members recover their freedom of action. The Satellites Conventions were adopted much later.

Moreover, as to all conventions, the application of EEC rules does not seem to affect the fulfilment of obligations of Member States *vis-à-vis* third countries. Article 234 does not protect obligations between EEC Member States entered into in international treaties. The purpose of Article 234 is to protect the right of third countries only and it is not intended to crystallize the acquired international treaty rights of Member States to the detriment of the EEC Treaty's objectives or of the Community interest. Finally, even if Article 234(1) did apply, the Member States concerned would nevertheless be obliged to take all appropriate steps to eliminate incompatibility between their obligations *vis-à-vis* third countries and the EEC rules. This applies in particular where Member States acting collectively have the statutory possibility to modify the international convention in question as required, e.g. in the case of the Eutelsat Convention.

141. As to the WATTC Regulations, the relevant provisions of the Regulations in force from 9 December 1988 are flexible enough to give the parties the choice whether or not to implement them or how to implement them.

In any event, EEC Member States, by signing the Regulations, have made a joint declaration that they will apply them in accordance with their obligations under the EEC Treaty.

142. As to the International Telegraph and Telephone Consultative Committee (CCITT) recommendations, competition rules apply to them.

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[1] Decision 88/88/EEC, OJ L 52, 26.2.1988, p. 51.

[2] 'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude ...'

143. Members of the CCITT are, pursuant to Article 11(2) of the International Telecommunications Convention, 'administrations' of the Members of the ITU and recognized private operating agencies ('RPOAs') which so request with the approval of the ITU members which have recognized them. Unlike the members of the ITU or the Administrative Conferences which are States, the members of the CCITT are telecommunications administrations and RPOAs. Telecommunications administrations are defined in Annex 2 to the International Telecommunications Conventions as 'tout service ou département gouvernemantal responsable des mesures à prendre pour exécuter les obligations de la Convention Internationale des télécommunications et des règlements' (any government service or department responsible for the measures to be taken to fulfil the obligations laid down in the International Convention on Telecommunications and Regulations). The CCITT meetings are in fact attended by TOs. Article 11(2) of the International Telecommunications Convention clearly provides that telecommunications administrations and RPOAs are members of the CCITT by themselves. The fact that, because of the ongoing process of separation of the regulatory functions from the business activity, some national authorities participate in the CCITT is not in contradiction with the nature of undertakings of other members. Moreover, even if the CCITT membership became governmental as a result of the separation of regulatory and operational activities of the telecommunications administrations, Article 90 in association with Article 85 could still apply either against the State measures implementing the CCITT recommendations and the recommendations themselves on the basis of Article 90(1), or if there is no such national implementing measure, directly against the telecommunications organizations which followed the recommendation.[1]

144. In the Commission's view, the CCITT recommendations are adopted, *inter alia*, by undertakings. Such CCITT recommendations, although they are not legally binding, are agreements between undertakings or decisions by an association of undertakings. In any event, according to the case-law of the Commission and the European Court of Justice[2] a statutory body entrusted with certain public functions and including some members appointed by the government of a Member State may be an 'association of undertakings' if it represents the trading interests of other members and takes decisions or makes agreements in pursuance of those interests.

The Commission draws attention to the fact that the application of certain provisions in the context of international conventions could result in infringements of the EEC competition rules:

— As to the WATTC Regulations, this is the case for the respective provisions for mutual agreement between TOs on the supply of international telecommunications services (Article 1(5)), reserving the choice of telecommunications routes to the TOs (Article 3(3)(3)), recommending practices equivalent to price agreements (Articles 6(6)(1)(2)), and limiting the possibility of special arrangements to activities meeting needs within and/or between the territories of the Members concerned (Article 9) and only where existing arrangements cannot satisfactorily meet the relevant telecommunications needs (Opinion PL A).

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[1] See Commission Decision 87/3/EEC ENI/Montedison, OJ L 5, 7.1.1987, p. 13.

[2] See Pabst & Richarz/BNIA, OJ L 231, 21.8.1976, p. 24, AROW/BNIC, OJ L 379, 31.12.1982, p. 1, and Case 123/83 *BNIC* v *Clair* [1985] ECR 391.

— CCITT recommendations D1 and D2 as they stand at the date of the adoption of these guidelines could amount to a collective horizontal agreement on prices and other supply conditions of international leased lines to the extent that they lead to a coordination of sales policies between TOs and therefore limit competition between them. This was indicated by the Commission in a CCITT meeting on 23 May 1990. The Commission reserves the right to examine the compatibility of other recommendations with Article 85.

— The agreements between TOs concluded in the context of the Conventions on Satellites are likely to limit competition contrary to Article 85 and/or 86 on the grounds set out in paragraphs 126 to 128 above.

Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty[1]

(93/C 39/05)

I. Introduction

1. The abolition of internal frontiers enables firms in the Community to embark on new activities and Community consumers to benefit from increased competition. The Commission considers that these advantages must not be jeopardized by restrictive or abusive practices of undertakings and that the completion of the internal market thus reaffirms the importance of the Community's competition policy and competition law.

2. A number of national and Community institutions have contributed to the formulation of Community competition law and are responsible for its day-to-day application. For this purpose, the national competition authorities, national and Community courts and the Commission each assume their own tasks and responsibilities, in line with the principles developed by the case-law of the Court of Justice of the European Communities.

3. If the competition process is to work well in the internal market, effective cooperation between these institutions must be ensured. The purpose of this Notice is to achieve this in relations between national courts and the Commission. It spells out how the Commission intends to assist national courts by closer cooperation in the application of Articles 85 and 86 of the EEC Treaty in individual cases.

II. Powers

4. The Commission is the administrative authority responsible for the implementation and for the thrust of competition policy in the Community and for this purpose has to act in the public interest. National courts, on the other hand, have the task of safeguarding the subjective rights of private individuals in their relations with one another.[2]

5. In performing these different tasks, national courts and the Commission possess concurrent powers for the application of Article 85(1) and Article 86 of the Treaty. In the case of the Commission, the power is conferred by Article 89 and by the provisions adopted pursuant to Article 87. In the case of the national courts, the power derives from the direct effect of the relevant Community rules. In *BRT* v *Sabam*, the Court of Justice considered that 'as the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard'.[3]

6. In this way, national courts are able to ensure, at the request of the litigants or on their own initiative, that the competition rules will be respected for the benefit of private individuals. In addition, Article 85(2) enables them to determine, in accordance with the national procedural law applicable, the civil law effects of the prohibition set out in Article 85.[4]

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[1] OJ C 39, 13.2.1993, p. 6.

[2] Case C 234/89, *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 44; Case T-24/90, *Automec* v *Commission* judgment of 17 September 1992, paragraphs 73 and 85 ECR 1992, II-2223.

[3] Case 127/73, *BRT* v *Sabam* [1974] ECR 51, paragraph 16.

[4] Case 56/65, *LTM* v *MBU* [1966] ECR 337, Case 48/72, *Brasserie De Haecht* v *Wilkin-Janssen* [1973] ECR 77; Case 319/82, *Ciments et Bétons* v *Kerpen & Kerpen* [1983] ECR 4173.

7. However, the Commission, pursuant to Article 9 of Regulation No 17,[1] has sole power to exempt certain types of agreements, decisions and concerted practices from this prohibition. The Commission may exercise this power in two ways. It make take a decision exempting a specific agreement in an individual case. It may also adopt regulations granting block exemptions for certain categories of agreements, decisions or concerted practices, where it is authorized to do so by the Council, in accordance with Article 87.

8. Although national courts are not competent to apply Article 85(3), they may nevertheless apply the decisions and regulations adopted by the Commission pursuant to that provision. The Court has on several occasions confirmed that the provisions of a regulation are directly applicable.[2] The Commission considers that the same is true for the substantive provisions of an individual exemption decision.

9. The powers of the Commission and those of national courts differ not only in their objective and content, but also in the ways in which they are exercised. The Commission exercises its powers according to the procedural rules laid down by Regulation No 17, whereas national courts exercise theirs in the context of national procedural law.

10. In this connection, the Court of Justice has laid down the principles which govern procedures and remedies for invoking directly applicable Community law.

'Although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law. On the other hand ... it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.'[3]

11. The Commission considers that these principles apply in the event of breach of the Community competition rules; individuals and companies have access to all procedural remedies provided for by national law on the same conditions as would apply if a comparable breach of national law were involved. This equality of treatment concerns not only the definitive finding of a breach of competition rules, but embraces all the legal means capable of contributing to effective legal protection. Consequently, it is the right of parties subject to Community law that national courts should take provisional measures, that an effective end should be brought, by injunction, to the infringement of Community competition rules of which they are victims, and that compensation should be awarded for the damage suffered as a result of infringements, where such remedies are available in proceedings relating to similar national law.

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[1] Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ 13, 21.2.1962, p. 204/62; Special Edition 1959-62, p. 87).

[2] Case 63/75, *Fonderies Roubaix* v *Fonderies Roux* [1976] ECR 111; Case C-234/89, *Delimitis* v *Henninger Bräu* [1991] ECR I-935.

[3] Case 158/80, *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805, paragraph 44; see also Case 33/76, *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989; Case 79/83, *Harz* v *Deutsche Tradax* [1984] ECR 1921; Case 199/82, *Amministrazione della Finanze delo stato* v *San Giorgio* [1983] ECR 3595.

12. Here the Commission would like to make it clear that the simultaneous application of national competition law is compatible with the application of Community law, provided that it does not impair the effectiveness and uniformity of Community competition rules and the measures taken to enforce them. Any conflicts which may arise when national and Community competition law are applied simultaneously must be resolved in accordance with the principle of the precedence of Community law.[1] The purpose of this principle is to rule out any national measure which could jeopardize the full effectiveness of the provisions of Community law.

III. The exercise of powers by the Commission

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.[2]

14. The Commission intends, in implementing its decision-making powers, to concentrate on notifications, complaints and own-initiative proceedings having 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 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.[3] In these circumstances the complaint will normally be filed.

16. In this respect the Commission would like to make it clear that the application of Community competition law by the national courts has considerable advantages for individuals and companies:

— the Commission cannot award compensation for loss suffered as a result of an infringement of Article 85 or Article 86. Such claims may be brought only before the national courts. Companies are more likely to avoid infringements of the Community competition rules if they risk having to pay damages or interest in such an event,

— national courts can usually adopt interim measures and order the ending of infringements more quickly than the Commission is able to do,

— before national courts, it is possible to combine a claim under Community law with a claim under national law. This is not possible in a procedure before the Commission,

— in some Member States, the courts have the power to award legal costs to the successful applicant. This is never possible in the administrative procedure before the Commission.

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[1] Case 14/68, *Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1; Joined Cases 253/78 and 1 to 3/79, *Procureur de la République* v *Giry and Guerlain* [1980] ECR 2327.

[2] Case T-24/90, *Automec* v *Commission*, judgment of 17 September 1992, paragraph 77 ECR 1992, II-2223.

[3] Case T-24/90, cited above, paragraphs 91 to 94.

IV. Application of Articles 85 and 86 by national courts

17. The national court may have to reach a decision on the application of Articles 85 and 86 in several procedural situations. In the case of civil law proceedings, two types of action are particularly frequent: actions relating to contracts and actions for damages. Under the former, the defendant usually relies on Article 85(2) to dispute the contractual obligations invoked by the plaintiff. Under the latter, the prohibitions contained in Articles 85 and 86 are generally relevant in determining whether the conduct which has given rise to the alleged injury is illegal.

18. In such situations, the direct effect of Article 85(1) and Article 86 gives national courts sufficient powers to comply with their obligation to hand down judgment. Nevertheless, when exercising these powers, they must take account of the Commission's powers in order to avoid decisions which could conflict with those taken or envisaged by the Commission in applying Article 85(1) and Article 86, and also Article 85(3).[1]

19. In its case-law the Court of Justice has developed a number of principles which make it possible for such contradictory decisions to be avoided.[2] The Commission feels that national courts could take account of these principles in the following manner.

1. *Application of Article 85(1) and (2) and Article 86*

20. The first question which national courts have to answer is whether the agreement, decision or concerted practice at issue infringes the prohibitions laid down in Article 85(1) or Article 86. Before answering this question, national courts should ascertain whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission. Such statements provide national courts with significant information for reaching a judgment, even if they are not formally bound by them. It should be noted in this respect that not all procedures before the Commission lead to an official decision, but that cases can also be closed by comfort letters. Whilst it is true that the Court of Justice has ruled that this type of letter does not bind national courts, it has nevertheless stated that the opinion expressed by the Commission constitutes a factor which the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of Article 85.[3]

21. If the Commission has not ruled on the same agreement, decision or concerted practice, the national courts can always be guided, in interpreting the Community law in question, by the case-law of the Court of Justice and the existing decisions of the Commission. It is with

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[1] Case C-234-89, *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 47.

[2] Case 48/72, *Brasserie de Haecht* v *Wilkin-Janssen* [1973] ECR 77; Case 127/73, *BRT* v *Sabam* [1974] ECR 51; Case C-234/89, *Delimitis* v *Henninger Bräu* [1991] ECR I-935.

[3] Case 99/79, *Lancôme* v *Etos* [1980] ECR 2511, paragraph 11.

this in view that the Commission has, in a number of general notices,[1] specified categories of agreements that are not caught by the ban laid down in Article 85(1).

22. On these bases, national courts should generally be able to decide whether the conduct at issue is compatible with Article 85(1) and Article 86. Nevertheless, if the Commission has initiated a procedure in a case relating to the same conduct, they may, if they consider it necessary for reasons of legal certainty, stay the proceedings while awaiting the outcome of the Commission's action.[2] A stay of proceedings may also be envisaged where national courts wish to seek the Commission's views in accordance with the arrangements referred to in this Notice.[3] Finally, where national courts have persistent doubts on questions of compatibility, they may stay proceedings in order to bring the matter before the Court of Justice, in accordance with Article 177 of the Treaty.

23. However, where national courts decide to give judgment and find that the conditions for applying Article 85(1) or Article 86 are not met, they should pursue their proceedings on the basis of such a finding, even if the agreement, decision or concerted practice at issue has been notified to the Commission. Where the assessment of the facts shows that the conditions for applying the said Articles are met, national courts must rule that the conduct at issue infringes Community competition law and take the appropriate measures, including those relating to the consequences that attach to infringement of a statutory prohibition under the civil law applicable.

2. *Application of Article 85(3)*

24. If the national court concludes that an agreement, decision or concerted practice is prohibited by Article 85(1), it must check whether it is or will be the subject of an exemption by the Commission under Article 85(3). Here several situations may arise.

25. (a) The national court is required to respect the exemption decisions taken by the Commission. Consequently, it must treat the agreement, decision or concerted practice at issue as compatible with Community law and fully recognize its civil law effects. In this respect mention should be made of comfort letters in which the Commission services state that the conditions for applying Article 85(3) have been met. The Commission considers that national courts may take account of these letters as factual elements.

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[1] See the notices on:
— exclusive dealing contracts with commercial agents (OJ 139, 24.12.1962, p. 2921/62),
— agreements, decisions and concerted practices in the field of cooperation between enterprises (OJ C 75, 29.7. 1968, p. 3, as corrected in OJ C 84, 28.8.1968, p. 14),
— assessment of certain subcontracting agreements (OJ C 1, 3.1.1979, p. 2),
— agreements of minor importance (OJ C 231, 12.9.1986, p. 2).

[2] Case 127/73, *BRT* v *Sabam* [1974] ECR 51, paragraph 21. The procedure before the Commission is initiated by an authoritative act. A simple acknowledgement of receipt cannot be considered an authoritative act as such; Case 48/72, *Brasserie de Haecht* v *Wilkin-Janssen* [1973] ECR 77, paragraphs 16 and 17.

[3] Case C-234/89, *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 53, Part V of this Notice.

26. (b) Agreements, decisions and concerted practices which fall within the scope of application of a block exemption regulation are automatically exempted from the prohibition laid down in Article 85(1) without the need for a Commission decision or comfort letter.[1]

27. (c) Agreements, decisions and concerted practices which are not covered by a block exemption regulation and which have not been the subject of an individual exemption decision or a comfort letter must, in the Commission's view, be examined in the following manner.

28. The national court must first examine whether the procedural conditions necessary for securing exemption are fulfilled, notably whether the agreement, decision or concerted practice has been duly notified in accordance with Article 4(1) of Regulation No 17. Where no such notification has been made, and subject to Article 4(2) of Regulation No 17, exemption under Article 85(3) is ruled out, so that the national court may decide, pursuant to Article 85(2), that the agreement, decision or concerted practice is void.

29. Where the agreement, decision or concerted practice has been duly notified to the Commission, the national court will assess the likelihood of an exemption being granted in the case in question in the light of the relevant criteria developed by the case-law of the Court of Justice and the Court of First Instance and by previous regulations and decisions of the Commission.

30. Where the national court has in this way ascertained that the agreement, decision or concerted practice at issue cannot be the subject of an individual exemption, it will take the measures necessary to comply with the requirements of Article 85(1) and (2). On the other hand, if it takes the view that individual exemption is possible, the national court should suspend the proceedings while awaiting the Commission's decision. If the national court does suspend the proceedings, it nevertheless remains free, according to the rules of the applicable national law, to adopt any interim measures it deems necessary.

31. In this connection, it should be made clear that these principles do not apply to agreements, decisions and concerted practices which existed before Regulation No 17 entered into force or before that Regulation became applicable as a result of the accession of a new Member State and which were duly notified to the Commission. The national courts must consider such agreements, decisions and concerted practices to be valid so long as the Commission or the authorities of the Member States have not taken a prohibition decision or sent a comfort letter to the parties informing them that the file has been closed.[2]

32. The Commission realizes that the principles set out above for the application of Articles 85 and 86 by national courts are complex and sometimes insufficient to enable those courts to perform their judicial function properly. This is particularly so where the practical application of Article 85(1) and Article 86 gives rise to legal or economic difficulties, where the Commission has initiated a procedure in the same case or where the agreement, decision

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[1] A list of the relevant regulations and of the official explanatory comments relating to them is given in the Annex to this Notice.

[2] Case 48/72, *Brasserie de Haecht* v *Wilkin-Janssen* [1973] ECR 77; Case 59/77, *De Blos* v *Bouyer [1977] ECR 2359; Case 99/79, Lancôme* v *Etos* [1980] ECR 2511.

or concerted practice concerned may become the subject of an individual exemption within the meaning of Article 85(3). National courts may bring such cases before the Court of Justice for a preliminary ruling, in accordance with Article 177. They may also avail themselves of the Commission's assistance according to the procedures set out below.

V. Cooperation between national courts and the Commission

33. Article 5 of the EEC Treaty estblishes the principle of constant and sincere cooperation between the Community and the Member States with a view to attaining the objectives of the Treaty, including implementation of Article 3(f), which refers to the establishment of a system ensuring that competition in the common market is not distorted. This principle involves obligations and duties of mutual assistance, both for the Member States and for the Community institutions. The Court has thus ruled that, under Article 5 of the EEC Treaty, the Commission has a duty of sincere cooperation vis-à-vis judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system.[1]

34. The Commission considers that such cooperation is essential in order to guarantee the strict, effective and consistent application of Community competition law. In addition, more effective participation by the national courts in the day-to-day application of competition law gives the Commission more time to perform its administrative task, namely to steer competition policy in the Community.

35. In the light of these considerations, the Commission intends to work towards closer cooperation with national courts in the following manner.

36. The Commission conducts its policy so as to give the parties concerned useful pointers to the application of competition rules. To this end, it will continue its policy in relation to block exemption regulations and general notices. These general texts, the case-law of the Court of Justice and the Court of First Instance, the decisions previously taken by the Commission and the annual reports on competition policy are all elements of secondary legislation or explanations which may assist national courts in examining individual cases.

37. If these general pointers are insufficient, national courts may, within the limits of their national procedural law, ask the Commission and in particular its Directorate-General for Competition for the following information.

First, they may ask for information of a procedural nature to enable them to discover whether a certain case is pending before the Commission, whether a case has been the subject of a notification, whether the Commission has officially initiated a procedure or whether it has already taken a position through an official decision or through a comfort letter sent by its services. If necessary, national courts may also ask the Commission to give an opinion as to how much time is likely to be required for granting or refusing individual exemption for notified agreements or practices, so as to be able to determine the conditions for any decision to suspend proceedings or whether interim measures need to be adopted,[2]

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[1] Case C-2/88 Imm., *Zwartveld* [1990] ECR I-3365, paragraph 18; Case C-234/89, *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 53.

[2] See paragraphs 22 and 30 of this Notice.

The Commission, for its part, will endeavour to give priority to cases which are the subject of national proceedings suspended in this way, in particular when the outcome of a civil dispute depends on them.

38. Next, national courts may consult the Commission on points of law. Where the application of Article 85(1) and Article 86 causes them particular difficulties, national courts may consult the Commission on its customary practice in relation to the Community law at issue. As far as Articles 85 and 86 are concerned, these difficulties relate in particular to the conditions for applying these Articles as regards the effect on trade between Member States and as regards the extent to which the restriction of competition resulting from the practices specified in these provisions is appreciable. In its replies, the Commission does not consider the merits of the case. In addition, where they have doubts as to whether a contested agreement, decision or concerted practice is eligible for an individual exemption, they may ask the Commission to provide them with an interim opinion. If the Commission says that the case in question is unlikely to qualify for an exemption, national courts will be able to waive a stay of proceedings and rule on the validity of the agreement, decision or concerted practice.

39. The answers given by the Commission are not binding on the courts which have requested them. In its replies the Commission makes it clear that its view is not definitive and that the right for the national court to refer to the Court of Justice, pursuant to Article 177, is not affected. Nevertheless, the Commission considers that it gives them useful guidance for resolving disputes.

40. Lastly, national courts can obtain information from the Commission regarding factual data: statistics, market studies and economic analyses. The Commission will endeavour to communicate these data, within the limits laid down in the following paragraph, or will indicate the source from which they can be obtained.

41. It is in the interests of the proper administration of justice that the Commission should answer requests for legal and factual information in the shortest possible time. Nevertheless, the Commission cannot accede to such requests unless several conditions are met. First, the requisite data must actually be at its disposal. Secondly, the Commission may communicate this data only in so far as permitted by the general principle of sound administrative practice.

42. For example, Article 214 of the Treaty, as spelt out in Article 20 of Regulation No 17 for the purposes of the competition rules, requires the Commission not to disclose information of a confidential nature. In addition, the duty of sincere cooperation deriving from Article 5 is one applying to the relationship between national courts and the Commission and cannot concern the position of the parties to the dispute pending before those courts. As amicus curiae, the Commission is obliged to respect legal neutrality and objectivity. Consequently, it will not accede to requests for information unless they come from a national court, either directly, or indirectly through parties which have been ordered by the court concerned to provide certain information. In the latter case, the Commission will ensure that its answer reaches all the parties to the proceedings.

43. Over and above such exchange of information, required in specific cases, the Commission is anxious to develop as far as possible a more general information policy. To this end, the Commission intends to publish an explanatory booklet regarding the application of the competition rules at national level.

44. Lastly, the Commission also wishes to reinforce the effect of national competition judgments. To this end, it will study the possibility of extending the scope of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters to competition cases assigned to administrative courts.[1] It should be noted that, in the Commission's view, competition judgments are already governed by this Convention where they are handed down in cases of civil and commercial nature.

VI. Final remarks

45. This Notice does not relate to the competition rules governing the transport sector.[2] Nor does it relate to the competition rules laid down in the Treaty establishing the European Coal and Steel Community.

46. This Notice is issued for guidance and does not in any way restrict the rights conferred on individuals or companies by Community law.

47. This Notice is without prejudice to any interpretation of the Community competition rules which may be given by the Court of Justice of the European Communities.

48. A summary of the answers given by the Commission pursuant to this Notice will be published annually in the Competition Report.

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[1] Convention of 27 September 1968 (OJ L 304, 30.10.1978, p. 77).

[2] Regulation No 141/62 of the Council of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ 124, 28.11.1962, p. 2751/62), as amended by Regulations Nos 165/65/EEC (OJ 210, 11.12.1965, p. 3141/65) and 1002/67/EEC (OJ 306, 16.12.1967, p. 1); Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1); Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4); Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1).

ANNEX

BLOCK EXEMPTIONS

A. ENABLING COUNCIL REGULATIONS

I. Vertical agreements (see under B.I and B.II)

Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (OJ, Special Edition 1965-66, p. 35).

II. Horizontal agreements (see under B.III)

Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices (OJ, Special Edition 1971-III, p. 1032), modified by Regulation (EEC) No 2743/72 of 19 December 1972 (OJ, Special Edition 1972, 28-30.12.1972, p. 60).

B. COMMISSION BLOCK EXEMPTION REGULATIONS AND EXPLANATORY NOTICES

I. Distribution agreements

1. Commission Regulation (EEC) No 1983/83 of 22 June 1983 concerning exclusive distribution agreements (OJ L 173, 30.6.1983, p. 1).
2. Commission Regulation (EEC) No 1984/83 of 22 June 1983 concerning exclusive purchasing agreements (OJ L 173, 30.6.1983, p. 5).
3. Commission Notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 (OJ C 101, 13.4.1984, p. 2).
4. Commission Regulation (EEC) No 123/85 of 12 December 1984 concerning motor vehicle distribution and servicing agreements (OJ L 15, 18.1.1985, p. 16).
5. Commission Notice concerning Regulation (EEC) No 123/85 (OJ C 17, 18.1.1985, p. 4).
6. Commission Notice on the clarification of the activities of motor vehicle intermediaries (OJ C 329, 18.12.1991, p. 20).

II. Licensing and franchising agreements

1. Commission Regulation (EEC) No 2349/84 of 23 July 1984 concerning patent licensing agreements (OJ L 219, 16.8.1984, p. 15; corrigendum OJ L 280, 22.10.1985, p. 32).
2. Commission Regulation (EEC) No 4087/88 of 30 November 1988 concerning franchising agreements (OJ L 359, 28.12.1988, p. 46).
3. Commission Regulation (EEC) No 556/89 of 30 November 1988 concerning know-how licensing agreements (OJ L 61, 4.3.1989, p. 1).

III. Cooperative agreements

1. Commission Regulation (EEC) No 417/85 of 19 December 1984 concerning specialization agreements (OJ L 53, 22.2.1985, p. 1).
2. Commission Regulation (EEC) No 418/85 of 19 December 1984 concerning research and development agreements (OJ L 53, 22.2.1985, p. 5).

Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty[1]

(93/C 43/02)

I. INTRODUCTION

1. Joint ventures (JVs), as referred to in this Notice, embody a special, institutionally fixed form of cooperation between undertakings. They are versatile instruments at the disposal of the parents, with the help of which different goals can be pursued and attained.

2. JVs can form the basis and the framework for cooperation in all fields of business activity. Their potential area of application includes, *inter alia*, the procuring and processing of data, the organization of working systems and procedures, taxation and business consultancy, the planning and financing of investment, the implementation of research and development plans, the acquisition and granting of licences for the use of intellectual property rights, the supply of raw materials or semi-finished products, the manufacture of goods, the provision of services, advertising, distribution and customer service.

3. JVs can fulfil one or more of the aforementioned tasks. Their activity can be limited in time or be of an unlimited duration. The broader the concrete and temporal framework of the cooperation, the stronger it will influence the business policy of the parents in relation to each other and to third parties. If the JV concerns market-oriented matters such as purchasing, manufacturing, sales or the provision of services, it will normally lead to coordination, if not even to a uniformity of the competitive behaviour of the parents at that particular economic level. This is all the more true where a JV fulfils all the functions of a normal undertaking and consequently behaves on the market as an independent supplier or purchaser. The creation of a JV which combines wholly or in part the existing activities of the parents in a particular economic area or takes over new activities for the parents, brings, over and above that, a change in the structure of the participating enterprises.

4. The assessment of cooperative joint ventures pursuant to Article 85(1) and (3) does not depend on the legal form which the parents choose for their cooperation. The applicability of the prohibition of restrictive practices depends, on the contrary, on whether the creation or the activities of the JV may affect trade between Member States and have as their object or effect the prevention, restriction or disortion of competition within the common market. The question whether an exemption can be granted to a JV will depend, on the one hand, on its overall economic benefits and, on the other hand, on the nature and scope of the restrictions of competition it entails.

5. In view of the variety of situations which come into consideration it is impossible to make general comments on the compliance of JVs with competition law. For a large proportion of JVs, whether or not they fall within the scope of application of Article 85, depends on their particular activity.[2] For other JVs, prohibition will occur only if particular legal and factual circumstances coincide, the existence of which must be determined on a case-by-case basis.[3] Exemptions from the prohibition are based on the analysis of the overall

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[1] OJ C 43, 16.2.1993, p. 2.
[2] See below III.1, point 15.
[3] See below III.2 and 3, points 17 *et seq.* and 32 *et seq.*

economic balance, the results of which can turn out differently.[1] Cooperative joint ventures can, however, be divided into different categories, which are each open to the same competition law analysis.

6. In the Commission Notice of 1968 concerning agreements, decisions and concerted practices in the field of cooperation between enterprises,[2] the Commission listed a series of types of cooperation which *by their nature* are not prohibited because they do not have as their object or effect the restriction of competition within the meaning of Article 85(1). The 1986 Notice on agreements of minor importance[3] sets out quantitative criteria for those arrangements which are not prohibited because they have no *appreciable* impact on competition or inter-State trade. Both Notices apply to JVs. Commission Regulations (EEC) No 417/85, (EEC) No 418/85, (EEC) 2349/84 and (EEC) No 556/89 on the application of Article 85(3) of the Treaty to specialization agreements,[4] research and development agreements,[5] patent licensing agreements,[6] and know-how licensing agreements,[7] as amended by Regulation (EEC) No 151/93,[8] include JVs amongst the beneficiaries of these group exemptions.[9] Further general indications on the assessment of cooperative JVs for competition purposes can be found in the numerous decisions and notices of the Commission in individual cases.[10]

7. The Commission will hereinafter summarize its administrative practice to date. In this way undertakings will be informed about both the legal and economic criteria which will guide the Commission in the future application of Article 85(1) and (3) to cooperative joint ventures. This Notice applies to all JVs which do not fall within the scope of application of Article 3 of Council regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.[11] It forms the counterpart of the Notice regarding concentrative and cooperative operations[12] and the Notice on restrictions ancillary to concentrations[13] which clarify the abovementioned Regulation. Links between undertakings other than JVs will not be dealt with in this Notice, even though they often have similar effects on competition in the common market and on trade between Member States. Having regard to the experience of the Commission, however, no generally applicable conclusions can yet be drawn.

8. This notice is without prejudice to the power of national courts in the Member States to apply Article 85(1) and group exemptions under Article 85(3) on the basis of their own jurisdiction. Nevertheless it constitutes a factor which the national courts can take into account when deciding a dispute before them. It is also without prejudice to any interpretation which may be given by the Court of Justice of the European Communities.

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[1] See below IV.1 and 2, points 43 *et seq.* and 52 *et seq.*
[2] OJ C 75, 29.7.1968, p. 3; corrected by OJ C 84, 28.8.1968, p. 14.
[3] OJ C 231, 12.9.1986, p. 2.
[4] OJ L 53, 22.2.1985, p. 1.
[5] OJ L 53, 22.2.1985, p. 5.
[6] OJ L 219, 16.8.1984, p. 15; corrected by OJ L 280, 22.10.1985, p. 32.
[7] OJ L 61, 4.3.1989, p. 1.
[8] OJ L 21, 29.1.1993, p. 8.
[9] See below IV.1 points 43 *et seq.*
[10] For references and summaries see the Commission Competition Policy Reports.
[11] OJ L 395, 30.12.1989, p. 1; corrected by OJ L 257, 21.9.1990, p. 13.
[12] OJ C 203, 14.8.1990, p. 10.
[13] OJ C 203, 14.8.1990, p. 5.

II. THE CONCEPT OF COOPERATIVE JOINT VENTURES

9. The concept of cooperative joint ventures can be derived from Regulation (EEC) No 4064/89. According to Article 3(1), a JV is an undertaking under the joint control of several other undertakings, the parents. Control, according to Article 3(3), consists of the possibility of exercising a decisive influence on the activities of the undertaking. Whether joint control, the prerequisite of every JV, exists, is determined by the legal and factual circumstances of the individual case. For details refer to the Notice regarding concentrative and cooperative operations.[1]

10. According to Article 3(2) of Regulation (EEC) No 4064/89, any JV which does not fulfil the criteria of a concentration, is cooperative in nature. Under the second subparagraph, this applies to:

— all JVs, the activities of which are not to be performed on a lasting basis, especially those limited in advance by the parents to a short time period,

— JVs which do not perform all the functions of an autonomous economic entity, especially those charged by their parents simply with the operation of particular functions of an undertaking (partial-function JVs),

— JVs which perform all the functions of an autonomous economic entity (full-function JVs) where they give rise to coordination of competitive behaviour by the parents in relation to each other or to the JV.

The delimitation of cooperative and concentrative operations can be difficult in individual cases. The abovementioned Commission Notice[2] contains detailed instructions for the solution of this problem. Additional indications can also be gained from the practice of the Commission under Regulation (EEC) No 4064/89.[3]

11. Cooperative JVs are outside the scope of the provisions on merger control. The determination of the cooperative character of a JV has however no substantive legal effects. It simply means that the JV is subject to the procedures set out in Regulation No 17[4] or Regulations (EEC) No 1017/68[5], (EEC) No 4056/86[6] or (EEC) No 3975/87[7] in the determination of its compliance with Article 85(1) and (3).

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[1] See points 6 to 14.

[2] See points 15 and 16.

[3] See, on the one hand, Decisions (pursuant to Article 6(1)(a) of Regulation (EEC) No 4064/89); Renault/Volvo; Baxter/Nestlé/Salvia; Apollinaris/Schweppes; Elf/Enterprise; Sunrise; BSN/Nestlé/Cokoladovny; Flachglas/Vegla; Eureko, Herba/IRR; Koipe-Tabacalera/Elosua; on the other hand Decisions (pursuant to Article 6(1)(b) of Regulation (EEC) No 4064/89): Sanofi/Sterling Drugs; Elf/BC/Cepsa; Dräger/IBM/HMP; Thomson/Pilkington; UAP/Transatlantic/Sun Life; TNT/GD Net; Lucas/Eaton; Courtaulds/SNIA; Volvo/Atlas; Ericsson/Kolbe; Spar/Dansk Supermarket; Generali/BCHA; Mondi/Frantschach; Eucom/Digital; Ericsson/Ascom; Thomas Cook/LTU/West LB; Elf-Atochem/Rohm & Haas; Rhône-Poulenc/SNIA; Northern Telecom/Matra Telecommunications; Avesta/British Steel; NCC/AGA/Axel Johnson; (References and summaries in the Commission Competition Policy Reports).

[4] OJ 13, 21.2.1962, p. 204/62.

[5] OJ L 175, 23.7.1968, p. 1.

[6] OJ L 378, 31.12.1986, p. 4.

[7] OJ L 374, 31.12.1987, p. 1.

III. ASSESSMENT PURSUANT TO ARTICLE 85

1. General comments

12. JVs can be caught by the prohibition of cartels only where they fulfil all the requisite elements pursuant to Article 85(1).

13. The creation of a JV is usually based on an agreement between undertakings and sometimes on a decision of an association of undertakings. The exercise of control as well as the management of the business is likewise usually governed by contract. Where there is no agreement, which is the case for instance in the acquisition of a joint controlling interest in an existing company by the purchase of shares on the stock exchange, the continued existence of the JV depends on the parent companies' coordinating their policy towards the JV and their manner of controlling it.

14. Whether the aforementioned agreements, decisions or concerted practices are likely to affect trade between Member States, can be decided only on a case-by-case basis. Where the JV's actual or foreseeable effects on competition are limited to the territory of one Member State or to territories outside the Community, Article 85(1) will not apply.

15. Article 85(1) does not therefore apply to certain categories of JV because they do not have as their object or effect the prevention, restriction or distortion of competition. This is particularly true for:

— JVs formed by parents which all belong to the same group and which are not in a position freely to determine their market behaviour: in such a case its creation is merely a matter of internal organization and allocation of tasks within the group,

— JVs of minor economic importance within the meaning of the 1986 Notice[1]; there is no appreciable restriction of competition where the combined turnover of the participating undertakings does not exceed ECU 200 million and their market share is not more than 5%,

— JVs with activities neutral to competition within the meaning of the 1968 Notice on cooperation between enterprises[2]: the types of cooperation referred to therein do not restrict competition because:

— they have as their sole object the procurement of non-confidential information and therefore serve in the preparation of autonomous decisions of the participating enterprises[3],

— they have as their sole object management cooperation[4],

— they have as their sole object cooperation in fields removed from the market[5],

— they are concerned solely with technical and organizational arrangements[6],

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[1] OJ C 231, 12.9.1986, p. 2.
[2] Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises, OJ C 75, 29.7.1968, p. 3; corrected by OJ C 84, 28.8.1968, p. 14.
[3] See II, point 1.
[4] See II, point 2.
[5] See II, point 3.
[6] See II, point 4.

— they concern solely arrangements between non-competitors[1],

— even though they concern arrangements between competitors, they neither limit the parties' competitive behaviour nor affect the market position of third parties[2].

The aforementioned characteristics for distinguishing between conduct restrictive of competition and conduct which is neutral from a competition point of view are not fixed, but form part of the general development of Community law. They must therefore be construed and applied in the light of the case-law of the Court of Justice as well as of the Commission's decisions. In addition, general Commission notices are modified from time to time in order to adapt them to the evolution of the law.

16. JVs which do not fall into any of the abovementioned categories must be individually examined to see whether they have the object or effect of restricting competition. The basic principles of the Notice on cooperation can be useful in such examination. The Commission will explain below on what criteria it assesses the restrictive character of a JV.

2. Criteria for the establishment of restrictions of competition

17. The appraisal of a cooperative JV in the light of the competition rules will focus on the relationship between the enterprises concerned and on the effects of their cooperation on third prties. In this respect the first task is to check whether the creation or operation of the JV is likely to prevent, restrict or distort competition between the parents. Secondly, it is necessary to examine whether the operation in question is likely to affect appreciably the competitive position of third parties, especially with regard to supply and sales possibilities. The relationship of the parents to the JV requires a separate legal assessment only if the JV is a full-function undertaking. However, even here the assessment must always take into account the relationship of the parents to each other and to third parties. Prevention, restriction or distortion of competition will be brought about by a JV only if its creation or activity affects the conditions of competition on the relevant market. The evaluation of a JV pursuant to Article 85(1) therefore always implies defining the relevant geographic and product market. The criteria to apply in that process are to be drawn from the de minimis Notice and the Commission's previous decisions. Sepecial attention must be paid to networks of JVs which are set up by the same parents, by one parent with different partners or by different parents in parallel. They form an important element of the market structure and may therefore be of decisive influence in determining whether the creation of a JV leads to restrictions of competition.

(a) *Competition between parent companies*

18. Competition between parent companies can be prevented, restricted or distorted through cooperation in a JV only to the extent that companies are already actual or potential competitors. The assumption of potential competitive circumstances presupposes that each parent alone is in a position to fulfil the tasks assigned to the JV and that it does not forfeit its capabilities to do so by the creation of the JV. An economically realistic approach is necessary in the assessment of any particular case.

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[1] See II, points 5 and 6.
[2] See II, points 7 and 8.

19. The Commission has developed a set of questions, which aim to clarify the theoretical and practical existing possibilities for the parents to perform the tasks individually instead of together[1]. Although these questions are designed to apply in particular to the case of manufacturing of goods, they are also relevant to the provision of services. They are as follows:

— *Contribution to the JV*
Does each parent company have sufficient financial resources to carry out the planned investment? Does each parent company have sufficient managerial qualifications to run the JV? Does each parent company have access to the necessary input products?

— *Production of the JV*
Does each parent know the production technique? Does each parent make the upstream or downstream products himself and does it have access to the necessary production facilities?

— *Sales by the JV*
Is actual or potential demand such as to enable each parent company to manufacture the product on its own? Does each parent company have access to the distribution channels needed to sell the product manufactured by the JV?

— *Risk factors*
Can each parent company on its own bear the technical and financial risks associated with the production operations of the JV?

— *Access to the relevant market*
What is the relevant geographic and product market? What are the barriers to entry into that market? Is each parent company capable of entering that market on its own? Can each parent overcome existing barriers within a reasonable time and without undue effort or cost?

20. The parents of a JV are potential competitors, in so far as in the light of the above factors, which may be given different weight from case to case, they could reasonably be expected to act autonomously. In that connection, analysis must focus on the various stages of the activity of an undertaking. The economic pressure towards cooperation at the R & D stage does not normally eliminate the possibility of competition between the participating undertakings at the production and distribution stages. The pooling of the production capacity of several undertakings, when it is economically unavoidable and thus unobjectionable as regards competition law, does not necessarily imply that these undertakings should also cooperate in the distribution of the products concerned.

(b) *Competition between the parent companies and the JV*

21. The relationship between the parents and the JV takes a specific significance when the JV is a full-function JV and is in competition with, or is a supplier to or a customer of, at least one of the parents. The applicability of the prohibition on cartels depends on the circumstances of the individual case. As anti-competitive behaviour between the parents will as a rule also influence business relationships between the parents and the JV and conversely, anti-competitive behaviour by the JV and one of the parents will always affect relationships between the parents, a global analysis of all the different relationships is necessary. The Commission's decisions offer plenty of examples of this.

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[1] See *Thirteenth Report on Competition Policy* (1983), point 55.

22. The restriction of competition, within the meaning of Article 85(1), between parents and JVs typically manifests itself in the division of geographical markets, product markets (especially through specialization) or customers. In such cases the participating undertakings reduce their activity to the role of potential competitors. If they remain active competitors, they will usually be tempted to reduce the intensity of competition by coordinating their business policy, especially as to prices and volume of production or sales or by voluntarily restraining their efforts.

(c) *Effects of the JV on the position of third parties*

23. The restrictive effect on third parties depends on the JV's activities in relation to those of its parents and on the combined market power of the undertakings concerned.

24. Where the parent companies leave it to the JV to handle their purchases or sales, the choice available to suppliers or customers may be appreciably restricted. The same is true when the parents arrange for the JV to manufacture primary or intermediate products or to process products which they themselves have produced. The creation of a JV may even exclude from the market the parents' traditional suppliers and customers. That risk increases in step with the degree of oligopolization of the market and the existence of exclusive or preferential links between the JV and its parents.

25. The existence of a JV in which economically significant undertakings pool their respective market power may even be a barrier to market entry by potential competitors and or impede the growth of the parents' competitors.

(d) *Assessment of the appreciable effect of restrictions of competition*

26. The scale of a JV's effects on competition depends on a number of factors, the most important of which are:

— the market shares of the parent companies and the JV, the structure of the relevant market and the degree of concentration in the sector concerned,

— the economic and financial strength of the parent companies, and any commercial or technical edge which they may have in comparison to their competitors,

— the market proximity of the activities carried out by the JV,

— whether the fields of activity of the parent companies and the JV are identical or interdependent,

— the scale and significance of the JV's activities in relation to those of its parents,

— the extent to which the arrangements between the firms concerned are restrictive,

— the extent to which market access by third parties is restricted.

(e) *JV networks*

27. JV networks can particularly restrict competition because they increase the influence of the individual JV on the business policy of the parents and on the market position of third parties. The assessment under competition law must take into account the different ways of arranging JV networks just as much as the cumulative effects of parallel existing networks.

28. Often competing parent companies set up several JVs which are active in the same product market but in different geographical markets. On top of the restrictions of competition which can already be attributed to each JV, there will then be those which arise in the relationships between the individual JVs. The ties between the parents are strengthened by the creation of every further JV so that any competition which still exists between them will be further reduced.

29. The same is true in the case where competing parents set up several JVs for complementary products which they themselves intend to process or for non-complementary products which they themselves distribute. The extent and intensity of the restrictive effects on competition are also increased in such cases. Competition is not severely restricted where undertakings competing within the same oligopolistic economic sector set up a multitude of JVs for related products or for a great variety of intermediate products. These considerations are also valid for the service sector.

30. Even where a JV is created by non-competing undertakings and does not, on its own, cause any restriction of competition, it can be anti-competitive if it belongs to a network of JVs set up by one of the parents for the same product market with different partners, because competition between the JVs may then be prevented, restricted or distorted[1]. If the different partners are actual or potential competitors, there will additionally be restrictive effects in the relationships between them.

31. Parallel networks of JVs, involving different parent companies, simply reveal the degree of personal and financial connection between the undertakings of an economic sector or between several economic sectors. They form, in so far as they are comparable to the degree of concentration on the relevant market, an important aspect of the economic environment which has to be taken into account in the assessment from a competition point of view of both the individual networks and the participating JVs.

3. Assessment of the most important types of JV

(a) *Joint ventures between non-competitors*

32. This group rarely causes problems for competition, whether the JV fulfils merely partial or the full functions of an undertaking. In the first case one must simply examine whether market access of third parties is significantly affected by the cooperation between the parents[2]. In the second case the emphasis of the examination is on the same question and the problem of competition restrictions between one of the parents and the JV[3] is usually only of secondary significance.

33. JVs between non-competitors created for research and development, for production or for distribution of goods including customer service do not in principle fall within Article 85(1). The non-application of the prohibition is justified by the combination of complementary knowledge, products and services in the JV. That is, however, subject to the

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[1] See Decision 'Optical fibres', OJ L 236, 22.8.1986, p. 30.
[2] See above III.2 (c) points 23, 24 and 25.
[3] See above III.2 (b) points 21 and 22.

reservation that there remains room for a sufficient number of R & D centres, production units and sales channels in the respective area of economic activity of the JV[1]. The same reasoning also applies to the assessment of purchasing JVs for customers from different business sectors. Such JVs are unobjectionable from a competition point of view as long as they leave suppliers with sufficient possibilities of customer choice.

34. JVs which manufacture exclusively for their parents primary or intermediate products or undertake processing for one or more of their parents do not, as a rule, restrict competition. A significant restriction of the supply and sales possibilities of third parties, a prerequisite for the application of the prohibition, can occur only if the parents have a strong market position in the supply or demand of the relevant products.

35. In the assessment of a full-function JV it is essential whether the activities the JV pursues are closely linked to those of the parents. In addition, the relationship of the activities of the parents to each other is of importance. If the JV trades in a product market which is upstream or downstream of the market of a parent, restrictions of competition can occur in relation to third parties, if the participants are undertakings with market power[2]. If the market of the JV is upstream of the market of one of the parents and at the same time downstream of the market of another parent, the JV functions as a connection between the two parents and also possibly as a vertical multi-level integration instrument. In such a situation the exclusive effects with regard to third parties are reinforced. Whether it fulfils the requisite minimum degree for the application of Article 85(1) can be decided only on an individual basis. If the JV and one of the parents trade in the same product market, then coordination of their market behaviour is probable if not inevitable.[3]

(b) *Joint ventures by competitors*

36. In this situation the effects of the JV on competition between the parents and on the market position of third parties must be analysed. The relationship between the activities of the JV and those of the parents is of decisive importance. In the absence of any interplay, Article 85(1) will usually not be applicable. The competition law assessment of the different types of JV leads to the following results.

37. A research and development JV may, in exceptional cases, restrict competition if it excludes individual activity in this area by the parents or if competition by the parents on the market for the resulting products will be restricted. This will normally be the case where the JV also assumes the exploitation of the newly developed or improved products or processes[4]. Whether the restriction of competition between the parents and the ensuing possible secondary effects on third parties are appreciable can be decided only on a case-by-case basis.

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[1] See Section II of the Notice on cooperation, points 3 and 6, and Regulation (EEC) No 418/85 on the application of Article 85(3) of the Treaty to categories of research and development agreements, OJ L 53, 22.2.1985, p. 5.

[2] No negative effect was found by the Commission in Decision 86/405/EEC (Optical fibres), OJ L 236, 22.8.1986, p. 30, and in Decision 90/410/EEC (Elopak/Metal Box-Odin), OJ L 209, 8.8.1990, p. 15.

[3] See above III.2 (b) point 22, and Decision 87/100/EEC (Mitchell Cotts/Sofiltra), OJ L 41, 11.2.1987, p. 31.

[4] See Notice in cooperation, II, point 3 and Regulation (EEC) No 418/85 (cited in footnote 5, page 271).

38. Sales JVs, selling the products of competing manufacturers, restrict competition between the parents on the supply side and limit the choice of purchasers. They belong to the category of traditional horizontal cartels which are subject to the prohibition of Article 85(1)[1], when they have an appreciable effect on the market.

39. Purchasing JVs set up by competitors can give the participants an advantageous position on the demand side and reduce the choice of suppliers. Depending on the importance of the jointly-sold products to the production and sales activities of the parents, the cooperation can also lead to a considerable weakening of price competition between the participating undertakings. This applies even more so when the purchase price makes up a significant part of the total cost of the products distributed by the parents. The application of Article 85(1) depends on the circumstances of the individual case[2].

40. JVs which manufacture primary or intermediate products for competing parent companies, which are further processed by them into the final product, must be assessed on the same principles. On the other hand, if the JV undertakes the processing of basic materials supplied by the parents, or the processing of half-finished into fully-finished products, with the aim of resupplying the parents, then competition between the participating undertakings, taking into consideration the market proximity of their cooperation and the inherent tendency to align prices, will usually exist only in a weaker form[3]. This is particularly so when the entire production activities of the parents are concentrated in the JV and the parents withdraw to the role of pure distributors. This leads to the standardization of manufacturing costs and the quality of the products to that essentially the only competition between the parents is on trade margins. This is a considerable restriction of competition which cannot be remedied by the parents marketing the products under different brand names[4].

41. Different situations must be distinguished when assessing full-function JVs between competing undertakings[5].

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[1] See the following decisions: NCH, OJ L 22, 26.1.1972, p. 16; Cementregeling voor Nederland, OJ L 303, 31.12.1972, p. 7; Cimbel, OJ L 303, 31.12.1972, p. 24; CSV, OJ L 242, 4.9.1978, p. 15; UIP, OJ L 226, 3.8.1989, p. 25 and Astra, OJ L 20, 28.1.1993, p. 23.

[2] See the following decisions: Socemas, OJ L 201, 12.8.1968, p. 4; Intergroup, OJ L 212, 9.8.1975, p. 23; National Sulphuric Acid Association I, OJ L 260, 3.10.1980, p. 24 and (II) OJ L 190, 5.7.1989, p. 25; Filmeinkauf Deutscher Fernsehanstalten, OJ L 284, 3.10.1989, p. 36; and IJsselcentrale, OJ L 28, 2.2.1991, p. 32.

[3] See Exxon/Shell, OJ C 92, 2.4.1993, p. 23 and OJ L 144, 9.6.1994, p. 17.

[4] See Decision 91/38/EEC (KSB/Goulds/Lowara/ITT), OJ L 19, 25.1.1991, p. 25; the anti-competitive character of joint economic production is acknowledged in principle in Regulation (EEC) No 417/85 on the application of Article 85(3) of the EEC treaty to categories of specialization agreements, OJ L 53, 22.2.1985, p. 1.

[5] See in particular the following decisions: Bayer/Gist-Brocades, OJ L 30, 5.2.1976, p. 13; United Reprocessors and KEWA, OJ L 51, 26.2.1976, pp. 7, 15; Vacuum Interrupters I, OJ L 48, 19.2.1977, p. 32 and II, OJ L 383, 31.12.1980, p. 1; De Laval/Stork I, OJ L 215, 23.8.1977, p. 11, and II, OJ L 59, 4.3.1988, p. 32; GEC/Weir, OJ L 327, 20.12.1977, p. 26; WANO/Schwarzpulver, OJ L 322, 16.11.1978, p. 26; Langenscheidt/Hachette, OJ L 39, 11.2.1982, p. 25; Amersham/Buchler, OJ L 314, 10.11.1982, p. 34; Rockwell/Iveco, OJ L 224, 17.8.1983, p. 19; Carbon Gas Technologie, OJ L 376, 31.12.1983, p. 17; Enichem/ICI, OJ L 50, 24.2.1988, p. 18; Bayer/BP Chemicals, OJ L 150, 16.6.1988, p. 35; Iveco/Ford, OJ L 230, 19.8.1988, p. 39; Alcatel Espace/ANT, OJ L 32, 3.2.1990, p. 19; Konsortium ECR 900, OJ L 228, 22.8.1990, p. 31; Screensport/EBU — Eurosport, OJ L 63, 9.3.1991, p. 32; Eirpage, OJ L 306, 7.11.1991, p. 22; Procter and Gamble/Finaf, OJ C 3, 7.1.1992, p. 2 and Infonet, OJ C 7, 11.1.1992, p. 3.

— Where the JV operates on the same market as its parents, the normal consequence is that competition between all participating undertakings will be restricted.

— Where the JV operates on a market upstream or downstream of that of the parents with which it has supply or delivery links, the effects on competition will be the same as in the case of a production JV.

— Where the JV operates on a market adjacent to that of its parents, competition can only be restricted when there is a high degree of interdependence between the two markets. This is especially the case when the JV manufactures products which are complementary to those of its parents.

Combinations of various types of JV are often found in economic life so that an overall assessment of the resultant restrictions of competition between participating undertakings and the consequences of the cooperation on third parties must be carried out. In addition the economic circumstances must be taken into account, especially the association of a JV to a network with other JVs and the existence of several parallel JV networks within the same economic sector[1].

42. Even JVs between competitors, which are usually caught by the prohibition in Article 85(1), must be examined to see whether in the actual circumstances of the individual case they have as their object or effect the restriction, prevention or distortion of competition. This will not be the case where cooperation in the form of a JV can objectively be seen as the only possibility for the parents to enter a new market or to remain in their existing market, provided that their presence will strengthen competition or prevent it from being weakened. Under these conditions the JV will neither reduce existing competition nor prevent potential competition from being realized. The prohibition in Article 85(1) will therefore not apply[2].

IV. ASSESSMENT PURSUANT TO ARTICLE 85(3)

1. Group exemptions

43. JVs falling within the scope of Article 85(1) are exempted from the prohibition if they fulfil the conditions of a group exemption. Two Commission regulations legalize cooperation between undertakings in the form of JVs. Two other Commission regulations authorize certain restrictive agreements on the transfer of technology to a JV by its parents. The field of application of these group exemption regulations will be considerably expanded, notably for JVs, by Regulation (EEC) No 151/93[3].

(a) Specialization Regulation

44. Regulation (EEC) No 417/85 on the application of Article 85(3) to categories of specialization agreements[4] includes, *inter alia*, agreements whereby several undertakings leave

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[1] See above III.2 (e), points 27 to 31.

[2] See the following decisions: Alliance des constructeurs français de machines-outils, OJ L 201, 12.8.1968, p. 1; SAFCO, OJ L 13, 17.1.1972, p. 44; Metaleurop, OJ L 179, 12.7.1990, p. 41; Elopak/Metal Box-Odin, OJ L 209, 8.8.1990, p. 15; Konsortium ECR 900, OJ L 228, 22.8.1990, p. 31.

[3] OJ L 21, 29.1.1993, p. 8.

[4] OJ L 53, 22.2.1985, p. 1.

the manufacture of certain products to a JV set up by them. This transfer can be for existing or future production. The creation and use of production JVs are exempted only if the aggregate market share of the participating undertakings does not exceed 20% and the cumulated turnover does not exceed ECU 1 000 million. Agreements between more sizeable undertakings, the turnover of which exceeds ECU 1 000 million, also benefit from the group exemption if they are properly notified and the Commission does not object to the agreement within six months. This procedure is not applicable when the market share threshold is exceeded.

45. The abovementioned rules apply exclusively to cooperation at the production level. The JV must supply all its production — which can include primary, intermediate or finished products — to its parents. The latter are not permitted to be active as manufacturers in the JV's area of production, but they may manufacture other products belonging to that product market. Products made by the JV are then sold by the parents, each of which can deal as exclusive distributor for a given territory.

46. Agreements in which the parents entrust JVs with the distribution of the contract products are also covered by the group exemption, though only under more rigorous conditions. The aggregate market share of the participating undertakings must not exceed 10%. In this case also, there is a turnover threshold of ECU 1 000 million, the effect of which undertakings can avoid by resorting to the opposition procedure. Regulation (EEC) No 417/85 leaves the undertakings concerned free to organize their cooperation at the production and distribution stages. It allows for separate production followed by joint distribution of the contract products through a sales JV, as well as for the merging of production and distribution in a full-function JV, or the separation of both functions through the creation of a production JV and a sales JV. The production and/or distribution of the contract products can be entrusted to several JVs instead of one, which may, as the case may be, fulfil their function on the basis of exclusive contracts in various territories.

(b) *Research and development Regulation*

7. Regulation (EEC) No 418/85 on the application of Article 85(5) to categories of research and development agreements[1] provides for the exemption of JVs whose activities can range from R&D to the joint exploitaiton of results. The term exploitation covers the manufacture of new or improved products as well as the use of new or improved production processes, the marketing of products derived from R&D activities and the granting of manufacturing, use or distribution licences to third parties. The exemption is subject to the requirement that the joint R&D contributes substantially to technical or economic progress and is essential to the manufacture of new or improved products.

48. Regulation (EEC) No 418/85 also links exemption from the prohibition to quantitative conditions in the form of a two-fold market share limit. Cooperation in the form of a JV dealing with R&D, production and licensing policy will be permitted for parents who have an aggregate market share of up to 20%. In the area of R&D as well as manufacture, the

[1] OJ L 53, 22.2.1985, p. 5.

Regulation allows all forms of coordination of behaviour because it does not require specialization. The parents can themselves remain or become active within the field of activity of the JV. They are also allowed to determine in what way they wish to use the possibilities of production by themselves or the licensing of third parties. By the allocation of contract territories the parents can protect themselves for the duration of the contract from the manufacture and use of the contract products by other partners in the reserved territories; furthermore, they can prevent other partners from pursuing an active marketing policy in those territories for five years after the introduction of the new or improved product into the common market. If, on the contrary, the partners entrust one or more JVs with the distribution of the contract products, a market share threshold of 10% is applicable to the whole of their cooperation. As Regulation (EEC) No 418/85 does not provide for a turnover threshold, all undertakings regardless of their size can benefit from the group exemption.

(c) *Patent-licensing and know-how licensing Regulations*

49. Regulation (EEC) No 2349/84 on the application of Article 85(3) of the Treaty to categories of patent licensing agreements[1] applies also to such agreements between any one of the parents and the JV affecting the activities of the JV. If the parents are competitors on the market of the contract products, the group exemption applies only up to a certain market share limit. This is 20% if the JV simply carries on manufacturing or 10% if it carries on the manufacture and marketing of the licensed products.

50. Regulation (EEC) No 2349/84 also permits the granting of exclusive territorial manufacture and distribution licences to the JV, the protection of the licence territories of the JV and of the parents against active and passive competition by other participants for the duration of the contract and the protection of the licence territory of the JV against other licences. The parents can proctect the JV from an active distribution policy by other licensees for the full duration of the contract. During an intitial five-year period from the introduction of a product into the common market, it is possible to forbid direct imports of contract products by other licensees into the JV's licensed territory.

51. Regulation (EEC) No 556/89 on the application of Article 85(3) of the Treaty to certain categories of know-how licensing agreements[2] contains similar provisions, except that the territorial protection between the JV and the parents is limited to 10 years, beginning at the signature of the first know-how agreement concluded for a territory inside the Community. This point in time also marks the beginning of the period for which the JV can be protected against active competition (10 years) and passive competition (five years) by other licensees.

2. Individual exemptions

(a) *General comments*

52. JVs which fall within Article 85(1) without fulfilling the conditions for the application of a group exemption regulation are not invevitably unlawful. They can be exempted by an

[1] OJ L 219, 16.8.1984, p. 15.
[2] OJ L 61, 4.3.1989, p. 1.

individual decision of the Commission in so far as they fulfil the four conditions of Article 85(3). According to Articles 4, 5 and 15 of Regulation No 17 an individual exemption can be issued only if the participating undertakings have notified the agreement, decision or concerted practice on which cooperation is based, to the Commission. Certain arrangements which are less harmful to the development of the common market are dispensed from the requirement to notify by Article 4(2) of Regulation No 17. They can therefore be exempted without prior notification. The same applies to transport cartels within the meaning of Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87.

53. The Commission must, pursuant to Article 85(3), examine:

— whether the JV contributes to improving the production or distribution of goods or to promoting technical or economic progress,

— whether consumers are allowed a fair share of the resulting benefit,

— whether the parents or the JV are subject to restrictions which are not indispensable for the attainment of these objectives, and

— whether the cooperation in the JV affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

An exemption from the prohibition in Article 85(1) can be issued only if the answer to the first two questions is in the affirmative and the answer to the second two questions is negative.

(b) *Principles of assessment*

54. In order to fulfil the first two conditions of Article 85(3) the JV must bring appreciable objective advantages for third parties, especially consumers, which at least equal the consequent detriment to competition.

55. Advantages in the abovementioned sense, which can be pursued and attained with the aid of a JV, include, in the Commission's opinion, in particular, the development of new or improved products and processes which are marketed by the originator or by third parties under licence. In addition, measures opening up new markets, leading to the sales expansion of the undertaking in new territories or the enlargement of its supply range by new products, will in principle be assessed favourably. In all these cases the undertakings in question contribute to dynamic competition, consolidating the internal market and strengthening the competitiveness of the relevant economic sector. Production and sales increases can also be a pro-competitive stimulant. On the other hand, the rationalization of production activities and distribution networks is rather a means of adapting supply to a shrinking or stagnant demand. It leads, however, to cost-savings which, under effective competition, are usually passed on to customers as lower prices. Plans for the reduction of production capacity, however, lead mostly to price rises. Agreements of this latter type will be judged favourable only if they serve to overcome a structural crisis, to accelerate the removal of unprofitable production capacity from the market and thereby to re-establish competition in the medium term.

56. The Commission will give a negative assessment to agreements which have as their main purpose the coordination of actual or potential competition between the participating undertakings. This is especially so for joint price-fixing, the reduction of production and sales by establishing quotas, the division of markets and contractual prohibitions or restrictions on investment. JVs which are created or operated essentially to achieve such aims are nothing but classic cartels the anti-competitive effects of which are well known.

57. The pros and cons of a JV will be weighed against each other on an overall economic balance, by means of which the type and the extent of the respective advantages and risks can be assessed. If the parents are economically and financially powerful and have, over and above that a high market-share, their exemption applications will need a rigorous examination. The same applies to JVs which reinforce an existing narrow oligopoly or belong to a network of JVs.

58. The acceptance pursuant to Article 85(3)(a) of restrictions on the parents or the JV depends above all on the type and aims of the cooperation. In this context, the decisive factor is usually whether the contractual restriction on the parties' economic freedom is directly connected with the creation of the JV and can be considered indispensable for its existence[1]. It is only for the restriction of global competition that Article 85(3)(b) sets an absolute limit. Competition must be fully functioning at all times. Agreements which endanger its effectiveness cannot benefit from individual exemption. This category includes JVs which, through the combination of activities of the parents, achieve, consolidate or strengthen a dominant position.

(c) *Assessment of the most important types of JV*

59. Pure research and development JVs which do not fulfil the conditions for group exemption under Regulation (EEC) No 418/85 can still in general be viewed positively. This type of cooperation normally offers important economic benefits without adversely affecting competition. That is also the case where the parents entrust the JV with the further task of granting licences to third parties. If the JV also takes on the manufacture of the jointly researched and developed product, the assessment for the purpose of exemption must include the principles which apply to production JVs[2]. JVs which are responsible for R&D, licensing, production and distribution are full-function JVs and must be analysed accordingly[3].

60. Sales JVs belong to the category of classic horizontal cartels. They have as a rule the object and effect of coordinating the sales policy of competing manufacturers. In this way they not only close off price competition between the parents but also restrict the volume of goods to be delivered by the participants within the framework of the system for allocating orders. The Commission will therefore in principle assess sales JVs negatively[4]. The Commission takes a positive view, however, of those cases where joint distribution of the

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[1] See below V.2, point 70 *et seq.*
[2] See below points 62 and 63.
[3] See below point 64.
[4] See the NCH, Cementregeling voor Nederland, Cimbel and CSV decisions (all cited in footnote 1, page 279) and Astra, OJ L 20, 28.1.1993, p. 23.

contract products is part of a global cooperation project which merits favourable treatment pursuant to Article 85(3) and for the success of which it is indispensable. The most important examples are sales JVs between manufacturers who have concluded a reciprocal specialization agreement, but wish to continue to offer the whole range of products concerned, or sales JVs set up for the joint exploitation of the results of joint R&D, even at the distribution stage. In other cases, an exemption can be envisaged only in certain specific circumstances[1].

61. Purchasing JVs contribute to the rationalization of ordering and to the better use of transport and store facilities but are at the same time an instrument for the setting of uniform purchase prices and conditions and often of purchase quotas. By combining their demand power in a JV, the parents can obtain a position of excessive influence vis-à-vis the other side of the market and distort competition between suppliers. Consequently, the disadvantages often outweigh the possible benefits which can accompany purchasing JVs, particularly those between competing producers. The Commission is correspondingly prepared to grant exemptions only in exceptional cases and then only if the parents retain the possibility of purchasing individually[2]. No decision has, however, concerned the most important of the purchasing JVs so far.

62. Production JVs can serve different economic purposes. They will often be set up to create new capacity for the manufacture of particular products which are also manufactured by the parents[3]. In other cases the JV will be entrusted with the manufacture of a new product in the place of the parents[4]. Finally, the JV can be entrusted with the combination of the production capacities of the parents and their expansion or reduction as necessary.

63. In view of the various tasks of production JVs their assessment for exemption purposes will be carried out according to different yardsticks. JVs, for the expansion of production capacity or product range, can contribute not only to the prevention of parallel investment — which results in cost-savings — but also to the stimulation of competition. The combination or reduction of existing production capacity is primarily a rationalization measure and is usually of a defensive nature. It is not always obvious that measures of this kind benefit third parties, especially consumers and they must therefore be justified individually. Generally applicable quantitative thresholds, for instance in the form of market share limits, cannot be fixed for production JVs. The more the competition between the parents is restricted, the more emphasis must be put on the maintenance of competition with third parties. The market share limit of 20% in the group exemption regulations can serve as a starting point for the assessment of production JVs in individual cases.

64. Full-function JVs, in so far as they are not price-fixing, quota-fixing or market-sharing cartels or vehicles for a coordination of the investment policies conducted by the parents

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[1] See Decision 89/467/EEC (UIP) (cited in footnote 1, page 279).
[2] See the National Sulphuric Acid Association, Filmeinkauf deutscher Fernsehanstalten, IJsselcentrale decisions (all cited in footnote 2, page 279).
[3] See Exxon/Shell (footnote 3, page 279).
[4] See the KSB/Goulds/Lowara/ITT decision (cited in footnote 4, page 279).

which goes beyond the individual case, often form elements of dynamic competition and then deserve a favourable assessment[1]. As cooperation also includes distribution, the Commission has to take special care in assessing individual cases that no position of market power will be created or strengthened by entrusting the JV with all the functions of an undertaking, combined with the placing at its disposal of all the existing resources of the parents. To assess whether a full-function JV raises problems of compatibility with the competition rules or not, an important point of reference is the aggregate market share limit of 10% contained in the group exemption regulations. Below this threshold it can be assumed that the effect of exclusion from the market of third parties and the danger of creating or reinforcing barriers to market entry will be kept within justifiable limits. A prerequisite is, however, that the market structure will continue to guarantee effective competition. If the said threshold is exceeded, an exemption will be considered only after a careful examination of each individual case.

V. ANCILLARY RESTRICTIONS

1. Principles of assessment

65. A distinction must be made between restrictions of competition which arise from the creation and operation of a JV, and additional agreements which would, on their own, also constitute restrictions of competition by limiting the freedom of action in the market of the participating undertakings. Such additional agreements are either directly related to and necessary for the establishment and operation of the JV in so far as they cannot be dissociated from it without jeopardizing its existence, or are simply concluded at the same time as the JVs creation without having those features.

66. Additional agreements which are directly related to the JV and necessary for its existence must be assessed together with the JV. They are treated under the rules of competition as ancillary restrictions if they remain subordinate in importance to the main object of the JV. In particular, in determining the 'necessity' of the restriction, it is proper not only to take account of its nature, but equally to ensure that its duration, subject-matter and geographical field of application do not exceed what the creation and operation of the JV normally requires.

67. If a JV does not fall within the scope of Article 85(1), then neither do any additional agreements which, while restricting competition on their own, are ancillary to the JV in the manner described above. Conversely, if a JV falls within the scope of Article 85(1), then so will any ancillary restrictions. The exemption from prohibition is based for both on the same principles. Ancillary restrictions require no special justification under Article 85(3). They will generally be exempted for the same period as the JV.

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[1] See the following decisions: Amersham/Buchler, OJ L 314, 10.11.1982, p. 34; Rockwell/Iveco, OJ L 224, 17.8.1983, p. 19; Carbon Gas Technologie, OJ L 376, 31.12.1983, p. 17; Enichem/ICI, OJ L 50, 24.2.1988, p. 18; Bayer/BP Chemicals, OJ L 150, 16.6.1988, p. 35; Iveco/Ford, OJ L 230, 19.8.1988, p. 39; Alcatel Espace/ANT, OJ L 32, 3.2.1990, p. 19; Eirpage, OJ L 306, 7.11.1991, p. 22; Bayer/Gist-Brocades, OJ L 30, 5.2.1976, p. 13; United Reprocessors and KEWA, OJ L 51, 26.2.1976, p. 7; Vacuum Interrupters I, OJ L 48, 19.2.1977, p. 32 and II, OJ L 383, 31.12.1980, p. 1; De Laval/Stork I, OJ L 215, 23.8.1977, p. 11 and II, OJ L 59, 4.3.1988, p. 32; GEC/Weir, OJ L 327, 20.12.1977, p. 26; Langenscheidt/Hachette, OJ L 39, 11.2.1982, p. 25; Procter and Gamble/Finaf, OJ C 3, 7.1.1992, p. 2; and INFONET, OJ C 7, 11.1.1992, p. 3.

68. Additional agreements which are not ancillary to the JV normally fall within the scope of Article 85(1), even though the JV itself may not. For them to be granted an exemption under Article 85(3), a specific assessment of their benefits and disadvantages must be made. This assessment must be carried out separately from that of the JV.

69. In view of the diversity of JVs and of the additional restrictions that may be linked to them, only a few examples can be given of the application of existing principles. They are drawn from previous Commission practice.

2. Assessment of certain additional restrictions

70. Assessment of whether additional restrictions constitute an ancillary agreement must distinguish between those which affect the JV and those which affect the parents.

(a) *Restrictions on the JV*

71. Of the restrictions which affect the JV, those which give concrete expression to its object, such as contract clauses which specify the product range or the location of production, may be regarded as ancillary. Additional restrictions which go beyond the definition of the venture's object and which relate to quantities, prices or customers may not. The same can be said for export bans.

72. When the setting-up of the JV involves the creation of new production capacity or the transfer of technology from the parent, the obligation imposed on the JV not to manufacture or market products competing with the licensed products may usually be regarded as ancillary. The JV must seek to ensure the success of the new production unit, without depriving the parent companies of the necessary control over exploitation and dissemination of their technology.[1].

73. In certain circumstances, other restrictions on the JV can be classified as ancillary such as contract clauses which limit the cooperation to a certain area or to a specific technical application of the transferred technology. Such restrictions must be seen as the invevitable consequences of the parent's wish to limit the cooperation to a specific field of activity without jeopardizing the object and existence of the JV[2].

74. Lastly, where the parent companies assign to the JV certain stages of production or the manufacture of certain products, obligations on the JV to purchase from or supply its parents may also be regarded as ancillary, at least during the JV's starting-up period.

(b) *Restrictions on the parent companies*

75. Restrictions which prohibit the parent companies from competing with the JV or from actively competing with it in its area of activity, may be regarded as ancillary at least during

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[1] Mitchell Cotts/Sofiltra (footnote 3, page 278).
[2] Elopak/Metal Box-Odin (footnote 2, page 278).

the JV's starting-up period. Additional restrictions relating to quantities, prices or customers, and export bans obviously go beyond what is required for the setting-up and operation of the JV.

76. The Commission has in one case regarded as ancillary, a territorial restriction imposed on a parent company where the JV was granted an exclusive manufacturing licence in respect of fields of technical application and product markets in which both the JV and the parent were to be active[1]. This decision was limited, however, to the starting-up period of the JV and appeared necessary for the parents to become established in a new geographical market with the help of the JV. In another case, the grant to the JV of an exclusive exploitation licence without time-limit was regarded as indispensable for its creation and operation. In this case the parent company granting the licence was not active in the same field of application or on the same product market as that for which the licence was granted[2]. This will generally be the case with JVs undertaking new activities in respect of which the parent companies are neither actual nor potential competitors.

[1] Mitchell Cotts/Sofiltra (footnote 3, page 278).
[2] Elopak/Metal Box-Odin (footnote 2, page 278).

IV — Regulations in the field of transport

COUNCIL REGULATION (EEC) No 2988/74[1] OF 26 NOVEMBER 1974

concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition

[1] See under B-I 'General procedural rules'

COUNCIL REGULATION No 141/62[1] OF 26 NOVEMBER 1962

exempting transport from the application of Council Regulation No 17 amended by Regulations Nos 165/65/EEC[2] and 1002/67/EEC[3]

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the treaty establishing the European Economic Community, and in particular Article 67 thereof,

Having regard to the first Regulation made in implementation of Articles 85 and 86 of the Treaty (Regulation No 17) of 6 February 1962, as amended by Regulation No 59 of 3 July 1962,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the Economic and Social Committee,

Having regard to the Opinion of the European Parliament,

Whereas, in pursuance of the common transport policy, account being taken of the distinctive features of the transport sector, it may prove necessary to lay down rules governing competition different from those laid down or to be laid down for other sectors of the economy, and whereas Regulation No 17 should not therefore apply to transport;

Whereas, in the light of work in hand on the formulation of a common transport policy, it is possible, as regards transport by rail, road and inland waterway, to envisage the introduction within a foreseeable period of rules on competition; whereas, on the other hand, as regards sea and air transport it is impossible to foresee whether and at what date the Council will adopt appropriate provisions; whereas accordingly a limit to the period during which Regulation No 17 shall not apply can be set only for transport by rail, road and inland waterway;

Whereas the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article 86 of the treaty, within the transport market.

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[1] OJ 124, 28.11.1962, p. 2751 (Special Edition 1959-62, p. 291).
[2] OJ 210, 11.12.1965, p. 314.
[3] OJ 306, 16.12.1967, p. 1.

Article 2

The Council, taking account of any measures that may be taken in pursuance of the common transport policy, shall adopt appropriate provisions in order to apply rules on competition to transport by rail, road and inland waterway. To this end, the Commission shall, before 30 June 1964, submit proposals to the Council.

Article 3

Article 1 of this Regulation shall remain in force, as regards transport by rail, road and inland waterway, until 30 June 1968.

Article 4

This Regulation shall enter into force on 13 March 1962. This provision shall not be invoked against undertakings or associations of undertakings which, before the day following the date of publication of this Regulation in the *Official Journal of the European Communities*, shall have terminated any agreement, decision or concerted practice covered by Article 1.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COUNCIL REGULATION (EEC) No 1017/68[1] OF 19 JULY 1968

applying rules of competition to transport by rail, road and inland waterway

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75 and 87 thereof,

Having regard to the proposal from the Commission,

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

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

Whereas Council Regulation No 141[4] exempting transport from the application of Regulation No 17[5] provides that the said Regulation No 17 shall not apply to agreements, decisions and concerted practices in the transport sector the effect of which is to fix transport rates and conditions, to limit or control the supply of transport or to share transport markets, nor to dominant positions, within the meaning of Article 86 of the Treaty, on the transport market;

Whereas, for transport by rail, road and inland waterway, Regulation No 1002/67/EEC[6] provides that such exemption shall not extend beyond 30 June 1968;

Whereas the establishing of rules of competition for transport by rail, road and inland waterway is part of the common transport policy and of general economic policy;

Whereas, when rules of competition for these sectors are being settled, account must be taken of the distinctive features of transport;

Whereas, since the rules of competition for transport derogate from the general rules of competition, it must be made possible for undertakings to ascertain what rules apply in any particular case;

Whereas, with the introduction of a system of rules on competition for transport, it is desirable that such rules should apply equally to the joint financing or acquisition of transport equipment for the joint operation of services by certain groupings of undertakings, and also to certain operations in connection with transport by rail, road or inland waterway of providers of services ancillary to transport;

Whereas, in order to ensure that trade between Member States is not affected or competition within the common market distorted, it is necessary to prohibit in principle for the three modes of transport specified above all agreements between undertakings, decisions of associ-

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[1] OJ L 175, 23.7.1968, p. 1 (Special Edition 1968 I, p. 302).
[2] OJ 205, 11.12.1964, p. 3505/64.
[3] OJ 103, 12.6.1965, p. 1792/62.
[4] OJ 124, 28.11.1962, p. 2751/62 (Special Edition 1959-62, p. 291).
[5] OJ 13, 21.2.1962, p. 204/62 (Special Edition 1959-62, p. 87).
[6] OJ 306, 16.12.1967, p. 1.

ations of undertakings and concerted practices between undertakings and all instances of abuse of a dominant position within the common market which could have such effects;

Whereas certain types of agreement, decision and concerted practice in the transport sector the object and effect of which is merely to apply technical improvements or to achieve technical cooperation may be exempted from the prohibition on restrictive agreements since they contribute to improving productivity; whereas, in the light of experience following application of this Regulation, the Council may, on a proposal from the Commission, amend the list of such types of agreement;

Whereas, in order that an improvement may be fostered in the sometimes too dispersed structure of the industry in the road and inland waterway sectors there should also be exempted from the prohibition on restrictive agreements those agreements, decisions and concerted practices providing for the creation and operation of groupings of undertakings in these two transport sectors whose object is the carrying on of transport operations, including the joint financing or acquisition of transport equipment for the joint operation of services; whereas such overall exemption can be granted only on condition that the total carrying capacity of a grouping does not exceed a fixed maximum, and that the individual capacity of undertakings belonging to the grouping does not exceed certain limits so fixed as to ensure that no one undertaking can hold a dominant position within the grouping; whereas the Commission must however, have power to intervene if, in specific cases, such agreements should have effects incompatible with the conditions under which a restrictive agreement may be recognized as lawful, and should constitute an abuse of the exemption; whereas, nevertheless the fact that a grouping has a total carrying capacity greater than the fixed maximum, or cannot claim the overall exemption because of the individual capacity of the undertakings belonging to the grouping, does not in itself prevent such a grouping from constituting a lawful agreement, decision or concerted practice if it satisfies the conditions therefor laid down in this Regulation;

Whereas, where an agreement, decision or concerted practice contributes towards improving the quality of transport services, or towards promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand may be subject to considerable temporal fluctuation, or towards increasing the productivity of undertakings or towards furthering technical or economic progress, it must be made possible for the prohibition to be declared not to apply, always provided, however, that the agreement, decision or concerted practice takes fair account of the interests of transport users, and neither imposes on the undertakings concerned any restriction not indispensable to the attainment of the above objectives nor makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned, having regard to competition from alternative modes of transport;

Whereas it is desirable until such time as the Council, acting in pursuance of the common transport policy, introduces appropriate measures to ensure a stable transport market, and subject to the condition that the Council shall have found that a state of crisis exists, to authorize, for the market in question, such agreements as are needed in order to reduce disturbance resulting from the structure of the transport market;

Whereas, in respect of transport by rail, road and inland waterway, it is desirable that Member States should neither enact nor maintain in force measures contrary to this Regula-

tion concerning public undertakings or undertakings to which they grant special or exclusive rights; whereas it is also desirable that undertakings entrusted with the operation of services of general economic importance should be subject to the provisions of this Regulation in so far as the application thereof does not obstruct, in law or in fact, the accomplishment of the particular tasks assigned to them, always provided that the development of trade is not thereby affected to such an extent as would be contrary to the interests of the Community; whereas the Commission must have power to see that these principles are applied and to address the appropriate directives or decisions for this purpose to Member States;

Whereas the detailed rules for application of the basic principles of this Regulation must be so drawn that they not only ensure effective supervision while simplifying administration as far as possible but also meet the needs of undertakings for certainty in the law;

Whereas it is for the undertakings themselves, in the first instance, to judge whether the predominant effects of their agreements, decisions or concerted practices are the restriction of competition or the economic benefits acceptable as justification for such restriction and to decide accordingly, on their own responsibility, as to the illegality or legality of such agreements, decisions or concerted practices;

Whereas, therefore, undertakings should be allowed to conclude or operate agreements without declaring them; whereas this exposes such agreements to the risk of being declared void with retroactive effect should they be examined following a complaint or on the Commission's own initiative, but does not prevent their being retroactively declared lawful in the event of such subsequent examination;

Whereas, however, undertakings may, in certain cases, desire the assistance of the competent authorities to ensure that their agreements, decisions or concerted practices are in conformity with the rules applicable; whereas for this purpose there should be made available to undertakings a procedure whereby they may submit applications to the Commission and a summary of each such application is published in the *Official Journal of the European Communities*, enabling any interested third parties to submit their comments on the agreement in question; whereas, in the absence of any complaint from Member States or interested third parties and unless the Commission notifies applicants, within a fixed time limit, that there are serious doubts as to the legality of the agreement in question, that agreement should be deemed exempt from the prohibition for the time already elapsed and for a further period of three years;

Whereas, in view of the exceptional nature of agreements needed in order to reduce disturbances resulting from the structure of the transport market, once the Council has found that a state of crisis exists, undertakings wishing to obtain authorization for such an agreement should be required to notify it to the Commission; whereas authorization by the Commission should have effect only from the date when it is decided to grant it; whereas the period of validity of such authorization should not exceed three years from the finding of a state of crisis by the Council; whereas renewal of the decision should depend upon renewal of the finding of a state of crisis by the Council; whereas, in any event, the authorization should cease to be valid not later than six months from the bringing into operation by the Council of appropriate measures to ensure the stability of the transport market to which the agreement relates;

Whereas, in order to secure uniform application within the common market of the rules of competition for transport, rules must be made under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the measures required for the application of such rules of competition;

Whereas for this purpose the Commission must have the cooperation of the competent authorities of the Member States and be empowered throughout the common market to request such information and to carry out such investigations as are necessary to bring to light any agreement, decision or concerted practice prohibited under this Regulation, or any abuse of a dominant position prohibited under this Regulation;

Whereas, if, on the application of the Regulation to a specific case, a Member State is of the opinion that a question of principle concerning the common transport policy is involved, it should be possible for such questions of principle to be examined by the Council; whereas it should be possible for any general questions raised by the implementation of the competition policy in the transport sector to be referred to the Council; whereas a procedure must be provided for which ensures that any decision to apply the Regulation in a specific case will be taken by the Commission only after the questions of principle have been examined by the Council, and in the light of the policy guidelines that emerge from that examination;

Whereas, in order to carry out its duty of ensuring that the provisions of this Regulation are applied, the Commission must be empowered to address to undertakings or associations of undertakings recommendations and decisions for the purpose of bringing to an end infringements of the provisions of this Regulation prohibiting certain agreements, decisions or practices;

Whereas compliance with the prohibitions laid down in this Regulation and the fulfilment of obligations imposed on undertakings and associations of undertakings under this Regulation must be enforceable by means of fines and periodic penalty payments;

Whereas undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity to submit their comments beforehand, and it must be ensured that wide publicity is given to decisions taken;

Whereas it is desirable to confer upon the Court of Justice, pursuant to Article 172, unlimited jurisdiction in respect of decisions under which the Commission imposes fines or periodic penalty payments;

Whereas it is expedient to postpone for six months, as regards agreements, decisions and concerted practices in existence at the date of publication of this Regulation in the *Official Journal of the European Communities*, the entry into force of the prohibition laid down in the Regulation, in order to make it easier for undertakings to adjust their operations so as to conform to its provisions;

Whereas, following discussions with the third countries' signatories to the Revised Convention for the Navigation of the Rhine, and within an appropriate period of time from the conclusion of those discussions, this Regulation as a whole should be admended as necessary in the light of the obligations arising out of the Revised Convention for the Navigation of the Rhine;

Whereas the Regulation should be amended as necessary in the light of the experience gained over a three-year period; whereas it will in particular be desirable to consider whether, in the light of the development of the common transport policy over that period, the scope of the Regulation should be extended to agreements, decisions and concerted practices, and to instances of abuse of a dominant position, not affecting trade between Member States,

HAS ADOPTED THIS REGULATION:

Article 1

Basic provision

The provisions of this Regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical cooperation, or the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by grouping within the meaning of Article 4 of road or inland waterway transport undertakings, and to the abuse of a dominant position on the transport market. These provisions shall apply also to operations of providers of services ancillary to transport which have any of the objects or effects listed above.

Article 2[1]

Prohibition of restrictive practices

Subject to the provisions of Articles 3 to 6, the following shall be prohibited as incompatible with the common market, no prior decision to that effect being required: all agreements between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix transport rates and conditions or any other trading conditions;

(b) limit or control the supply of transport, markets, technical development or investment;

(c) share transport markets;

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

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

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[1] **Documents concerning the accession** 'with regard to the UK the prohibition imposed by Art. 2 of this Regulation shall apply from 1 July 1973 to agreements, decisions and concerted practices in existence at the date of accession which come within the field of application of this prohibition as a result of accession'. (OJ L 73, 27.3.1972, p. 138).

Article 3

Exception for technical agreements

1. The prohibition laid down in Article 2 shall not apply to agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical cooperation by means of:

(a) the standardization of equipment, transport supplies, vehicles or fixed installations;

(b) the exchange or pooling, for the purpose of operating transport services, of staff, equipment, vehicles or fixed installations;

(c) the organization and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates;

(d) the use, for journeys by a single mode of transport, of the routes which are most rational from the operational point of view;

(e) the coordination of transport timetables for connecting routes;

(f) the grouping of single consignments;

(g) the establishment of uniform rules as to the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions.

2. The Commission shall, where appropriate, submit proposals to the Council with a view to extending or reducing the list in paragraph 1.

Article 4

Exemption for groups of small and medium-sized undertakings

1. The agreements, decisions and concerted practices referred to in Article 2 shall be exempt from the prohibition in that Article where their purpose is:

— the constitution and operation of groupings of road or inland waterway transport undertakings with a view to carrying on transport activities;

— the joint financing or acquisition of transport equipment or supplies, where these operations are directly related to the provision of transport services and are necessary for the joint operations of the aforesaid groupings;

always provided that the total carrying capacity of any grouping does not exceed:

— 10 000 tonnes in the case of road transport,

— 500 000 tonnes in the case of transport by inland waterway.

The individual capacity of each undertaking belonging to a grouping shall not exceed 1 000 tonnes in the case of road transport or 50 000 tonnes in the case of transport by inland waterway.

2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 5 and which constitute an abuse of the exemption from the provisions of Article 2, undertakings or associations of undertakings may be required to make such effects cease.

Article 5

Non-applicabiity of the prohibition

The prohibition in Article 2 may be declared inapplicable with retroactive effect to:

— any agreement or category of agreement between undertakings,

— any decision or category of decision of an association of undertakings, or

— any concerted practice or category of concerted practice which contributes towards:

— improving the quality of transport services; or

— promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation; or

— increasing the productivity of undertakings; or

— furthering technical or economic progress;

and at the same time takes fair account of the interests of transport users and neither:

(a) imposes on the transport undertakings concerned any restriction not essential to the attainment of the above objectives; nor

(b) makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

Article 6

Agreements intended to reduce disturbances resulting from the structure of the transport market

1. Until such time as the Council, acting in pursuance of the common transport policy, introduces appropriate measures to ensure a stable transport market, the prohibition laid down in Article 2 may be declared inapplicable to any agreement, decision or concerted practice which tends to reduce disturbances on the market in question.

2. A decision not to apply the prohibition laid down in Article 2, made in accordance with the procedure laid down in Article 14, may not be taken until the Council, either acting by a qualified majority or, where any Member State considers that the conditions set out in Article 75(3) of the Treaty are satisfied, acting unanimously, has found on the basis of a report by the Commission, that a state of crisis exists in all or part of a transport market.

3. Without prejudice to the provisions of paragraph 2, the prohibition in Article 2 may be declared inapplicable only where:

(a) the agreement, decision or concerted practice in question does not impose upon the undertakings concerned any restriction not indispensable to the reduction of disturbances; and

(b) does not make it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

Article 7

Invalidity of agreements and decisions

Any agreement or decision prohibited under the foregoing provisions shall be automatically void.

Article 8

Prohibition of abuse of dominant positions

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

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair transport rates or conditions;

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

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

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

Article 9

Public undertakings

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the provisions of the foregoing Articles.

2. Undertakings entrusted with the operation of services of general economic importance shall be subject to the provisions of the foregoing Articles, in so far as the application thereof does not obstruct, in law or in fact, the accomplishment of the particular task assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall see that the provisions of this Article are applied and shall, where necessary, address appropriate directives or decisions to Member States.

Article 10

Procedures on complaint or on the Commission's own initiative

Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Article 2 or Article 8 or to enforce Article 4(2).

Complaints may be submitted by:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

Article 11

Result of procedures on complaint or on the Commission's own initiative

1. Where the Commission finds that there has been an infringement of Article 2 or Article 8, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under the preceding subparagraph, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

2. Paragraph 1 shall apply also to cases falling within Article 4(2).

3. If the Commission, acting on a complaint received, concludes that on the evidence before it there are no grounds for intervention under Article 2, Article 4(2) or Article 8 in respect of any agreement, decision or concerted practice, it shall issue a decision rejecting the complaint as unfounded.

4. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 2 and of Article 5, it shall issue a decision applying Article 5. Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

Article 12

Application of Article 5 — objections

1. Undertakings and associations of undertakings which seek application of Article 5 in respect of agreements, decisions and concerted practices falling within the provisions of Article 2 to which they are parties may submit applications to the Commission.

2. If the Commission judges an application admissible and is in possession of all the available evidence, and no action under Article 10 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the *Official Journal of the European Communities* a summary of the application and invite all interested third parties to submit their comments to the Commission within 30 days. Such

publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within 90 days from the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 5, the agreement, decision or concerted practice shall be deemed exempt, in so far as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of three years from the date of publication in the *Official Journal of the European Communities*.

If the Commission finds, after expiry of the 90-day time limit, but before expiry of the three-year period, that the conditions for applying Article 5 are not satisfied, it shall issue a decision declaring that the prohibition in Article 2 is applicable. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse the exemption from the provisions of Article 2.

4. If, within the 90-day time limit, the Commission notifies applicants as referred to in the first subparagraph of paragraph 3, it shall examine whether the provisions of Article 2 and of Article 5 are satisfied.

If it finds that the provisions of Article 2 and of Article 5 are satisfied it shall issue a decision applying Article 5. The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.

Article 13

Duration and revocation of decisions applying Article 5

1. Any decision applying Article 5 taken under Article 11(4) or under the second subparagraph of Article 12(4) shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.

2. The decision may be renewed if the conditions for applying Article 5 continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision;

(b) where the parties commit a breach of any obligation attached to the decision;

(c) where the decision is based on incorrect information or was induced by deceit;

(d) where the parties abuse the exemption from the provisions of Article 2 granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

Article 14

Decisions applying Article 6

1. Any agreement, decision or concerted practice covered by Article 2 in respect of which the parties seek application of Article 6 shall be notified to the Commission.

2. Any decision by the Commission to apply Article 5 shall have effect only from the date of its adoption. It shall state the period for which it is to be valid. Such period shall not exceed three years from the finding of a state of crisis by the Council provided for in Article 6(2).

3. Such decision may be renewed by the Commission if the Council again finds, acting under the procedure provided for in Article 6(2), that there is a state of crisis and if the other conditions laid down in Article 6 continue to be satisfied.

4. Conditions and obligations may be attached to the decision.

5. The decision of the Commission shall cease to have effect not later than six months from the coming into operation of the measures referred to in Article 6(1).

6. The provisions of Article 13(3) shall apply.

Article 15

Powers

Subject to review of its decision by the Court of Justice, the Commission shall have sole power:

— to impose obligations pursuant to Article 4(2);

— to issue decisions pursuant to Articles 5 and 6.

The authorities of the Member States shall retain the power to decide whether any case falls within the provisions of Article 2 or Article 8, until such time as the Commission has initiated a procedure with a view to formulating a decision in the case in question or has sent notification as provided for in the first subparagraph of Article 12(3).

Article 16

Liaison with the authorities of the Member States

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.

2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications, and of the most important documents sent to it or which it sends out in the course of such procedures.

3. An Advisory Committee on Restrictive Practices and Monopolies in the Transport Industry shall be consulted prior to the taking of any decision following upon a procedure under

Article 10 or of any decision under the second subparagraph of Article 12(3), or under the second subparagraph of paragraph 4 of the same Article, or under paragraph 2 or paragraph 3 of Article 14. The Advisory Committee shall also be consulted prior to adoption of the implementing provisions provided for in Article 29.

4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies in transport. Each Member State shall appoint two officials to represent it, each of whom, if prevented from attending, may be replaced by some other official.

5. Consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than 14 days after dispatch of the notice convening it. This notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 17

Consideration by the Council of questions of principle concerning the common transport policy raised in connection with specific cases

1. The Commission shall not give a decision in respect of which consulation as laid down in Article 16 is compulsory until after the expiry of 20 days from the date on which the Advisory Committee has delivered its Opinion.

2. Before the expiry of the period specified in paragraph 1, any Member State may request that the Council be convened to examine with the Commission any question of principle concerning the common transport policy which such Member State considers to be involved in the particular case for decision.

The Council shall meet within 30 days from the request by the Member State concerned for the sole purpose of considering such questions of principle.

The Commission shall not give its decision until after the Council meeting.

3. Further, the Council may at any time, at the request of a Member State or of the Commission, consider general questions raised by the implementation of the competition policy in the transport sector.

4. In all cases where the Council is asked to meet to consider under paragraph 2 questions of principle or under paragraph 3 general questions, the Commission shall, for the purposes of this Regulation, take into account the policy guidelines which emerge from that meeting.

Article 18

Inquiries into transport sectors

1. If trends in transport, fluctuations in or inflexibility of transport rates, or other circumstances, suggest that competition in transport is being restricted or distorted within the common market in a specific geographical area, or over one or more transport links, or in respect of the carriage of passengers or goods belonging to one or more specific categories, the Commission may decide to conduct a general inquiry into the sector concerned, in the course of which it may request transport undertakings in that sector to supply the information and documentation necessary for giving effect to the principles formulated in Articles 2 to 8.

2. When making inquiries pursuant to paragraph 1, the Commission shall also request undertakings or groups of undertakings whose size suggests that they occupy a dominant position within the common market or a substantial part thereof to supply such particulars of the structure of the undertakings and of their behaviour as are requisite to an appraisal of their position in the light of the provisions of Article 8.

3. Article 16(2) to (6) and Articles 17, 19, 20 and 21 shall apply.

Article 19

Requests for information

1. In carrying out the duties assigned to it by this Regulation, 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 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 22(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 person authorized to represent them by law or by their constitution, shall be bound to 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 22(1)(b) and Article 23(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.

Article 20

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 21(1), or which it has ordered by decision pursuant to Article 21(3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall excercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject-matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, the officials of the Commission may assist the officials of such authority in carrying out their duties.

Article 21[1, 2]

Investigating powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, 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 vehicles 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 22(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

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[1] **Documents concerning the accession**
The following is inserted at the end of the second sentence of Article 21(6):
'New Member States shall take the measures referred to in Art. 21(6) within six months from the date of accession after consulting the Commission.
(OJ L 73, 27.3.1972, p. 138)

[2] **Documents concerning the accession of the Hellenic Republic**
The following sentence is added to Article 21(6):
'The Hellenic Republic shall, after consultation with the Commission, take the necessary measures to this end within a period of six months following accession.'
(OJ L 291, 19.11.1979, p. 92).

the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 22(1)(c) and Article 23(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 January 1970.

Article 22

Fines

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently:

(a) they supply incorrect or misleading information in an application pursuant to Article 12 or in a notification pursuant to Article 14; or

(b) they supply incorrect information in response to a request made pursuant to Article 18 or to Article 19(3) or (5), or do not supply information within the time limit fixed by a decision taken under Article 19(5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 20 or Article 21, or refuse to submit to an investigation ordered by decision issued in implementation of Article 21(3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 10 to 1 million units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently:

(a) they infringe Article 2 or Article 8; or

(b) they commit a breach of any obligation imposed pursuant to Article 13(1) or Article 14(4).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 16(3) to (6) and Article 17 shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal-law nature.

Article 23

Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1 000 units of account per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 2 or Article 8 of this Regulation, the termination of which it has ordered pursuant to Article 11 or to comply with an obligation imposed pursuant to Article 4(2);

(b) to refrain from any act prohibited under Article 13(3);

(c) to supply complete and correct information which it has requested by decision taken pursuant to Article 19(5);

(d) to submit to an investigation which it has ordered by decision taken pursuant to Article 21(3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 16(3) to (6) and Article 17 shall apply.

Article 24

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 25

Unit of account

For the purpose of applying Articles 23 to 24 the unit of account shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 26

Hearing of the parties and of third persons

1. Before taking decisions as provided for in Articles 11, 12(3), second subparagraph, and 12(4), 13(3), 14(2) and (3), 22 and 23, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons where they show a sufficient interest shall be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 5 or Article 6, it shall publish a summary of the relevant agreement, decision or concerted practice and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 27

Professional secrecy

1. Information acquired as a result of the application of Articles 18, 19, 20 and 21 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 26 and 28, 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.

Article 28

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Articles 11, 12(3), second subpargraph, 12(4), 13(3) and 14(2) and (3).

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 29

Implementing provisions

The Commission shall have power to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12, notifications pursuant to Article 14(1) and the hearings provided for in Article 26(1) and (2).

Article 30

Entry into force, existing agreements

1. This Regulation shall enter into force on 1 July 1968.

2. Nothwithstanding the provisions of paragraph 1, Article 8 shall enter into force on the day following the publication of this Regulation in the *Official Journal of the European Communities*.

3. The prohibition in Article 2 shall apply from 1 January 1969 to all agreements, decisions and concerted practices falling within Article 2 which were in existence at the date of entry into force of this Regulation or which came into being between that date and the date of publication of this Regulation in the *Official Journal of the European Communities*.

4. Paragraph 3 shall not be invoked against undertakings or associations of undertakings which, before the day following publication of this Regulation in the *Official Journal of the European Communities*, shall have terminated any agreements, decisions or concerted practices to which they are party.

Article 31

Review of the Regulation

1. Within six months of the conclusion of discussions with the third countries' signatories to the Revised Convention for the Navigation of the Rhine, the Council, on a proposal from the Commission, shall make any amendments to this Regulation which may prove necessary in the light of the obligations arising out of the Revised Convention for the Navigation of the Rhine.

2. The Commission shall submit to the Council, before 1 January 1971, a general report on the operation of this Regulation and, before 1 July 1971, a proposal for a Regulation to make the necessary amendments to this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EEC) No 1629/69[1] OF 8 AUGUST 1969

on the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and notifications pursuant to Article 14(1) of Council Regulation (EEC) No 1017/68 of 19 July 1968 (as amended by Commission Regulation (EC) No 3666/93 of 15 December 1993)[2]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75 , 87 and 155 thereof,

Having regard to Article 29 of Regulation (EEC) No 1017/68[3] of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway,

Having regard to the Opinion of the Advisory Committee on Restrictive Practices and Monopolies in the field of transport,

Whereas, pursuant to Article 29 of Regulation (EEC) No 1017/68, the Commission is authorized to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and notifications pursuant to Article 14(1) of that Regulation;

Whereas the complaints may make it easier for the Commission to take action for infringement of the provisions of Regulation (EEC) No 1017/68; whereas it would consequently seem appropriate to make the procedure for submitting complaints as simple as possible; whereas it is appropriate, therefore, to provide for complaints to be submitted in one written copy, the use of forms being left to the discretion of the complainants;

Whereas the submission of the applications and notifications may have important legal consequences for each undertaking which is a party to an agreement, decision or concerted practice; whereas each undertaking should, therefore, have the right to submit such applications or notifications to the Commission; whereas, on the other hand, if an undertaking makes use of that right, it must so inform the other undertakings which are parties to the agreement, decision or concerted practice, in order that they may protect their interests;

Whereas it is for the undertakings and associations of undertakings to inform the Commission of the facts and circumstances in support of the applications submitted in accordance with Article 12 and the notifications provided for in Article 14(1);

Whereas it is desirable to prescribe that forms be used for applications and notifications in order, in the interest of all concerned, to simplify and speed up examination thereof by the competent departments,

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[1] OJ L 209, 21.8.1969, p. 1; (Special Edition 1969 II, p. 371).
[2] OJ L 336, 31.12.1993, p. 1.
[3] OJ L 175, 23.7.1968, p. 1; (Special Edition 1968 I, p. 302).

HAS ADOPTED THIS REGULATION:

Article 1

Complaints

1. Complaints pursuant to Article 10 of Regulation (EEC) No 1017/68 shall be submitted in writing in one of the official languages of the Community; they may be submitted on Form I shown in the Annex.

2. When representatives of undertakings, of associations of undertakings, or of natural or legal persons sign such complaints, they shall produce written proof that they are authorized to act.

Article 2

Persons entitled to submit applications and notifications

1. Any undertaking which is party to agreements, decisions or practices of the kind described in Article 2 of Regulation (EEC) No 1017/68 may submit an application under Article 12 or a notification under Article 14(1) of Regulation (EEC) No 1017/68. Where the application or notification is submitted by some, but not all, of the undertakings concerned, they shall give notice to the others.

2. Where applications or notifications under Articles 12 and 14(1) of Regulation (EEC) No 1017/68 are signed by representatives of undertakings, of associations of undertakings, or of natural or legal persons, such representatives shall produce written proof that they are authorized to act.

3. Where a joint application or notification is submitted, a joint representative shall be appointed.

Article 3

Submission of applications and notifications

1. Applications pursuant to Article 12 of Regulation (EEC) 1017/68 shall be submitted on Form II shown in the Annex.

2. Notifications pursuant to Article 14(1) of Regulation (EEC) No 1017/68 shall be submitted on Form II shown in the Annex.

3. Several participating undertakings may submit an application or notification on a single form.

4. Applications and notifications shall contain the information requested in the forms.

5. Fifteen copies of each application or notification and of the supporting documents shall be submitted to the Commission.

6. The supporting documents shall be either originals or copies. Copies must be certified as true copies of the original.

7. Applications and notifications shall be in one of the official languages of the Community. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation in one of the official languages shall be attached.

Article 3a

Where complaints, applications and notifications as provided for in Article 1(1), Article 3(1) and Article 3(2) are made pursuant to Articles 53 and 54 of the Agreement on the European Economic Area, they may also be in one of the official languages of the EFTA States or the working language of the EFTA Surveillance Authority.

Article 4

Entry into force

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

This form and the supporting documents should be forwarded in 15 copies together with proof in a single copy of the representative's authority to act.

If the space opposite each question is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM I[1]

TO THE EUROPEAN COMMISSION

Directorate-General for Competition,
rue de la Loi 200
B-1049 Brussels.

Complaint submitted by natural or legal persons pursuant to Article 10 of Council Regulation (EEC) No 1017/68 and having as its object the opening of proceedings for the verification of infringements of Article 2 or 8, or the application of Article 4(2), of that Regulation[2].

I. Information regarding parties

1. Name, forenames and address of person submitting the complaint. If such person is acting as representative, state also the name and address of his principal; for undertakings, and associations of undertakings or persons, state the name, forenames and address of the proprietors or partners or, in the case of legal persons, of their legal representatives.

Proof of representative's authority to act must be supplied.

If the complaint is submitted by a number of persons or on behalf of a number of persons, the information must be given in respect of each complainant and each principal.

2. Name and address of persons about whom the complaint is made.

II. Object of the complaint

A. Description of the alleged infringement of Article 2 or 8. Attach a detailed statement of the facts which, in your opinion, constitute an infringement of Article 2 or 8.

[1] Applications made by using Form I issued by the Commission and Form I issued by the EFTA side are equally valid. Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the Agreement on the European Economic Area.

[2] See also this Regulation as adapted for EEA purposes (point 10 of Annex XIV to the Agreement on the European Economic Area, hereinafter referred to as 'the EEA Agreement').

State in particular:

1. which practices by undertakings or associations of undertakings, referred to in the complaint, have the object or effect of preventing, restricting or distorting competition or constitute an improper exploitation of a dominant position in the common market, in the territory of the EFTA States and/or in the EEA territory; and

2. to what extent trade between Member States or between the Community and one or more EFTA States or between EFTA States may be affected thereby.

B. Description of the alleged abuse of exemption for groups of small or medium-sized undertakings (Article 4(2)).

Attach a detailed statement of the facts which, in your opinion, justify the application of Article 4(2).

State in particular:

1. against which of the agreements, decisions or concerted practices referred to in Article 4(1) the complaint is made;

2. to what extent implementation of the agreement, decision or concerted practice leads to results incompatible with the conditions laid down in Article 5;

3. to what extent this fact constitutes an abuse of exemption from the prohibition pursuant to Article 2.

III. Existence of legitimate interest

Describe — if necessary in an Annex — the reasons for which you consider that you have a legitimate interest in the Commission's initiating the procedure laid down in Article 10.

IV. Evidence

1. State the name, forenames and address of persons in a position to give evidence as to the facts disclosed, in particular of the persons affected by the alleged infringement or abuse.

2. Submit all documents concerning the facts disclosed or directly connected with them (for example, the text of agreements, minutes of negotiations or meetings, conditions of transport or dealing, documents relating to costs of transport, business letters, circulars).

3. Submit statistics or other data relating to the facts disclosed (concerning, for example, price trends, price determination, alterations in supply or demand with regard to transport services, conditions of transport or dealing, boycotting or discrimination).

4. Specify, where appropriate, any special technical features or name experts who can do so.

5. Indicate any other evidence available to establish that there has been an infringement or abuse as alleged.

V. State all the steps and measures adopted, before the complaint, by you or by any other person to whom the disclosed practice is prejudicial, with the object of putting a stop to the alleged infringement or abuse (proceedings before national courts or public authorities specifying in particular the reference number of the case and the results of such proceedings).

The undersigned declare that the information in this form and in its Annexes has been given in all good faith.

Place and date: ....

Signatures: ....

....

....

EUROPEAN
COMMISSION

Directorate-General for Competition

Brussels, ...

To

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if completed in a single copy by the complainant.)

Your complaint dated: .....

with regard to the opening of proceedings for:

- verification of an infringement of Article 2 or 8,
- application of Article 4(2),

of Regulation (EEC) No 1017/68.

(a) Complainant: .....

.....

(b) Author of the infringement or abuse: .....

.....

was received on: .....

and registered under No: IV/TR .....

Please quote the above number in all correspondence.

Address: rue de la Loi 200, B-1049 Brussels.

Telephone: Direct line: 29 ..... Telephone exchange: 299 11 11.

Fax No: 29.....

This form and the supporting documents should be forwarded in 15 copies together with proof in a single copy of the representative's authority to act.

If the space opposite each question in insufficient, please use extra pages, specifying to which item on the form they relate.

FORM II[1]

TO THE EUROPEAN COMMISSION

Directorate-General for Competition,
rue de la Loi 200
B-1049 Brussels.

Application pursuant to Article 12 of Council Regulation (EEC) No 1017/68 with a view to obtaining a declaration of non-applicability of the prohibition in Article 2 to agreements, decisions and concerted practices, in accordance with Article 5 of that Regulation.[2]

I. Information regarding parties

1. Name, forenames and address of person submitting the application. If such person is acting as representative, state also the name and address of the undertaking or association of undertakings represented and the name, forenames and address of the proprietors or partners or, in the case of legal persons, of their legal representatives.

Proof of representative's authority to act must be supplied.

If the application is submitted by a number of persons or on behalf of a number of undertakings, the information must be given in respect of each person or undertaking.

2. Name and address of the undertakings which are parties to the agreement, decision or concerted practice and name, forenames and address of the proprietors or partners or, in the case of legal persons, of their legal representatives (unless this information has been given under I(1).

If the undertakings which are parties are not all associated in submitting the application, state what steps have been taken to inform the other undertakings.

This information is not necessary in respect of standard contracts (see II(2)(b)).

3. If a firm or joint agency has been formed in pursuance of the agreement, decision or concerted practice, state the name and address of such firm or agency and the names, forenames and addresses of its representatives.

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[1] Applications made by using Form II issued by the Commission and Form II issued by the EFTA side are equally valid. Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the Agreement on the European Economic Area.

[2] See also this Regulation as adapted for EEA purposes (point 10 of Annex XIV to the Agreement of the European Economic Area, hereinafter referred to as 'the EEA Agreement').

4. If a firm or joint agency is responsible for operating the agreement, decision or concerted practice, state the name and address of such firm or agency and the names, forenames and addresses of its representatives.

Attach a copy of the statutes.

5. In the case of a decision of an association of undertakings, state the name and address of the association and the names, forenames and addresses of its representatives.

Attach a copy of the statutes.

6. If the undertakings are established or have their seat outside the EEA territory, state the name and address of a representative or branch established in the EEA territory.

II. Information regarding contents of agreement, decision or concerted practice

1. Does the agreement, decision or concerted practice concern transport:

— by rail,

— by road,

— by inland waterway,

or operations of providers of services ancillary to transport?

2. If the contents were reduced to writing, attach a copy of the full text unless (a) or (b) provides otherwise.

(a) Is there only an outline agreement or outline decision?

If so, attach also copy of the full text of the individual agreement and implementing provisions.

(b) Is there a standard contract, i.e. a contract which the undertaking submitting the application regularly concludes with particular persons or groups of persons?

If so, only the text of the standard contract need be attached.

3. If the contents were not, or were only partially, reduced to writing, state the contents in the space opposite.

4. In all cases give the following additional information:

(a) date of agreement, decision or concerted practice;

(b) date when it came into force and, where applicable, proposed period of validity;

(c) subject: exact description of the transport service or services involved, or of any other subject to which the agreement, decision or concerted practice relates;

(d) aims of the agreement, decision or concerted practice;

(e) terms of adherence, termination or withdrawal;

(f) sanctions which may be taken against participating undertakings (penalty clause, exclusion, etc.).

III. Means of achieving the aims of the agreement, decision or concerted practice

1. State whether and how far the agreement, decision or concerted practice relates to:

— adherence to certain rates and conditions of transport or other operating conditions,

— restriction or control of the supply of transport, technical development or investment,

— sharing of transport markets,

— restrictions on freedom to conclude transport contracts with third parties (exclusive contracts),

— application of different terms for supply of equivalent services.

2. Is the agreement, decision or concerted practice concerned with transport services:

(a) within one Member State or EFTA State only?

(b) between Member States?

(c) between EFTA States?

(d) between the Community and one or more EFTA States?

(e) between a Member State or an EFTA State and third countries?

(f) between third countries in transit through one or more Member States and/or EFTA States?

IV. Description of the conditions to be fulfilled by the agreement, decision or concerted practice so as to be exempt from the prohibition in Article 2

Describe to what extent:

1. the agreement, decision or concerted practice contributes towards:

— improving the quality of transport services, or

— promoting, in markets subject to considerable temporal fluctuations of supply and demand, greater continuity and stability in the satisfaction of transport needs, or

— increasing the productivity of undertakings, or

— promoting technical or economic progress;

2. takes fair account of the interests of transport users;

3. the agreement, decision or concerted practice is essental for realizing the aims set out under 1; and

4. the agreement, decision or concerted practice does not eliminate competition in respect of a substantial part of the transport market concerned.

V. State whether you intend to produce further supporting arguments and, if so, on which points.

The undersigned declare that the information given above and in the Annexes attached hereto is correct. They are aware of the provisions of Article 22(1)(a) of Regulation (EEC) No 1017/68.

Place and date: ....

Signatures: ....

....

....

EUROPEAN
COMMISSION

Directorate-General for Competition

Brussels, ...

To

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if completed in a single copy by the person lodging it.)

Your application dated .....

(a) Parties:

1. .....

2. ..... and others

(There is no need to name the other undertakings party to the arrangement.)

(b) Subject: .....

.....

.....

(brief description of the restriction on competition)

was received on: .....

and registered under No: IV/TR .....

Please quote the above number in all correspondence.

Address: rue de la Loi 200 B-1049 Brussels.

Telephone: Direct line: 29 ..... Telephone exchange: 299 11 11.

Fax No: 29.....

This form and the supporting documents should be forwarded in 15 copies together with proof in a single copy of the representative's authority to act.

If the space opposite each question is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM III[1]

TO THE EUROPEAN COMMISSION

Directorate-General for Competition,
rue de la Loi 200
B-1049 Brussels.

Notification of an agreement, decision or concerted practice pursuant to Article 14(1) of Council Regulation (EEC) No 1017/68 with a view to obtaining a declaration of non-applicability of the prohibition in Article 2, available in states of crisis, pursuant to Article 6 of that Regulation.[2]

I. Information regarding parties

1. Name, forenames and address of person submitting the notification. If such person is acting as representative, state also the name and address of the undertaking or association of undertakings represented and the name, forenames and address of the proprietors or partners or, in the case of legal persons, of their legal representatives.

Proof of representative's authority to act must be supplied.

If the notification is submitted by a number of persons or on behalf of a number of undertakings, the information must be given in respect of each person or undertaking.

2. Name and address of the undertakings which are parties to the agreement, decision or concerted practice and name, forenames and address of the proprietors or partners, in the case of legal persons, of their legal representatives (unless this information has been given under I(1)).

If the undertakings which are parties are not all associated in submitting the notification, state what steps have been taken to inform the other undertakings.

This information is not necessary in respect of standard contracts (see II(2)(b)).

3. If a firm or joint agency has been formed in pursuance of the agreement, decision or concerted practice, state the name and address of such firm or agency and the names, forenames and addresses of its representatives.

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[1] Notifications made by using Form III issued by the Commission and Form III issued by the EFTA side are equally valid. Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the Agreement on the European Economic Area.

[2] See also this Regulation as adapted for EEA purposes (point 10 of Annex XIV to the Agreement on the European Economic Area, hereinafter referred to as 'the EEA Agreement').

4. If a firm or joint agency is responsible for operating the agreement, decision or concerted practice, state the name and address of such firm or agency and the names, forenames and addresses of its representatives.

Attach a copy of the statutes.

5. In the case of a decision of an association of undertakings, state the name and address of the association and the names, forenames and addresses of its representatives.

Attach a copy of the statutes.

6. If the undertakings are established or have their seat outside the EEA territory, state the name and address of a representative or branch established in the EEA territory.

II. Information regarding contents of agreement, decision or concerted practice

1. Does the agreement, decision or concerted practice concern transport:

— by rail,

— by road,

— by inland waterway,

or operations of providers of services ancillary to transport?

2. If the contents were reduced to writing, attach a copy of the full text unless (a) or (b) below provides otherwise.

(a) Is there only an outline agreement or outline decision?

If so, attach also copy of the full text of the individual agreements and implementing provisions.

(b) Is there a standard contract, i.e. a contract which the undertaking submitting the notification regularly concludes with particular persons or groups of persons?

If so, only the text of the standard contract need be attached.

3. If the contents were not, or were only partially, reduced to writing, state the contents in the space opposite.

4. In all cases give the following additional information:

(a) date of agreement, decision or concerted practice;

(b) date when it came into force and, where applicable, proposed period of validity;

(c) subject: exact description of the transport service or services involved, or of any other subject to which the agreement, decision or concerted practice relates;

(d) aims of the agreement, decision or concerted practice;

(e) terms of adherence, termination or withdrawal;

(f) sanctions which may be taken against participating undertakings (penalty clause, exclusion, etc.).

III. Means of achieving the aims of the agreement, decision or concerted practice

1. State whether and how far the agreement, decision or concerted practice relates to:

— adherence to certain rates and conditions of transport or other operating conditions,

— restriction or control of the supply of transport, technical development or investment,

— sharing of transport markets,

— restrictions on freedom to conclude transport contracts with third parties (exclusive contracts),

— application of different terms for supply of equivalent services.

2. Is the agreement, decision or concerted practice with transport services:

(a) within one Member State or EFTA State only?

(b) between Member States?

(c) between EFTA States?

(d) between the Community and one or more EFTA States?

(e) between a Member State or an EFTA State and third countries?

(f) between third countries in transit through one or more EC Member States and/or one or more EFTA States?

IV. Description of the conditions to be fulfilled by the agreement, decision or concerted practice so as to be exempt from the prohibition in Article 2

Describe to what extent:

1. the transport market is disturbed;

2. the agreement, decision or concerted practice is essential for reducing that disturbance;

3. the agreement, decision or concerted practice does not eliminate competition in respect of substantial parts of the transport market concerned.

V. State whether you intend to produce further supporting arguments and, if so, on which points.

The undersigned declare that the information given above and in the Annexes attached hereto is correct. They are aware of the provisions of Article 22(1)(a) of Regulation (EEC) No 1017/68.

Place and date: ....

Signatures: ....

....

....

EUROPEAN
COMMISSION

Directorate-General for Competition

Brussels, ...

To

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if completed in a single copy by the person lodging it.)

Your notification dated: .....

(a) Parties:

1. .....

2. ..... and others

(There is no need to name the other undertakings party to the arrangement.)

(b) Subject: .....

.....

.....

(brief description of the restriction on competition)

was received on: .....

and registered under No: IV/TR .....

Please quote the above number in all correspondence.

Address: rue de la Loi 200 B-1049 Brussels.

Telephone: Direct line: 29 ..... Telephone exchange: 299 11 11.

Fax No: 29.....

COMMISSION REGULATION (EEC) No 1630/69[1] OF 8 AUGUST 1969

on the hearings provided for in Article 26(1) and (2) of Council Regulation (EEC) No 1017/68 of 19 July 1968

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75, 87 and 155 thereof,

Having regard to Article 29 of Council Regulation (EEC) No 1017/68[2] of 18 July 1968 applying rules of competition to transport by rail, road and inland waterways,

Having regard to the Opinion of the Advisory Committee on Restrictive Practices and Monopolies in the field of transport,

Whereas, pursuant to Article 29 of Regulation (EEC) No 1017/68, the Commission is empowered to adopt implementing provisions concerning the hearings provided for in Article 26(1) and (2) of that Regulation;

Whereas in most cases the Commission will in the course of the procedure already be in close touch with the participating undertakings or associations of undertakings and they will accordingly have the opportunity of making known their views regarding the objections raised against them;

Whereas, however, in accordance with Article 26(1) of Regulation No 1017/68 and with the rights of defence, the undertakings and associations of undertakings concerned must have the right on conclusion of the procedure to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions;

Whereas persons other than the undertakings or associations of undertakings which are involved in the procedure may have an interest in being heard; whereas, by the second sentence of Article 26(2) of Regulation No 1017/68, such persons must have the opportunity of being heard if they apply and show that they have a sufficient interest;

Whereas it is desirable to enable persons who pursuant to Article 10(2) of Regulation No 1017/68 have lodged a complaint to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for action;

Whereas the various persons entitled to submit comments must do so in writing, both in their own interest and in the interests of good administration, without prejudice to oral procedure where appropriate to supplement the written procedure;

Whereas it is necessary to define the rights of persons who are to be heard, and in particular the conditions upon which they may be represented or assisted and the setting and calculation of time limits;

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[1] OJ L 209, 21.8.1969, p. 11 (Special Edition 1969 II, p. 381).
[2] OJ L 175, 23.7.1968, p. 1 (Special Edition 1968 I, p. 302).

Whereas the Advisory Committee on Restrictive Practices and Monopolies delivers its Opinion on the basis of a preliminary draft decision; whereas it must therefore be consulted concerning a case after the inquiry in respect thereof has been completed; whereas such consultation does not prevent the Commission from-reopening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

Article 1

Before consulting the Advisory Committee on Restrictive Practices and Monopolies, the Commission shall hold a hearing pursuant to Article 26(1) of Regulation No 1017/68.

Article 2

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.

2. The Commission may inform the parties by giving notice in the *Official Journal of the European Communities*, if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.

3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the obligations were notified in the manner provided for in paragraph 1.

4. The Commission shall, when giving notice of objections, fix a time limit up to which the undertakings and associations of undertakings may inform the Commission of their views.

Article 3

1. Undertakings and associations of undertakings shall, within the appointed time limit, make known in writing their views concerning the objections raised against them.

2. They may in their written comments set out all matters relevant to their defence.

3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

Article 4

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

Article 5

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 26(2) of Regulation No 1017/68, the Commission shall afford them the opportunity of making known their views in writing within such time limits as it shall fix.

Article 6

Where the Commission having received an application pursuant to Article 10(2) of Regulation No 1017/68, 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 or if the Commission proposes to impose on them a fine or periodic penalty payment.

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

Article 8

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

Article 9

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall appear either in person or be represented by legal representatives or by representatives authorized by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorized agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

Article 10

Without prejudice to Article 2(2), information and summonses from the Commission shall be sent to the addressees by registered letter with acknowledgement of receipt, or shall be delivered by hand against receipt.

Article 11

1. In fixing the time limits provided for in Articles 2, 5 and 6, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. The time limit shall be not less than two weeks; it may be extended.

2. Time limits shall run from the day following receipt of a communication or delivery thereof by hand.

3. Written comments must reach the Commission or be dispatched by registered letter before expiry of the time limit. Where the time limit would expire on a Sunday or public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating the extension, public holidays shall, in cases where the relevant date is the date of receipt of written comments, be those set out in the Annex to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

Article 12

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COUNCIL REGULATION (EEC) No 4056/86[1] OF 22 DECEMBER 1986

laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 84(2) and 87 thereof,

Having regard to the proposal from the Commission,

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

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

Whereas the rules on competition form part of the Treaty's general provisions which also apply to maritime transport; whereas detailed rules for applying those provisions are set out in the Chapter of the Treaty dealing with the rules on competition or are to be determined by the procedures laid down therein;

Whereas according to Council Regulation No 141,[4] Council Regulation No 17[5] does not apply to transport; whereas Council Regulation (EEC) No 1017/68[6] applies to inland transport only; whereas, consequently, the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 and 86 in maritime transport; whereas, moreover, the Commission lacks such powers of its own to take decisions or impose penalties as are necessary for it to bring to an end infringements established by it;

Whereas this situation necessitates the adoption of a Regulation applying the rules of competition to maritime transport; whereas Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conference[7] will result in the application of the Code of Conduct to a considerable number of conferences serving the Community; whereas the Regulation applying the rules of competition to maritime transport foreseen in the last recital of Regulation (EEC) No 954/79 should take account of the adoption of the Code; whereas, as far as conferences subject to the Code of Conduct are concerned, the Regulation should supplement the Code or make it more precise;

Whereas it appears preferable to exclude tramp vessel services from the scope of this Regulation, rates for these services being freely negotiated on case-by-case basis in accordance with supply and demand conditions;

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[1] OJ L 378, 31.12.1986, p. 4.
[2] OJ C 172, 2.7.1984, p. 178; OJ C 255, 13.10.1986, p. 169.
[3] OJ C 77, 21.3.1983, p. 13; OJ C 344, 31.12.1985, p. 31.
[4] OJ 124, 28.11.1962, p. 2751/62.
[5] OJ 13, 21.2.1962, p. 204/62.
[6] OJ L 175, 23.7.1968, p. 1.
[7] OJ L 121, 17.5.1979, p. 1.

Whereas this Regulation should take account of the necessity, on the one hand to provide for implementing rules that enable the Commission to ensure that competition is not unduly distorted within the common market, and on the other hand to avoid excessive regulation of the sector;

Whereas this Regulation should define the scope of the provisions of Articles 85 and 86 of the Treaty, taking into account the distinctive characteristics of maritime transport; whereas trade between Member States may be affected where restrictive practices or abuses concern international maritime transport, including intra-Community transport, from or to Community ports; whereas such restrictive practices or abuses may influence competition, firstly, between ports in different Member States by altering their respective catchment areas, and secondly, between activities in those catchment areas, and disturb trade patterns within the common market;

Whereas certain types of technical agreement, decisions and concerted practices may be excluded from the prohibition on restrictive practices on the ground that they do not, as a general rule, restrict competition;

Whereas provision should be made for block exemption of liner conferences; whereas liner conferences have a stabilizing effect, assuring shippers of reliable services; whereas they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users; whereas such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income; whereas in most cases conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport; whereas the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conferences to constant competition which they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned;

Whereas, however, in order to prevent conferences from engaging in practices which are incompatible with Article 85(3) of the Treaty, certain conditions and obligations should be attached to the exemption;

Whereas the aim of the conditions should be to prevent conferences from imposing restrictions on competition which are not indispensable to the attainment of the objectives on the basis of which exemption is granted; whereas, to this end, conferences should not, in respect of a given route, apply rates and conditions of carriage which are differentiated solely by reference to the country of origin or destination of the goods carried and thus cause within the Community deflections of trade that are harmful to certain ports, shippers, carriers or providers of services ancillary to transport; whereas, furthermore, loyalty arrangements should be permitted only in accordance with rules which do not restrict unilaterally the freedom of users and consequently competition in the shipping industry, without prejudice, however, to the right of a conference to impose penalties on users who seek by improper means to evade the obligation of loyalty required in exchange for the rebates, reduced freight rates or commission granted to them by the conference; whereas users must

be free to determine the undertakings to which they have recourse in respect of inland transport or quayside services not covered by the freight charge or by other charges agreed with the shipping line;

Whereas certain obligations should also be attached to the exemption; whereas in this respect users must at all times be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference, since in the case of inland transports organized by shippers, the latter continue to be subject to Regulation (EEC) No 1017/68; whereas provision should be made that awards given at arbitration and recommendations made by conciliators and accepted by the parties be notified forthwith to the Commission in order to enable it to verify that conferences are not thereby exempted from the conditions provided for in the Regulation and thus do not infringe the provisions of Articles 85 and 86;

Whereas consultations between users or associations of usrs and conferences are liable to secure a more efficient operation of maritime transport services which takes better account of users' requirements; whereas, consequently, certain restrictive practices which could ensue from such consultations should be exempted;

Whereas there can be no exemption if the conditions set out in Article 85(3) are not satisfied; whereas the Commission must therefore have power to take the appropriate measures where an agreement or concerted practice owing to special circumstances proves to have certain effects incompatible with Article 85(3); whereas, in view of the specific role fulfilled by the conferences in the sector of the liner servies, the reaction of the Commission should be progressive and proportionate; whereas the Commission should consequently have the power first to address recommendations, then to make decisions;

Whereas the automatic nullity provided for in Article 85(3) in respect of agreements or decisions which have not been granted exemption pursuant to Article 85(3) owing to their discriminatory or other features applies only to the elements of the agreement covered by the prohibition of Article 85(1) and applies to the agreement in its entirety only if those elements do not appear to be severable from the whole of the agreement; whereas the Commission should therefore, if it finds an infringement of the block exemption, either specify what elements of the agreement are by the prohibition and consequently automatically void, or indicate the reasons why those elements are not severable from the rest of the agreement and why the agreement is therefore void in its entirety;

Whereas, in view of the characteristics of international maritime transport, account should be taken of the fact that the application of this Regulation to certain restrictive practices or abuses may result in conflicts with the laws and rules of certain third countries and prove harmful to important Community trading and shipping interests; whereas consultations and, where appropriate, negotiations authorized by the Council should be undertaken by the Commission with those countries in pursuance of the maritime transport policy of the Community;

Whereas this Regulation should make provision for the procedures, decision-making powers and penalties that are necessary to ensure compliance with the prohibitions laid down in Article 85(1) and Article 86, as well as the conditions governing the application of Article 85(3);

Whereas account should be taken in this respect of the procedural provisions of Regulation (EEC) No 1017/68 applicable to inland transport operations which takes account of certain distinctive features of transport operations viewed as a whole;

Whereas, in particular, in view of the special characteristics of maritime transport, it is primarily the responsibility of undertakings to see to it that their agreements, decisions and concerted practices conform to the rules on competition, and consequently their notification to the Commission need not be made compulsory;

Whereas in certain circumstances undertakings may, however, wish to apply to the Commission for confirmation that their agreements, decisions and concerted practices are in conformity with the provisions in force; whereas a simplified procedure should be laid down for such cases,

HAS ADOPTED THIS REGULATION:

SECTION I

Article 1

Subject-matter and scope of the Regulation

1. This Regulation lays down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport services.

2. It shall apply only to international maritime transport services or to one or more Community ports, other than tramp vessel services.

3. For the purposes of this Regulation:

(a) 'tramp vessel services' means the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand;

(b) 'liner conference' means a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services;

(c) 'transport user' means an undertaking (e.g. shippers, consignees, forwarders, etc.) provided it has entered into, or demonstrates an intention to enter into, a contractual or other arrangement with a conference of shipping line for the shipment of goods, or any association of shippers.

Article 2

Technical agreements

1. The prohibition laid down in Article 85(1) of the Treaty shall not apply to agreements, decisions and concerted practices whose sole object and effect is to achieve technical improvements or cooperation by means of:

(a) the introduction or uniform application of standards or types in respect of vessels and other means of transport, equipment, supplies or fixed installations;

(b) the exchange or pooling for the purpose of operating transport services, of vessels, space on vessels or slots and other means of transport, staff, equipment or fixed installations;

(c) the organization and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations;

(d) the coordination of transport timetables for connecting routes;

(e) the consolidation of individual consignments;

(f) the establishment or application of uniform rules concerning the structure and conditions governing the application of transport tariffs.

2. The Commission shall, if necessary, submit to the Council proposals for the amendment of the list contained in paragraph 1.

Article 3

Exemption for agreements between carriers concerning the operation of scheduled maritime transport services

Agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are hereby exempted from the prohibition in Article 85(1) of the Treaty, subject to the condition imposed by Article 4 of this Regulation, when they have as their objective the fixing of rates and conditions of carriage, and, as the case may be, one or more of the following objectives:

(a) the coordination of shipping timetables, sailing dates or dates of calls;

(b) the determination of the frequency of sailings or calls;

(c) the coordination or allocation of sailings or calls among members of the conference;

(d) the regulation of the carrying capacity offered by each member;

(e) the allocation of cargo or revenue among members.

Article 4

Condition attaching to exemption

The exemption provided for in Articles 3 and 6 shall be granted subject to the condition that the agreement, decision or concerted practice shall not, with in the common market, cause detriment to certain ports, transport users or carriers by applying for the carriage of the same goods and in the area covered by the agreement, decision or concerted practice, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions can be economically justified.

Any agreement or decision or, if it is severable, any part of such an agreement or decision not complying with the preceding paragraph shall automatically be void pursuant to Article 85(2) of the Treaty.

Article 5

Obligations attaching to exemption

The following obligations shall be attached to the exemption provided for in Article 3:

1. *Consultations*

There shall be consultations for the purpose of seeking solutions on general issues of principle between transport users on the one hand and conferences on the other concerning the rates, conditions and quality of scheduled maritime transport services.

These consultations shall take place whenever requested by any of the abovementioned parties.

2. *Loyalty arrangements*

The shipping lines' members of a conference shall be entitled to institute and maintain loyalty arrangements with transport users, the form and terms of which shall be matters for consultation between the conference and transport users' organizations. These loyalty arrangements shall provide safeguards making explicit the rights of transport users and conference members. These arrangements shall be based on the contract system or any other system which is also lawful.

Loyalty arrangements must comply with the following conditions:

(a) Each conference shall offer transport users a system of immediate rebates or the choice between such a system and a system of deferred rebates:

— under the system of immediate rebates each of the parties shall be entitled to terminate the loyalty arrangement at any time without penalty and subject to a period of notice of not more than six months; this period shall be reduced to three months when the conference rate is the subject of a dispute;

— under the system of deferred rebates neither the loyalty period on the basis of which the rebate is calculated nor the subsequent loyalty period required before payment of the rebate may exceed six months; this period shall be reduced to three months where the conference rate is the subject of a dispute.

(b) The conference shall, after consulting the transport users concerned, set out:

(i) a list of cargo and any portion of cargo agreed with transport users which is specifically excluded from the scope of the loyalty arrangement; 100% loyalty arrangements may be offered but may not be unilaterally imposed;

(ii) a list of circumstances in which transport users are released from their obligation of loyalty; these shall include:

— circumstances in which consignments are dispatched from or to a port in the area covered by the conference but not advertised and where the request for a waiver can be justified, and

— those in which waiting time at a port exceeds a period to be determined for each port and for each commodity or class of commodities following consultation of the transport users directly concerned with the proper servicing of the port.

The conference must, however, be informed in advance by the transport user, within a specified period, of his intention to dispatch the consginment from a port not advertised by the conference or to make use of a non-conference vessel at a port served by the conference as soon as he has been able to establish from the published schedule of sailings that the maximum waiting period will be exceeded.

3. *Services not covered by the freight charges*

Transport users shall be entitled to approach the undertakings of their choice in respect of inland transport operations and quayside services not covered by the freight charge or charges on which the shipping line and the transport user have agreed.

4. *Availability of tariffs*

Tariffs, related conditions, regulations and any amendments thereto shall be made available on request to transport users at reasonable cost, or they shall be available for examination at offices of shipping lines and their agents. They shall set out all the conditions concerning loading and discharge, the exact extent of the services covered by the freight charge in proportion to the sea transport and the land transport or by any other charge levied by the shipping line and customary practice in such matters.

5. *Notification to the Commission of awards at arbitration and recommendations*

Awards given at arbitration and recommendations made by conciliators that are accepted by the parties shall be notified forthwith to the Commission when they resolve disputes relating to the practices of conferences referred to in Article 4 and in points 2 and 3 above.

Article 6

Exemption for agreements between transport users and conferences concerning the use of scheduled maritime transport services

Agreements, decisions and concerned practices between transport users, on the one hand, and conferences, on the other hand, and agreements between transport users which may be necessary to that end, concerning the rates, conditions and quality of liner services, as long as they are provided for in Article 5(1) and (2) are hereby exempted from the prohibition laid down in Article 85(1) of the Treaty.

Article 7

Monitoring of exempted agreements

1. *Breach of an obligation*

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Section II:

— address recommendations to the persons concerned;

— in the event of failure by such persons to observe those recommendations and depending upon the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out or requires them to perform specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption according to Article 11(4) or withdraws the benefit of the block exemption which they enjoyed.

2. *Effects incompatible with Article 85(3)*

(a) Where, owing to special circumstances as described below, agreements, decisions and concerted practices which qualify for the exemption provided for in Articles 3 and 6 have nevertheless effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, the Commission, on receipt of a complaint or on its own initiative, under the conditions laid down in Section II, shall take the measures described in (c) below. The severity of these measures must be in proportion to the gravity of the situation.

(b) Special circumstances are, *inter alia*, created by:

(i) acts of conferences or a change of market conditions in a given trade resulting in the absence or elimination of actual or potential competition such as restrictive practices whereby the trade is not available to competition; or

(ii) acts of conference which may prevent technical or economic progress or user participation in the benefits;

(iii) acts of third countries which:

— prevent the operation of outsiders in a trade,

— impose unfair tariffs on conference members,

— impose arrangements which otherwise impede technical or economic progress (cargo-sharing, limitations on type of vessels).

(c) (i) If actual or potential competition is absent or may be eliminated as a result of action by a third country, the Commission shall enter into consultations with the competent authorities of the third country concerned, followed if necessary by negotiations under directives to be given by the Council, in order to remedy the situation.

If the special circumstances result in the absence or elimination of actual or potential competition contrary to Article 85(3)(b) of the Treaty the Commission shall withdraw the benefit of the block exemption. At the same time it shall rule on whether and, if so, under what additional conditions and obligations an individual exemption shoud be granted to the relevant conference agreement with a view, *inter alia*, to obtaining access to the market for non-conference lines;

(ii) If, as a result of special circumstances as set out in (b), there are effects other than those referred to in (i) hereof, the Commission shall take one or more of the measures described in paragraph 1.

Article 8

Effects incompatible with Article 86 of the Treaty

1. The abuse of a dominant position within the meaning of Article 86 of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case the conduct of conferences benefiting from the exemption laid down in Article 3 nevertheless has effects which are incompatible with Article 86 of the Treaty, it may withdraw the benefit of the block exemption and take, pursuant to Article 10, all appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty.

3. Before taking a decision under paragraph 2, the Commission may address to the conference concerned recommendations for termination of the infringement.

Article 9

Conflicts of international law

1. Where the application of this Regulation to certain restrictive practices or clauses is liable to enter into conflict with the provisions laid down by law, regulation or administrative action of certain third countries which would compromise important Community trading and shipping interests, the Commission shall, at the earliest opportunity, undertake with the competent authorities of the third countries concerned, consultations aimed at reconciling as far as possible the abovementioned interest with the respect of Community law. The Commission shall inform the Advisory Committee referred to in Article 15 of the outcome of these consultations.

2. Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with an Advisory Committee as referred to in Article 15 and within the framework of such directives as the Council may issue to it.

3. In exercising the powers conferred on it by this Article, the Council shall act in accordance with the decision-making prodecure laid down in Article 84(2) of the Treaty.

SECTION II

RULES OF PROCEDURE

Article 10

Prodecures on complaint or on the Commission's own initiative

Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85(1) or 86 of the Treaty or to enforce Article 7 of this Regulation.

Complaints may be submitted by:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

Article 11

Result of procedures on complaint or on the Commission's own initiative

1. Where the Commission finds that there has been an infringement of Articles 85(1) or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under the preceding subparagraph, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

2. Paragraph 1 shall apply also to cases falling within Article 7 of this Regulation.

3. If the Commission, acting on a complaint received, concludes that on the evidence before it there are no grounds for intervention under Articles 85(1) or 86 of the Treaty or Article 7 of this Regulation, in respect of any agreement, decision or practice, it shall issue a decision rejecting the complaint as unfounded.

4. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 85(1) and of Article 85(3) of the Treaty, it shall issue a decision applying Article 85(3). Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

Article 12

Application of Article 85(3) — objections

1. Undertakings and associations of undertakings which seek application of Article 85(3) of the Treaty in respect of agreements, decisions and concerted practices falling within the provisions of Article 85(1) to which they are parties shall submit applications to the Commission.

2. If the Commission judges an application admissible and is in possession of all the available evidence, and no action under Article 10 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the *Official Journal of the European Communites* a summary of the application and invite all interested third parties and the Member States to submit their comments to the Commission within 30 days. Such publications shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within 90 days from the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 85(3), the agreement, decision or concerted practice shall be deemed exempt, insofar as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of six years from the date of publication in the *Official Journal of the European Communities*.

If the Commission finds, after expiry of the 90-day time limit, but before expiry of the six year period, that the conditions for applying Article 85(3) are not satisfied, it shall issue a decision declaring that the prohibition in Article 85(1) is applicable. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse the exemption from the provisions of Article 85(1).

4. The Commission may notify applicants as referred to in the first subparagraph of paragraph 3 and shall do so if requested by a Member State within 45 days of the forwarding to the Member State of the application in accordance with Article 15(2). This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

If it finds that the conditions of Article 85(1) and of Article 85(3) are satisfied, the Commission shall issue a decision applying Article 85(3). The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.

Article 13

Duration and revocation of decisions applying Article 85(3)

1. Any decision applying Article 85(3) taken under Article 11(4) or under the second subparagraph of Article 12(4) shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.

2. The decision may be renewed if the conditions for applying Article 85(3) continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision;

(b) where the parties commit a breach of any obligation attached to the decision;

(c) where the decision is based on incorrect information or was induced by deceit, or

(d) where the parties abuse the exemption from the provisions of Article 85(1) granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

Article 14

Powers

Subject to review of its decision by the Court of Justice, the Commission shall have sole power:

— to impose obligations pursuant to Article 7;

— to issue decisions pursuant to Article 85(3).

The authorities of the Member States shall retain the power to decide whether any case falls within the provisions of Article 85(1) or Article 86, until such time as the Commission has initiated a procedure with a view to formulating a decision in the case in question or has sent notification as provided for in the first subpargraph of Article 12(3).

Article 15

Liaison with the authorities of the Member States

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.

2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications, and of the most important documents sent to it or which it sends out in the course of such procedures.

3. An Advisory Committee on agreements and dominant positions in maritime transport shall be consulted prior to the taking of any decision following upon a procedure under Article 10 or of any decision issued under the second subparagraph of Article 12(3), or under the second subparagraph, of paragraph 4 of the same Article. The Advisory Committee shall also be consulted prior to the adoption of the implementing provisions provided for in Article 26.

4. The Advisory Committee shall be composed of officials competent in the sphere of maritime transport and agreements and dominant positions. Each Member State shall nominate two officials to represent it, each of whom may be replaced, in the event of his being prevented from attending, by another official.

5. Consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier that 14 days after dispatch of the notice convening it. This notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 16

Requests for information

1. In carrying out the duties assigned to it by this Regulation, 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 19(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 person authorized to represent them by law or by their constitution, shall be bound to 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 19(1)(b) and Article 20(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.

Article 17

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the member States shall undertake the investigations which the Commission considers to be necessary under Article 18(1), or which it has ordered by decision pursuant to Article 18(3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, Commission officials may assist the officials of such authority in carrying out their duties.

Article 18

Investigating powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, 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 vehicles 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 19(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 19(1)(c) and Article 20(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. To this end, Member States shall take the necessary measures, after consulting the Commission, before 1 January 1989.

Article 19

Fines

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from ECU 100 to 5 000 where, intentionally or negligently:

(a) they supply incorrect or misleading information, either in a communication pursuant to Article 5(5) or in an application pursuant to Article 12; or

(b) they supply incorrect information in response to a request made pursuant to Article 16(3) or (5), or do not supply information within the time limit fixed by a decision taken under Article 16(5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 17 or Article 18, or refuse to submit to an investigation ordered by decision issued in implementation of Article 18(3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from ECU 1 000 to one million, or a sum in excess thereof but not exceeding 10% of the 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 do not comply with an obligation imposed under Article 7 of this Regulation;

(b) they commit a breach of any obligation imposed pursuant to Article 5 or to Article 13(1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 15(3) and (4) shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

The fines provided for in paragraph 2(a) shall not be imposed in respect of acts taking place 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.

However, this provision 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.

Article 20

Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from ECU 50 to 1 000 per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 85(1) or Article 86 of the Treaty the termination of which it has ordered pursuant to Article 11, or to comply with an obligation imposed pursuant to Article 7;

(b) to refrain from any act prohibited under Article 13(3);

(c) to supply complete and correct information which it has requested by decision taken pursuant to Article 16(5);

(d) to submit to an investigation which it has ordered by decision taken pursuant to Article 18(3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 15(3) and (4) shall apply.

Article 21

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 22

Unit of account

For the purpose of applying Articles 19 to 21 the ecu shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 23

Hearing of the parties and of third persons

1. Before taking decisions as provided for in Articles 11, 12(3) second subparagraph, and 12(4), 13(3), 19 and 20, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons where they show a sufficient interest shall be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 85(3) of the Treaty, it shall publish a summary of the relevant agreement, decision or concerted practice and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 24

Professional secrecy

1. Information acquired as a result of the application of Articles 17 and 18 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 23 and 25, 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.

Article 25

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Articles 11, 12(3), second paragraph, 12(4) and 13(3).

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 26

Implementing provisions

The Commission shall have power to adopt implementing provisions concerning the scope of the obligation of communication pursuant to Article 5(5), the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2).

Article 27

Entry into force

This Regulation shall enter into force on 1 July 1987.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EEC) No 4260/88[1] OF 16 DECEMBER 1988 on the communications, complaints and applications and the hearings provided for in Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (as amended by Commission Regulation (EC) No 3666/93 of 15 December 1993)[2]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport[3] and in particular Article 26 thereof,

Having regard to the opinion of the Advisory Committee on Agreements and Dominant Positions in the field of Maritime Transport.

Whereas, pursuant to Article 26 of Regulation (EEC) No 4056/86, the Commission is empowered to adopt implementing provisions concerning the scope of the obligation of communication pursuant to Article 5(5), the form, content and other details of complaints pursuant to Article 10 and of applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2) of that Regulation;

Whereas the obligation of communication to the Commission of awards at arbitration and recommendations by conciliators provided for in Article 5(5) of Regulation (EEC) No 4056/86 concerns the settlement of disputes relating to the practices of conferences referred to in Articles 4 and 5(2) and (3) of that Regulation; whereas it seems appropriate to make the procedure for this notification as simple as possible; whereas it is appropriate, therefore, to provide for notifications to be made in writing, attaching the documents containing the text of the awards and recommendations concerned;

Whereas complaints pursuant to Article 10 of Regulation (EEC) No 4045/86 may make it easier for the Commission to take action for infringement of Articles 85 and 86 of the EEC Treaty in the field of maritime transport; whereas it would consequently seem appropriate to make the procedure for submitting complaints as simple as possible; whereas it is appropriate, therefore, to provide for complaints to be submitted in one written copy, the form, content and details being left to the discretion of the complainants;

Whereas the submission of the applications pursuant to Article 12 of Regulation (EEC) No 4056/86 may have important legal consequences for each undertaking which is a party to an agreement, decision or concerted practice; whereas each undertaking should, therefore,

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[1] OJ L 376, 31.12.1988, p. 1.
[2] OJ L 336, 31.12.1993, p. 1.
[3] OJ L 378, 31.12.1986, p. 4.

have the right to submit such applications to the Commission; whereas, on the other hand, if an undertaking makes use of that right, it must so inform the other undertakings which are parties to the agreement, decision or concerted practice, in order that they may protect their interests;

Whereas it is for the undertakings and associations of undertakings to inform the Commission of the facts and circumstances in support of the applications submitted in accordance with Article 12 of Regulation (EEC) No 4056/86;

Whereas it is desirable to prescribe that forms be used for applications in order, in the interest of all concerned, to simplify and expedite examination thereof by the competent departments;

Whereas in most cases the Commission will in the course of the procedure for the hearings provided for in Article 23(1) and (2) of Regulation (EEC) No 4056/86 already be in close touch with the participating undertakings or associations of undertakings and they will accordingly have the opportunity of making known their views regarding the objections raised against them;

Whereas in accordance with Article 23(1) and (2) of Regulation (EEC) No 4056/86 and with the rights of the defence, the undertakings and associations of undertakings concerned must have the right on conclusion of the procedure to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions;

Whereas persons other than the undertakings or associations of undertakings which are involved in the procedure may have an interest in being heard; whereas, pursuant to the second sentence of Article 23(2) of Regulation (EEC) No 4056/86, such persons should have the opportunity of being heard if they apply and show that they have a sufficient interest;

Whereas it is desirable to enable persons who pursuant to Article 10 of Regulation (EEC) No 4056/86 have lodged a complaint to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for action;

Whereas the various persons entitled to submit comments must do so in writing, both in their own interest and in the interests of good administration, without prejudice to an oral procedure where appropriate to supplement the written procedure;

Whereas it is necessary to define the rights of persons who are to be heard, and in particular the conditions upon which they may be represented or assisted and the setting and calculation of time limits;

Whereas the Advisory Committee on Restrictive Practices and Dominant Positions in Maritime Transport delivers its opinion on the basis of a preliminary draft Decision; whereas it must therefore be consulted concerning a case after the inquiry in that case has been completed; whereas such consultation does not prevent the Commission from re-opening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

SECTION 1

NOTIFICATIONS, COMPLAINTS AND APPLICATIONS

Article 1

Notifications

1. Awards at arbitration and recommendations by conciliators accepted by the parties shall be notified to the Commission when they concern the settlement of disputes relating to the practices of conferences referred to in Article 4 and 5(2) and (3) of Regulation (EEC) No 4056/86.

2. The obligation of notification applies to any party to the dispute resolved by the award or recommendation.

3. Notifications shall be submitted forthwith by registered letter with an acknowledgement of receipt or shall be delivered by hand against receipt. They shall be written in one of the official languages of the Community.

Supporting documents shall be either originals or copies. Copies must be certified as true copies of the original. They shall be submitted in their original language. Where the original language is not one of the official languages of the Community, a translation in one of the official languages shall be attached.

4. When representatives of undertakings, of associations of undertakings, or of natural or legal persons sign such notifications, they shall produce written proof that they are authorized to act.

Article 2

Complaints

1. Complaints pursuant to Article 10 of Regulation (EEC) No 4056/86 shall be submitted in writing in one of the official languages of the Community, their form, content and other details being left to the discretion of complainants.

2. Complaints may be submitted by:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

3. When representatives of undertakings, of associations of undertakings, or of natural or legal persons sign such complaints, they shall produce written proof that they are authorized to act.

Article 3

Persons entitled to submit applications

1. Any undertaking which is party to agreements, decisions or practices of the kind described in Article 85(1) of the Treaty may submit an application under Article 12 of Regulation (EEC) No 4056/86. Where the application is submitted by some but not all of the undertakings concerned, they shall give notice to the others.

2. Where applications under Article 12 of Regulation (EEC) No 4056/86 are signed by representatives of undertakings, of associations of undertakings, or of natural or legal persons, such representatives shall produce written proof that they are authorized to act.

3. Where a joint application is submitted, a joint representative shall be appointed.

Article 4

Submission of applications

1. Applications pursuant to Article 12 of Regulation (EEC) No 4056/86 shall be submitted on Form MAR shown in Annex I.

2. Several participating undertakings may submit an application on a single form.

3. Applications shall contain the information requested in the form.

4. Fifteen copies of each application and of the supporting documents shall be submitted to the Commission.

5. The supporting documents shall be either originals or copies. Copies must be certified as true copies of the original.

6. Applications shall be in one of the official languages of the Community. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation in one of the official languages shall be attached.

7. The date of submission of an application shall be the date on which it is received by the Commission. Where, however, the application is sent by registered post, it shall be deemed to have been received on the date shown on the postmark of the place of posting.

8. Where an application submitted pursuant to Article 12 of Regulation (EEC) No 4056/86 falls outside the scope of that Regulation, the Commission shall without delay inform the applicant that it intends to examine the application under the provisions of such other Regulation as is applicable to the case; however, the date of submission of the application shall be the date resulting from paragraph 7. The Commission shall inform the applicant of its reasons and fix a period for him to submit any comments in writing before it conducts is appraisal pursuant to the provisions of that other Regulation.

Article 4a

Where notifications, complaints and applications provided for in Article 1(3), Article 2(1) and Article 4(6) are made pursuant to Articles 53 and 54 of the Agreement on the European Economic Area they may also be in one of the official languages of the EFTA States or in the working language of the EFTA Surveillance Authority.

SECTION II

HEARINGS

Article 5

Before consulting the Advisory Committee on Agreements and Dominant Positions in the field of Maritime Transport, the Commission shall hold a hearing pursuant to Article 23(1) of Regulation (EEC) No 4056/86.

Article 6

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.

2. The Commission may inform the parties by giving notice in the *Official Journal of the Europepan Communities*, if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.

3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the objections were notified in the manner provided for in paragraph 1.

4. The Commission shall, when giving notice of objections, fix a period within which the undertakings and associations of undertakings may inform the Commission of their views.

Article 7

1. Undertakings and associations of undertakings shall, within the appointed period, make known in writing their views concerning the objections raised against them.

2. They may in their written comments set out all matters relevant to their defence.

3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

Article 8

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

Article 9

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 23(2) of Regulation (EEC) No 4056/86 the Commission shall afford them the opportunity of making known their views in writing within such period as it shall fix.

Article 10

Where the Commission, having received a complaint pursuant to Article 10 of Regulation (EEC) No 4056/86, considers that on the basis of the information in its possession there are insufficient grounds for acting on the complaint, it shall inform the persons who submitted the complaint of its reasons and fix a period for them to submit any further comments in writing.

Article 11

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 or if the Commission proposes to impose on them a fine or periodic penalty payment.

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

Article 12

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

Article 13

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall either appear in person or be represented by legal representatives or by representatives authorized by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorized agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the Protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

Article 14

Without prejudice to Article 6(2), information and summonses from the Commission shall be sent to the addressees by registered letter with acknowledgement of receipt, or shall be delivered by and against receipt.

Article 15

1. In fixing the periods provided for in Articles 4(8), 6, 9 and 10, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. A period shall be not less than two weeks; it may be extended.

2. Periods shall run from the day following receipt of a communication or delivery thereof by hand.

3. Written comments must reach the Commission or be dispatched by registered letter before expiry of the period. Where the period would expire on a Sunday or a public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating the extension, public holidays shall, in cases where the relevant date is the date of receipt of written comments, be those set out in Annex II to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

Article 16

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

This form must be accompanied by an Annex containing the information specified in the attached Complementary Note.

The form and the Annex must be supplied in 15 copies (two for the Commission, one for each Member State and one for the EFTA Surveillance Authority). Supply three copies of any relevant agreement and one copy of other supporting documents.

Please do not forget to complete the 'Acknowledgement of receipt' annexed.

If space is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM MAR

TO THE EUROPEAN COMMISSION

Directorate-General for Competition,
rue de la Loi 200
B-1049 Brussels.

Application pursuant to Article 12 of Council Regulation (EEC) No 4056/86 with a view to obtaining a decision pursuant to Article 85(3) of the Treaty establishing the European Community, and/or Article 53(3) of the Agreement on the European Economic Area.[1]

Identity of the parties

1. *Identity of applicant*

Full name and address, telephone, telex and facsimile numbers, and brief description of the undertaking(s) or association(s) of undertakings submitting the application.

For partnership, sole traders or any other unincorporated body trading under a business name, give, also, the name, forename(s) and address of the proprietor(s) or partner(s).

Where an application is submitted on behalf of some other person (or is submitted by more than one person) the name, address and position of the representative (or joint representative) must be given, together with proof of his authority to act. Where an application is submitted by or on behalf of more than one person they should appoint a joint representative (Article 3(2) and (3) of Commission Regulation (EEC) No 4260/88).

2. *Identity of any other parties*

Full name and address and brief description of any other parties to the agreement, decision or concerted practice (hereinafter referred to as 'the arrangements').

[1] Hereinafter referred to as 'the EEA Agreement'.

State what steps have been taken to inform these other parties of this application.

(This information is not necessary in respect of standard contracts which an undertaking submitting the application has concluded or intends to conclude with a number of parties.)

Purpose of this application (see Complementary note) *(Please answer yes or no to the questions.)*

Would you be satisfied with a comfort letter? (See the end of Section VIII of the Complementary Note.)

The undersigned declare that the information given above and in the ..... pages annexed hereto is correct to the best of their knowledge and belief, 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 19(1)(a) of Regulation (EEC) No 4056/86 (see attached Complementary Note).

Place and date: ....

Signatures: ....

....

....

EUROPEAN
COMMISSION

Directorate-General for Competition

Brussels, ...

To

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if the top half is completed in a single copy by the person lodging it.)

Your application dated: .....

Concerning: .....

Your reference: .....

Parties:

1. .....

2. ..... and others

(There is no need to name the other undertakings party to the arrangement.)

(To be completed by the Commission.)

was received on: .....

and registered under No: IV/MAR/.....

Please quote the above number in all correspondence.

Address: rue de la Loi 200 B-1049 Brussels.

Telephone: Direct line: 29 ..... Telephone exchange: 299 11 11.

Fax No: 29.....

COMPLEMENTARY NOTE

CONTENTS

Additions or alterations to the information given in the Annexes will be published by the Commission from time to time.

NB: Any undertaking uncertain about how to complete a notification or wishing further explanation may contact the Directorate-General for Competition (DG IV) or the Competition Directorate of the EFTA Surveillance Authority in Brussels. Alternatively, any Commission Information Office (those in the Community and in the EFTA States are listed in Annex III), will be able to obtain guidance or indicate an official in Brussels who speaks the preferred official Community language or official language of one of the EFTA States.[2]

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[1] The texts of Annexes I, II and III are reproduced in OJ L 336, 31.12.1993, pages 16 to 23.

[2] For the purposes of this note, any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the Agreement on the European Economic Area. See the relevant text of the Protocol adjusting the Agreement on the European Economic Area in Annex II to this note, as well as the list in Annex III.

I. Purpose of the EC and EEA competition rules

1. *Purpose of the Community competition rules*

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

Article 85(1) of the Treaty establishing the European Community (the text of Articles 85 and 86 is reproduced in Annex I to this note) prohibits restrictive agreements, decisions or concerned practices which may affect trade between Member States, and Article 85(2) declares agreements and decisions containing such restrictions void (although the European 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 practices 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 (the references to this and all other acts mentioned in this note or relevant to notifications and applications made on Form A/B are listed in Annex II to this note).

2. *Purpose of the EEA competition rules*

The competition rules of the Agreement on the EEA 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 restrictive practices 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 to this note) prohibits restrictive agreements, decisions or concerted practices 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 (although the European Court of Justice has held that if restrictive terms of agreements are severable, only those terms are void); Article 53(3), however, provides for exemption of practices 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.

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

II. Competence of the Commission and of the EFTA surveillance authority to apply the EEA competition rules

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. Notifications and applications relating to restrictive 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 in the sense of the Commission notice of 1986 on agreements of minor importance.[1] Furthermore, all restrictive agreements, decisions or concerted practices affecting trade between one Member State and one or more EFTA States should be notified to the Commission, provided the undertakings concerned achieve more than 67% of their combined EEA-wide turnover within the Community.[2] 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 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 dominance exists only in the Community, or with the EFTA Surveillance Authority, if dominance exists only in the territory of the EFTA States, or a substantial part of it. Only where dominance 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 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.

III. Negative clearance

The purpose of the negative clearance procedure is to allow business ('undertaking') to ascertain whether or not the Commission considers that any of their arrangements or behaviour are prohibited pursuant to Article 85(1) or 86 of the Treaty and/or Article 53(1) or 54 of the EEA Agreement. (It is governed by Article 2 of Regulation No 17.) Clearance takes the form of a decision by the Community certifying that, on the basis of the facts in its possession, there are no grounds pursuant to Article 85(1) or 86 of the Treaty and/or Article 53(1) or 54 of the EEA Agreement for action on its part in respect of the arrangements or behaviour.

Any party may apply for negative clearance, even without the consent (but not without the knowledge) of other parties to arrangements. There would be little point in applying, however, where arrangements or behaviour clearly do not fall within the scope of Article 85(1) or 86 of the Treaty, and/or Article 53(1) or 54 of the EEA Agreement, where

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

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

applicable. (In this connection, your attention is drawn to the last paragraph of V below and to Annex II.) Nor is the Commission obliged to give negative clearance — Article 2 of Regulation No 17 states that '... the Commission may certify ...'. The Commission does not usually issue negative clearance decision in cases which, in its opinion, so clearly do not fall within the scope of the prohibition of Article 85(1) of the Treaty and/or Article 53(1) of the EEA Agreement that there is no reasonable doubt for it to resolve by such a decision.

IV. Exemption

The purpose of the procedure for exemption pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement is to allow undertakings to enter into arrangements which, in fact, offer economic advantages but which, without an exemption, would be prohibited pursuant to Article 85(1) of the Treaty and/of Article 53(1) of the EEA Agreement. (It is governed by Articles 4, 6 and 8 of Regulation No 17 and, for new Member States, by Articles 5, 7 and 25; with respect to existing agreements falling under Article 53(1) of the EEA Agreement by virtue of its entry into force, it is governed by Articles 5 to 13 of Protocol 21 to the EEA Agreement.) It takes the form of a decision by the Commission declaring Article 85(1) of the Treaty and/or Article 53(1) of the EEA Agreement to be inapplicable to the arrangements described in the decision. Article 8 of Regulation No 17 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.

Any party may notify arrangements, even without the consent (but not without the knowledge) of other parties.

The Commission has adopted a number of regulations granting exemption to categories of agreements. These group exemptions also apply with respect to the EEA in the form as contained in Annex XIV to the EEA Agreement. Some of these regulations (see Annex II for the latest list) provide that some agreements may benefit by such an 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 pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement and if the benefit of an opposition procedure is claimed in the notification.

A decision granting exemption pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement may have retroactive effect but, with certain exceptions, cannot be made effective earlier than the date of notification (Article 6 of Regulation No 17; see also Article 6 of Protocol 21 to the EEA Agreement). Should the Commission find that notified arrangements are indeed prohibited by Article 85(1) of the Treaty and/or Article 53(1) of the EEA Agreement, and cannot be exempted pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement and, therefore, take a decision condemning them, the parties are nevertheless protected, from the date of notification, against fines for any infringement described in the notification (Article 3 and Article 15(5) and (6) of Regulation No 17).

V. Purpose of the form

The purpose of Form A/B is to allow undertakings, or associations of undertakings, wherever situated, to apply to the Commission for negative clearance for arrangements or behaviour, or to notify such arrangements and apply to have them exempted from the prohibition of Article 85(1) of the Treaty by virtue of Article 85(3) and/or of Article 53(1) of the EEA Agreement by virtue of its Article 53(3). The form allows undertakings applying for negative clearance to notify, at the same time, in order to obtain an exemption. It should be noted that only a notification in order to obtain exemption affords immunity from fines (Article 15(5)).

To be valid, applications for negative clearance in respect of Article 85 of the Treaty and/or Article 53(1) of the EEA Agreement, notifications to obtain an exemption and notifications claiming the benefit of an opposition procedure must be made on Form A/B (by virtue of Article 4 of Regulation No 27). (Undertakings applying for negative clearance for their behaviour in relation to a possible dominant position — Article 86 of the Treaty and/or Article 54 of the EEA Agreement — need not use Form A/B (see Article 4(4) of Regulation No 27), but they are strongly recommended to give all the information requested at X below in order to ensure that their application gives a full statement of the facts.) The applications or notifications made on the Form A/B issued by the EFTA side are equally valid. However, if the arrangements or behaviour concerned solely fall under Article 85 or 86 of the Treaty, i.e. have no EEA relevance whatsoever, it is advisable to use the present form established by the Commission.

Before completing a form, your attention is particularly drawn to the regulations granting block exemption and the notices listed in Annex II — these were published to allow undertakings to judge for themselves, in many cases, whether there was any doubt about their arrangements. This would allow them to avoid the considerable bother and expense, both for themselves and for the Commission, of submitting and examining an application or notification where there is clearly no doubt.

VI. Nature of the form

The form consists of a single sheet calling for the identity of the applicant(s) or notifier(s) and of any other parties. This must be supplemented by further information given under the headings and references detailed below (see X). For preference the paper used should be A4 (21 × 29.7 cm — the same size as the form) but must not be bigger. Leave a margin of at least 25 mm or one inch on the left-hand side of the page and, if you use both sides, on the right-hand side of the reverse.

VII. The need for complete and accurate information

It is important that applicants give all the relevant facts. Although the Commission has the right to seek further information from applicants or third parties, and is obliged to publish a summary of the application before granting negative clearance or exemption pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement, it will usually base its

decision on the information provided by the applicant. Any decision taken on the basis of incomplete information could be without effect in the case of a negative clearance, or voidable in that of an exemption. For the same reason, it is also important to inform the Commission of any material changes to your arrangements made after your application or notification.

Complete information is of particular importance if you are claiming the benefit of a block exemption through an opposition procedure. Such exemption is dependent on the information supplied being complete and in accordance with the facts. If the Commission does not oppose a claim to benefit under this procedure on the basis of the facts in a notification and, subsequently, additional or different facts come to light that could and should have been in the notification, then the benefit of the exemption will be lost, and with retroactive effect. Similarly, there would be little point in claiming the benefit of an opposition procedure with clearly incomplete information, the Commission would be bound either to reject such a notification or oppose exemption in order to allow time for further information to be provided.

Moreover, you should be aware of the provisions of Article 15(1)(a) of Regulation No 17 which reads as follows:

> 'The Commission may by decision impose on undertakings or associations of undertakings fines from 100 to 5 000 units of account[1] where, intentionally or negligently, they supply incorrect or misleading information in an application pursuant to Article 2 or in a notification pursuant to Article 4 or 5.'

The key words here are 'incorrect or misleading information'. However, it often remains a matter of judgment how much detail is relevant; the Commission accepts estimates where accurate information is not readily available in order to facilitate notifications; and the Commission calls for opinions as well as facts.

You should therefore note that the Commission will use these powers only where applicants or notifiers have, intentionally or negligently, provided false information or grossly inaccurate estimates or suppressed readily available information or estimates, or have deliberately expressed false opinions in order to obtain negative clearance or exemption.

VIII. 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. The application or notification might be considered invalid if obviously incomplete or not on the obligatory form.

Further information might be sought from the applicants or from third parties (Article 11 or 14 of Regulation No 17) and suggestions might be made as to amendments to the arrangements that might make them acceptable.

A notification claiming the benefit of an opposition procedure may be opposed by the Commission either because the Commission does not agree that the arrangements should

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[1] The value of the European currency unit (ecu) which has replaced the unit of account, is published daily in the 'C' series of the *Official Journal of the European Communities*.

benefit from a block exemption or to allow for more information to be sought. If the Commission opposes a claim, and unless the Commission subsequently withdraws its opposition, that notification will then be treated as an application for an individual exemption decision.

If, after examination, the Commission intends to grant the application, 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 Member States competent in the matter of restrictive practices and monopolies (Article 10 of Regulation No 17) and attended, where the case falls under the EEA Agreement, by representatives of the EFTA Surveillance Authority and EFTA States who 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 a decision.

Sometimes files are 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 the applicants are satisfied by a less formal letter from the Commission's departments (sometimes called a 'comfort letter') indicating that the arrangements do not call for any action by the Commission, at least in present circumstances. 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 if necessary — if, for example, it were to be asserted that a contract was void pursuant to Article 85(2) of the Treaty and/or Article 53(2) of the EEA Agreement — take an appropriate decision.

IX. Secrecy

Article 214 of the Treaty, Articles 20 and 21 of Regulation No 17, Article 9 of Protocol 23 to the EEA Agreement, Article 122 of the EEA Agreement as well as 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, Member States, the EFTA Surveillance Authority, and EFTA States not to disclose information of the kind covered by the obligation of professional secrecy. On the other hand, Article 19(3) of Regulation No 17 requires the Commission to publish a summary of your application, should it intend to grant it, before taking the relevant decision. In this publication, the Commission shall have regard to the legitimate interest of undertakings in the protection of their business secrets. In this connection, if you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulgeld to other parties, please put all such information in a second Annex with each page clearly marked 'Business Secrets'; in the principal Annex, under any affected heading state 'see second Annex' or 'see also second Annex'; in the second Annex repeat the affected heading(s) and reference(s) and give the information you do not wish to have published, together with your reasons for this. Do not overlook the fact that the Commission may have to publish a summary of your application.

Before publishing an Article 19(3) notice, the Commission will show the undertakings concerned a copy of the proposed text.

X. Further information and headings to be used in the annex to form A/B

The further information is to be given under the following headings and reference numbers. Wherever possible, give exact information. If this is not readily available, give your best estimate, and identify what you give as an estimate. If you believe any detail asked for to be unavailable or irrelevant, please explain why. This may, in particular, be the case if one party is notifying arrangements alone without the cooperation of other parties. Do not overlook the fact that Commission officials are ready to discuss what detail is relevant (see the *nota bene* at the beginning of this Complementary Note). An example that might help you is available on request.

1. *Brief description*

Give a brief description of the arrangements or behaviour (nature, purpose, date(s) and duration) — (full details are requested below).

2 *Market*

The nature of the goods or services affected by the arrangements or behaviour (include the heading number according to the Harmonized Commodity Description and Coding System). A brief description of the structure of the market (or markets) for these goods or services — e.g. who sells in it, who buys in it, its geographical extent, the turnover in it, how competitive it is, whether it is easy for new suppliers to enter the market, whether there are substitute products. If you are notifying a standard contract (e.g. a contract appointing dealers), say how many you expect to conclude. If you know of any studies of the market, it would be helpful to refer to them.

3. *Fuller details of the party or parties*

3.1. Do any of the parties form part of a group of companies? A group relationship is deemed to exist where a firm:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, the board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs of another.

If the answer is yes, give:

— the name and address of the ultimate parent company,

— a brief description of the business of the group[1] (and, if possible, one copy of the last set of group accounts),

[1] For example: 'motor vehicle manufacturer', 'computer service bureau', 'conglomerate'.

— the name and address of any other company in the group competing in a market affected by the arrangements or in any related market, that is to say any other company competing directly or indirectly with the parties ('relevant associated company').

3.2. The most recently available total, and total EEA-wide turnover of each of the parties and, as the case may be, of the group of which it forms part (it could be helpful also if you could provide one copy of the last set of accounts). The figures and percentage of the EEA-wide total turnover achieved within the Community and within the territory of the EFTA States.

3.3. The sales or turnover of each party in the goods or services affected by the arrangements in the Community, in the territory of the EFTA States, in the EEA territory and worldwide. If the turnover in the Community or in the territory of the EFTA States or in the EEA territory is material (say more than a 5% market share), please also give figures for each Member State and for each EFTA State,[1] and for previous years (in order to show any significant trends), and give each party's sales targets for the future. Provide the same figures for any relevant associated company. (Under this heading, in particular, your best estimate might be all that you can readily supply.)

For the calculation of turnover in the banking and insurance sector see Article 3 of Protocol 22 to the EEA Agreement.

3.4. In relation to the market (or markets) for the goods or services described at 2, give, for each of the sales or turnover figures in 3.3, your estimate of the market share it represents, within the Community, within the territory of the EFTA States, and within the EEA territory as a whole.

3.5. If you have a substantial interest falling short of control (more than 25% but less than 50%) in some other company competing in a market affected by the arrangements, or if some other such company has a substantial interest in yours, give its name and address and brief details.

4. *Full details of the arrangements*

4.1. If the contents are reduced to writing give a brief description of the purpose of the arrangements and attach three copies of the text (except that the technical descriptions often contained in know-how agreements may be omitted; in such cases, however, indicate parts omitted).

If the contents are not, or are only partially, reduced to writing, give a full description.

4.2. Detail any provisions contained in the arrangements 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,

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[1] See list in Annex III.

— purchases from or sales to third parties,

— whether to apply similar terms for the supply of equivalent goods or services,

— whether to offer different goods or services separately or together.

(If you ar claiming the benefit of an opposition procedure, identify particularly in this list the restrictions that exceed those automatically exempted by the relevant regulation.)

4.3. State between which Member States and/or EFTA States[1] trade may be affected by the arrangements, and whether trade between the Community or the EEA territory, and any third countries is affected.

5. *Reasons for negative clearance*

If you are applying for negative clearance state, under the reference:

5.1. Why, i.e. state which provision or effects of the arrangements or behaviour might, in your view, raise questions of compatibility with the Community's and/or 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 arrangements or behaviour that you wish to have resolved by a negative clearance decision.

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

5.2. why the arrangements 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

5.3. why the arrangements 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

5.4. why the arrangements 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.

6. *Reasons for exemption*

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

6.1. the arrangements contribute to improving production or distribution, and/or promoting technical or economic progress;

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

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[1] See list in Annex III.

6.3. all restrictive provisions of the arrangements are indispensable to the attainment of the aims set out under 6.1 (if your are claiming the benefit of an opposition procedure, it is particularly important that you should identify and justify restrictions that exceed those automatically exempted by the relevant regulation); and

6.4. the arrangements do not eliminate competition in respect of a substantial part of the goods or services concerned.

7. *Other information*

7.1. 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 EC or EFTA authorities or courts concerning these or any related arrangements.

7.2. Give any other information presently available that you think might be helpful in allowing the Commission to appreciate whether there are any restrictions contained in the agreement, or any benefits that might justify them.

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

7.4. State, with reasons, the urgency of your application or notification.

XI. Languages

Your are entitled to notify your agreements in any of the official languages of the European Community or of an EFTA State. In order to ensure rapid proceedings, you are, however, invited to use, if possible, in case of 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 notification to the Commission, one of the official languages of the European Community or the working language of the EFTA Surveillance Authority.

COUNCIL REGULATION (EEC) No 479/92[1] OF 25 FEBRUARY 1992

on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof,

Having regard to the proposal from the Commission[2],

Having regard to the opinion of the European Parliament[3],

Having regard to the opinion of the Economic and Social Committee[4],

Whereas Article 85(1) of the Treaty may in accordance with Article 85(3) thereof be declared inapplicable to categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85(3);

Whereas, pursuant to Article 87 of the Treaty, the provisions for the application of Article 85(3) of the Treaty should be adopted by way of Regulation; whereas, according to Article 87(2)(b), such a Regulation must lay down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent on the other; whereas, according to Article 87(2)(d), such a regulation is required to define the respective functions of the Commission and of the Court of Justice;

Whereas liner shipping is a capital intensive industry; whereas containerization has increased pressures for cooperation and rationalization; whereas the Community shipping industry needs to attain the necessary economies of scale in order to compete succesfully on the world liner shipping market;

Whereas joint-service agreements between liner shipping companies with the aim of rationalizing their operations by means of technical, operational and/or commercial arrangements (described in shipping circles as consortia) can help to provide the necessary means for improving the productivity of liner shippig services and promoting technical and economic progress;

Having regard to the importance of maritime transport for the development of the Community's trade and the role which consortia agreements can fulfil in this respect, taking account of the special features of international liner shipping;

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[1] OJ L 55, 29.2.1992, p. 3.
[2] OJ C 167, 10.7.1990, p. 9.
[3] OJ C 305, 25.11.1991, p. 39.
[4] OJ C 69, 18.3.1991, p. 16.

Whereas the legalization of these agreements is a measure which can make a positive contribution to improving the competitiveness of shipping in the Community;

Whereas users of the shipping services offered by consortia can obtain a share of the benefits resulting from the improvements in productivity and service, by means of, *inter alia,* regularity, cost reductions derived from higher levels of capacity utilization, and better service quality stemming from improved vessels and equipment;

Whereas the Commission should be enabled to declare by way of Regulation that the provisions of Article 85(1) of the Treaty do not apply to certain categories of consortia agreements, decisions and concerted practices, in order to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy;

Whereas the Commission, in close and constant liaison with the competent authorities of the Member States, should be able to define precisely the scope of these exemptions and the conditions attached to them;

Whereas consortia in liner shipping are a specialized and complex type of joint venture; whereas there is a great variety of different consortia agreements operating in different circumstances; whereas the scope, parties, activities or terms of consortia are frequently altered; whereas the Commission should therefore be given the responsibility of defining from time to time the consortia to which a group exemption should apply;

Whereas, in order to ensure that all the conditions of Article 85(3) of the Treaty are met, conditions should be attached to group exemptions to ensure in particular that a fair share of the benefits will be passed on to shippers and that competition is not eliminated;

Whereas pursuant to Article 11(4) of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport[1] the Commission may provide that a decision taken in accordance with Article 85(3) of the Treaty shall apply with retroactive effect; whereas it is desirable that the Commission be empowered to adopt, by Regulation, provisions to that effect;

Whereas notification of agreements, decisions and concerted practices falling within the scope of this Regulation must not be made compulsory, it being primarily the responsibility of undertakings to see to it that they conform to the rules on competition, and in particular to the conditions laid down by the subsequent Commission Regulation implementing this Regulation;

Whereas there can be no exemption if the conditions set out in Article 85(3) of the Treaty are not satisfied; whereas the Commission should therefore have power to take the appropriate measures where an agreement proves to have effects incompatible with Article 85(3) of the Treaty; whereas the Commission should be able first to address recommendations to the parties and then to take decisions,

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[1] OJ L 378, 31.12.1986, p. 4.

HAS ADOPTED THIS REGULATION:

Article 1

1. Without prejudice to the application of Regulation (EEC) No 4056/86, the Commission may by regulation and in accordance with Article 85(3) of the Treaty, declare that Article 85(1) of the Treaty shall not apply to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices that have as an object to promote or establish cooperation in the joint operation of maritime transport services between liner shipping companies, for the purpose of rationalizing their operations by means of technical, operational and/or commercial arrangements — with the exception of price fixing (consortia).

2. Such regulation adopted pursuant to paragraph 1 shall define the categories of agreements, decisions and concerted practices to which it applies and shall specify the conditions and obligations under which, pursuant to Article 85(3), of the Treaty, they shall be considered exempted from the application of Article 85(1) of the Treaty.

Article 2

1. The regulation adopted pursuant to Article 1 shall apply for a period of five years, calculated as from the date of its entry into force.

2. It may be repealed or amended where circumstances have changed with respect to any of the facts which were basic to its adoption.

Article 3

The regulation adopted pursuant to Article 1 may include a provision stating that it applies with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of entry into force of such regulation, provided they comply with the conditions established in that regulation.

Article 4

Before adopting its regulation, the Commission shall publish a draft thereof to enable all the persons and organizations concerned to submit their comments within such reasonable time limit as the Commission shall fix, but in no case less than one month.

Article 5

1. Before publishing the draft regulation and before adopting the regulation, the Commission shall consult the Advisory Committee on Agreements and Dominant Positions in Maritime Transport established by Article 15(3) of Regulation (EEC) No 4056/86.

2. Paragraphs 5 and 6 of Article 15 of Regulation (EEC) No 4056/86 relating to consultation with the Advisory Committee, shall apply, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

Article 6

1. Where the persons concerned are in breach of a condition or obligation attaching to an exemption granted by the Regulation adopted pursuant to Article 1, the Commission may, in order to put an end to such a breach:

— address recommendations to the persons concerned, and

— in the event of failure by such persons to observe those recommendations, and depending on the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out, or requires them to perform specific acts or, while withdrawing the benefit of the group exemption which they enjoyed, grants them an individual exemption in accordance with Article 11(4) of Regulation (EEC) No 4056/86, or withdraws the benefit of the group exemption which they enjoyed.

2. Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in a particular case an agreement, decision or concerted practice to which the group exemption granted by the Regulation adopted pursuant to Article 1 applies, nevertheless has effects which are incompatible with Article 85(3) of the Treaty or with the prohibition laid down in Article 86 of the Treaty, it may withdraw the benefit of the group exemption from those agreements, decisions or concerted practices and take all appropriate measures for the purpose of bringing these infringements to an end, pursuant to Article 13 of Regulation (EEC) No 4056/86.

3. Before taking a decision under paragraph 2, the Commission may address recommendations for termination of the infringement to the persons concerned.

Article 7

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COUNCIL REGULATION (EEC) No 3975/87[1] OF 14 DECEMBER 1987

laying down the procedure for the application of the rules on competition to undertakings in the air transport sector

As amended by Council Regulation (EEC) No 1284/91 of 14 May 1991[2] and Council Regulation (EEC) No 2410/92 of 23 July 1992.[3]

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof,

Having regard to the proposal from the Commission,[4]

Having regard to the opinions of the European Parliament,[5]

Having regard to the opinion of the Economic and Social Committee,[6]

Whereas the rules on competition form part of the Treaty's general provisions which also apply to air transport; whereas the rules for applying these provisions are either specified in the Chapter on competition or fall to be determined by the procedures laid down therein;

Whereas, according to Council Regulation No 141,[7] Council Regulation No 17[8] does not apply to transport services; whereas Council Regulation (EEC) No 1017/68[9] applies only to inland transport; whereas Council Regulation (EEC) No 4056/86[10] applies only to maritime transport; whereas consequently the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 and 86 of the Treaty in air transport; whereas moreover the Commission lacks such powers of its own to take decisions or impose penalties as are necessary for it to bring to an end infringements established by it;

Whereas air transport is characterized by features which are specific to this sector; whereas, furthermore, international air transport is regulated by a network of bilateral agreements between States which define the conditions under which air carriers designated by the parties to the agreements may operate routes between their territories;

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[1] OJ L 374, 31.12.1987, p. 1.
[2] OJ L 122, 17.5.1991, p. 2.
[3] OJ L 240, 24.8.1992, p. 18.
[4] OJ C 182, 9.7.1984, p. 2.
[5] OJ C 182, 19.7.1982, p. 120 and OJ C 345, 21.12.1987.
[6] OJ C 77, 21.3.1983, p. 20.
[7] OJ 124, 28.11.1962, p. 2751/62.
[8] OJ 13, 21.2.1962, p. 204/62.
[9] OJ L 175, 23.7.1968, p. 1.
[10] OJ L 378, 31.12.1986, p. 4.

Whereas practices which affect competition relating to air transport between Member States may have a substantial effect on trade between Member States; whereas it is therefore desirable that rules should be laid down under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for the application of Articles 85 and 86 of the Treaty to international air transport between Community airports;

Whereas such a regulation should provide for appropriate procedures, decision-making powers and penalties to ensure compliance with the prohibitions laid down in Articles 85(1) and 86 of the Treaty; whereas account should be taken in this respect of the procedural provisions of Regulation (EEC) No 1017/68 applicable to inland transport operations, which takes account of certain distinctive features of transport operations viewed as a whole;

Whereas undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand and it must be ensured that wide publicity is given to decisions taken;

Whereas all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice under the conditions specified in the Treaty; whereas it is moreover desirable, pursuant to Article 172 of the Treaty, to confer upon the Court of Justice unlimited jurisdiction in respect of decisions under which the Commission imposes fines or periodic penalty payments;

Whereas it is appropriate to except certain agreements, decisions and concerted practices from the prohibition laid down in Article 85(1) of the Treaty, in so far as their sole object and effect is to achieve technical improvements or cooperation;

Whereas, given the specific features of air transport, it will in the first instance be for undertakings themselves to see that their agreements, decisions and concerted practices conform to the competition rules, and notification to the Commission need not be compulsory;

Whereas undertakings may wish to apply to the Commission in certain cases for confirmation that their agreements, decisions and concerted practices conform to the law, and a simplified procedure should be laid down for such cases;

Whereas this Regulation does not prejudge the application of Article 90 of the treaty,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. This Regulation lays down detailed rules for the application of Articles 85 and 86 of the Treaty to air transport services.

2. This Regulation shall apply only to air transport between Community airports.

Article 2

Exceptions for certain technical agreements

1. The prohibition laid down in Article 85(1) of the Treaty shall not apply to the agreements, decisions and concerted practices listed in the Annex, in so far as their sole object and effect is to achieve technical improvements or cooperation. This list is not exhaustive.

2. If necessary, the Commission shall submit proposals to the Council for the amendment of the list in the Annex.

Article 3

Procedures on complaint or on the Commission's own initiative

1. Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85(1) or 86 of the Treaty.

Complaints may be submitted by:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

2. Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the 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 concerted practice.

Article 4

Result of procedures on complaint or on the Commission's own initiative

1. Where the Commission finds that there has been an infringement of Articles 85(1) or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such an infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may address recommendations for termination of the infringement to the undertakings or associations of undertakings concerned before taking a decision under the preceding subparagraph.

2. If the Commission, acting on a complaint received, concludes that, on the evidence before it, there are no grounds for intervention under Articles 85(1) or 86 of the Treaty in respect of any agreement, decision or concerted practice, it shall take a decision rejecting the complaint as unfounded.

3. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions of both Article 85(1) and 85(3) of the Treaty, it shall take a decision applying paragraph 3 of the said Article. Such a decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

Article 4a

Interim measures against anti-competitive practices

1. Without prejudice to the application of Article 4(1), where the Commission has clear *prima facie* evidence that certain practices are contrary to Article 85 or 86 of the Treaty and have the object or effect of directly jeopardizing the existence of an air service, and where recourse to normal procedures may not be sufficient to protect the air service or the airline company concerned, it may by decision take interim measures to ensure that these practices are not implemented or cease to be implemented and give such instructions as are necessary to prevent the occurrence of these practices until a decision under Article 4(1) is taken.

2. A decision taken pursuant to paragraph 1 shall apply for a period not exceeding six months. Article 8(5) shall not apply.

The Commission may renew the initial decision, with or without modification, for a period not exceeding three months. In such case, Article 8(5) shall apply.

Article 5

Application of Article 85(3) of the Treaty — objections

1. Undertakings and associations of undertakings which wish to seek application of Article 85(3) of the Treaty in respect of agreements, decisions and concerted practices falling within the provisions of paragraph 1 of the said Article to which they are parties shall submit applications to the Commission.

2. If the Commission judges an application admissible and is in possession of all the available evidence and no action under Article 3 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the *Official Journal of the Europepan Communities* a summary of the application and invite all interested third parties and the Member States to submit their comments to the Commission within 30 days. Such publications shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within 90 days of the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 85(3) of the Treaty, the agreement, decision or concerted practice shall be deemed exempt, in so far as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of six years from the date of publication in the *Official Journal of the European Communities*.

If the Commission finds, after expiry of the 90-day time limit, but before expiry of the six-year period, that the conditions for applying Article 85(3) of the Treaty are not satisfied, it shall issue a decision declaring that the prohibition in Article 85(1) applies. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse an exemption from the provisions of Article 85(1) or have contravened Article 86.

4. The Commission may notify applicants as referred to in the first subparagraph of paragraph 3; it shall do so if requested by a Member State within 45 days of the forwarding to the Member State of the application in accordance with Article 8(2). This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

If it finds that the conditions of Article 85(1) and (3) of the Treaty are satisfied, the Commission shall issue a decision applying Article 85(3). The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.

Article 6

Duration and revocation of decisions applying Article 85(3)

1. Any decision applying Article 85(3) of the Treaty adopted under Articles 4 or 5 of this Regulation shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.

2. The decision may be renewed if the conditions for applying Article 85(3) of the Treaty continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specific acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision; or

(b) where the parties commit a breach of any obligation attached to the decision; or

(c) where the decision is based on incorrect information or was induced by deceit; or

(d) where the parties abuse the exemption from the provisions of Article 85(1) of the Treaty granted to them by the decision.

In cases falling under subparagraphs (b), (c) or (d), the decision may be revoked with retroactive effect.

Article 7

Powers

Subject to review of its decision by the Court of Justice, the Commission shall have sole power to issue decisions pursuant to Article 85(3) of the Treaty.

The authorities of the Member States shall retain the power to decide whether any case falls under the provisions of Article 85(1) or Article 86 of the Treaty, until such time as the Commission has initiated a procedure with a view to formulating a decision on the case in question or has sent notification as provided by the first subparagraph of Article 5(3) of this Regulation.

Article 8

Liaison with the authorities of the Member States

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.

2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications and of the most important documents sent to it or which it sends out in the course of such procedures.

3. An Advisory Committee on Agreements and Dominant Positions in Air Transport shall be consulted prior to the taking of any decision folowing upon a procedure under Article 3 or of any decision under the second subparagraph of Article 5(3), or under the second subparagraph of paragraph 4 of the same Article or under Article 6. The Advisory Committee shall also be consulted prior to adoption of the implementing provisions provided for in Article 19.

4. The Advisory Committee shall be composed of officials competent in the sphere of air transport and agreements and dominant positions. Each Member State shall nominate two officials to represent it, each of whom may be replaced, in the event of his being prevented from attending, by another official.

5. Consultation shall take place at a joint meeting convened by the Commission; such a meeting shall be held not earlier than 14 days after dispatch of the notice convening it. In respect of each case to be examined, this notice shall be accompanied by a summary of the case, together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 9

Requests for information

1. In carrying out the duties assigned to it by this Regulation, 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 forward a copy of the request at the same time to the competent

authority of the Member State in whose territory the head office of the undertaking or association of undertakings is situated.

3. In its request, the Commission shall state the legal basis and purpose of the request and also the penalties for supplying incorrect information provided for in Article 12(1)(b).

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

5. When an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or suplies 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 12(1)(b) and Article 13(1)(c), as well as the right to have the decision reviewed by the Court of Justice.

6. At the same time the Commission shall send a copy of its decision to the competent authority of the Member State in whose territory the head office of the undertaking or association of undertakings is situated.

Article 10

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 11(1) or which it has ordered by decision adopted pursuant to Article 11(3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such an authorization shall specify the subject-matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, Commission officials may assist the officials of the competent authority in carrying out their duties.

Article 11

Investigating powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorized by the Commission shall be 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 vehicles used by undertakings or associations of undertakings.

2. The authorized officials of the Commission 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 12(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 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 Articles 12(1)(c) and 13(1)(d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take the decisions mentioned 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 assist the Commission officials in carrying out their duties, at the request of such authority or of the Commission.

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. To this end, Member States shall take the necessary measures after consultation of the Commission by 31 July 1989.

Article 12

Fines

1. The Commission may, by decision, impose fines on undertakings or associations of undertakings of from ECU 100 to 5 000 where, intentionally or negligently;

(a) they supply incorrect or misleading information in connection with an application pursuant to Article 3(2) or Article 5; or

(b) they supply incorrect information in response to a request made pursuant to Article 9(3) or (5), or do not supply information within the time limit fixed by a decision adopted under Article 9(5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 10 or Article 11, or refuse to submit to an investigation ordered by decision taken pursuant to Article 11(3).

2. The Commission may, by decision, impose fines on undertakings or associations of undertakings of from ECU 1 000 to 1 000 000, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of the undertakings participating in the infringement, where either intentionally or negligently they:

(a) infringe Article 85(1) or Article 86 of the Treaty; or

(b) commit a breach of any obligation imposed pursuant to Article 6(1) of this Regulation.

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 8 shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a penal nature.

5. The fines provided for in paragraph 2(a) shall not be imposed in respect of acts taking place 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.

However, this provision shall not have effect where the Commission has informed the undertakings or associations of 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.

Article 13

Periodic penalty payments

1. By decision, the Commission may impose periodic penalty payments on undertakings or associations of undertakings of from ECU 50 to ECU 1 000 per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 85(1) or Article 86 of the Treaty, the termination of which has been ordered pursuant to Article 4 of this Regulation;

(b) to refrain from any act prohibited under Article 6(3);

(c) to supply complete and correct information which has been requested by decision, taken pursuant to Article 9(5);

(d) to submit to an investigation which has been ordered by decision taken pursuant to Article 11(3).

(e) to comply with any measure imposed by decision taken under Article 4a.

2. When the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would result from the original decision.

3. Article 8 shall apply.

Article 14

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 15

Unit of account

For the purpose of applying Articles 12 to 14, the ecu shall be adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 16

Hearing of the parties and of third persons

1. Before refusing the certificate mentioned in Article 3(2), or taking decisions as provided for in Articles 4, 4a, 5(3) second subparagraph and 5(4), 6(3), 12 and 13, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission takes, or has taken, objection.

2. If the Commission or the competent authorities of the member States consider it necessary, they may also hear other natural or legal persons. Applications by such persons to be heard shall be granted when they show a sufficient interest.

3. When the Commission intends to take a decision pursuant to Article 85(3) of the Treaty, it shall publish a summary of the relevant agreement, decision or concerted practice in the *Official Journal of the European Communities* and invite all interested third parties to submit their observations within a period, not being less than one month, which it shall fix. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 17

Professional secrecy

1. Information acquired as a result of the application of Articles 9 to 11 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 16 and 18, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information of a kind covered by the obligation of professional secrecy and which has been acquired by them as a result of the application of this Regulation.

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

Article 18

Publication of decisions

1. The Commission shall publish the decisions which it adopts pursuant to Articles 3(2), 4, 5(3) second subparagraph, 5(4) and 6(3).

2. The publication shall state the names of the parties and the main contents of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 19

Implementing provisions

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 3, applications pursuant to Articles 3(2) and 5 and the hearings provided for in Article 16(1) and (2).

Article 20

Entry into force

This Regulation shall enter into force on 1 January 1988.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

ANNEX

List referred to in Article 2

(a) The introduction or uniform application of mandatory or recommended technical standards for aircraft, aircraft parts, equipment and aircraft supplies, where such standards are set by an organization normally accorded international recognition, or by an aircraft or equipment manufacturer;

(b) the introduction or uniform application of technical standards for fixed installations for aircraft, where such standards are set by an organization normally accorded international recognition;

(c) the exchange, leasing, pooling, or maintenance of aircraft, aircraft parts, equipment or fixed installations for the purpose of operating air services and the joint purchase of aircraft parts, provided that such arrangements are made on a non-discriminatory basis;

(d) the introduction, operation and maintenance of technical communication networks, provided that such arrangements are made on a non-discriminatory basis;

(e) the exchange, pooling or training of personnel for technical or operational purposes;

(f) the organization and execution of substitute transport operations for passengers, mail and baggage, in the event of breakdown/delay of aircraft, either under charter or by provision of substitute aircraft under contractual arrangements;

(g) the organization and execution of successive or supplementary air transport operations, and the fixing and application of inclusive rates and conditions for such operations;

(h) the consolidation of individual consignments;

(i) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs, provided that such rules do not directly or indirectly fix transport fares and conditions;

(j) arrangements as to the sale, endorsement and acceptance of tickets between air carriers (interlining) as well as the refund, pro-rating and accounting schemes established for such purposes;

(k) the clearing and settling of accounts between air carriers by means of a clearing house, including such services as may be necessary or incidental thereto; the clearing and settling of accounts between air carriers and their appointed agents by means of a centralised and automated settlement plan or system, including such services as may be necessary or incidental thereto.

COMMISSION REGULATION (EEC) No 4261/88[1] OF 16 DECEMBER 1988

on the complaints, applications and hearings provided for in Council Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector

(as amended by Commission Regulation (EC) No 3666/93 of 15 December 1993)[2]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector,[3] and in particular Article 19 thereof,

Having regard to the opinion of the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas, pursuant to Article 19 of Regulation (EEC) No 3975/87, the Commission is empowered to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 3(1) and of applications pursuant to Articles 3(2) and 5 and the hearings provided for in Article 16(1) and (2) of that Regulation;

Whereas complaints pursuant to Article 3(1) of Regulation (EEC) No 3975/87 may make it easier for the Commission to take action for infringement of Articles 85 and 86 of the EEC Treaty in the field of air transport; whereas it would consequently seem appropriate to make the procedure for submitting complaints as simple as possible; whereas it is appropriate, therefore, to provide for complaints to be submitted in one written copy, the form, content and details being left to the discretion of the complainants;

Whereas the submission of the application pursuant to Articles 3(2) and 4 of Regulation (EEC) No 3975/87 may have important legal consequences for each undertaking which is a party to an agreement, decision or concerted practice; whereas each undertaking should, therefore, have the right to submit such applications to the Commission; whereas, on the other hand, if an undertaking makes use of that right, it must so inform the other undertakings which are parties to the agreement, decision or concerted practice, in order that they may protect their interests;

Whereas it is for the undertakings and associations of undertakings to inform the Commission of the facts and circumstances in support of the applications submitted in accordance with Articles 3(2) and 5 of Regulation (EEC) No 3975/87;

Whereas it is desirable to prescribe that forms be used for applications in order, in the interest of all concerned, to simplify and expedite examination thereof by the competent departments;

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[1] OJ L 376, 31.12.1988, p. 10.
[2] OJ L 336, 31.12.1993, p. 1.
[3] OJ L 374, 31.12.1987, p. 1.

Whereas in most cases the Commission will in the course of the procedure for the hearings provided for in Article 16(1) and (2) of Council Regulation (EEC) No 3975/87 already be in close touch with the participating undertakings or associations of undertakings and they will accordingly have the opportunity of making known their views regarding the objections raised against them;

Whereas in accordance with Article 16(1) and (2) of Regulation (EEC) No 3975/87 and with the rights of the defence, the undertakings and associations of undertakings concerned must have the right on conclusion of the procedure to submit their comments on the whole of the objections raised against them which the Commission proposes to deal with in its decisions;

Whereas persons other than the undertakings or associations of undertakings which are involved in the procedure may have an interest in being heard; whereas, by the second sentence of Article 16(2) of Regulation (EEC) No 3975/87, such persons must have the opportunity of being heard if they apply and show that they have a sufficient interest;

Whereas it is desirable to enable persons who pursuant to Article 3(1) of Regulation (EEC) No 3975/87 have lodged a complaint to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for action;

Whereas the various persons entitled to submit comments must do so writing, both in their own interest and in the interests of good administration, without prejudice to an oral procedure where appropriate to supplement the written procedure;

Whereas it is necessary to define the rights of persons who are to be heard, and in particular the conditions upon which they may be represented or assisted and the setting and calculation of time limits;

Whereas the Advisory Committee on Restrictive Practices and Dominant Positions in Air Transport delivers its opinion on the basis of a preliminary draft decision; whereas it must therefore be consulted concerning a case after the inquiry in that case has been completed; whereas such consultation does not prevent the Commission from re-opening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

SECTION I

COMPLAINTS AND APPLICATIONS

Article 1

Complaints

1. Complaints pursuant to Article 3(1) of Regulation (EEC) No 3975/87 shall be submitted in writing in one of the official languages of the Community, their form, content and other details being left to the discretion of complainants.

2. Complaints may be submitted by:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

3. When representatives of undertakings, of associations of undertakings, or of natural or legal persons sign such complaints, they shall produce written proof that they are authorized to act.

Article 2

Persons entitled to submit applications

1. Any undertaking which is party to agreements, decisions or practices of the kind described in Articles 85(1) and 86 of the Treaty may submit an application under Articles 3(2) and 5 of Regulation (EEC) No 3975/87. Where the application is submitted by some but not all of the undertakings concerned, they shall give notice to the others.

2. Where applications under Articles 3(2) and 5 of Regulation (EEC) No 3975/87 are signed by representatives of undertakings, of associations of undertakings, or of natural or legal persons, such representatives shall produce written proof that they are authorized to act.

3. Where a joint application is submitted, a joint representative shall be appointed.

Article 3

Submission of applications

1. Applications pursuant to Articles 3(2) and 5 of Regulation (EEC) No 3975/87 shall be submitted on Form AER shown in Annex I.

2. Several participating undertakings may submit an application on a single form.

3. Applications shall contain the information requested in the form.

4. Fifteen copies of each application and of the supporting documents shall be submitted to the Commission.

5. The supporting documents shall be either originals or copies. Copies must be certified as true copies of the original.

6. Applications shall be in one of the official languages of the Community. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation in one of the official languages shall be attached.

7. The date of submission of an application shall be the date on which it is received by the Commission. Where, however, the application is sent by registered post, it shall be deemed to have been received on the date shown on the postmark of the place of posting.

8. Where an application submitted pursuant to Articles 3(2) and 5 of Regulation (EEC) No 3975/87 falls outside the scope of that Regulation, the Commission shall without delay inform the applicant that it intends to examine the application under the provisions of such

other Regulation as is applicable to the case; however, the date of submission of the application shall be the date resulting from paragraph 7. The Commission shall inform the applicant of its reasons and fix a period for him to submit any comments in writing before it conducts its appraisal pursuant to the provisions of that other Regulation.

Article 3a

Where complaints and applications as provided for in Articles 1(1) and 3(6) are made pursuant to Articles 53 and 54 of the Agreement on the European Economic Area, they may also be in one of the official languages of the EFTA States or the work language of the EFTA Surveillance Authority.

SECTION II

HEARINGS

Article 4

Before consulting the Advisory Committee on Agreements and Dominant Positions in Air Transport, the Commission shall hold a hearing pursuant to Article 16(1) of Regulation (EEC) No 3975/87.

Article 5

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.

2. The Commission may inform the parties by giving notice in the *Official Journal of the European Communities*, if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.

3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the objections were notified in the manner provided for in paragraph 1.

4. The Commission shall, when giving notice of objections, fix a period within which the undertakings and associations of undertakings may inform the Commission of their view.

Article 6

1. Undertakings and associations of undertakings shall, within the appointed period, make known in writing their views concerning the objections raised against them.

2. They may in their written comments set out all matters relevant to their defence.

3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

Article 7

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

Article 8

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 16(2) of Regulation (EEC) No 3975/87 the Commission shall afford them the opportunity of making known their views in writing within such period as it shall fix.

Article 9

Where the Commission, having received a complaint pursuant to Article 3(1) of Regulation (EEC) No 3975/87 considers that on the basis of the information in its possession there are insufficient grounds for acting on the complaint, it shall inform the persons who submitted the complaint of its reasons and fix a period for them to submit any further comments in writing.

Article 10

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 or if the Commission proposes to impose on them a fine or periodic penalty payment.

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

Article 11

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

Article 12

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall either appear in person or be represented by legal representatives or by representatives authorized by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorized agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the Protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

Article 13

Without prejudiuce to Article 5(2), information and summonses from the Commission shall be sent to the adressees by registered letter with acknowledgement of receipt, or shall be delivered by hand against receipt.

Article 14

1. In fixing the periods provided for in Articles 3(8), 5, 8 and 9, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. A period shall be not less than two weeks; it may be extended.

2. Periods shall run from the day following receipt of a communication or delivery thereof by hand.

3. Written comments must reach the Commission or be dispatched by registered letter before expiry of the period. Where the period would expire on a Sunday or a public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating the extension, public holidays shall, in cases where the relevant date is the date of receipt of written comments, be those set out in Annex II to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

Article 15

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

ANNEX I

NB: This form must be accompanied by an Annex containing the information specified in the attached Complementary Note.

The form and the Annex must be supplied in 15 copies (two for the Commission, one for each Member State and one for the EFTA Surveillance Authority). Supply three copies of any relevant agreement and one copy of other supporting documents.

Please do not forget to complete the 'Acknowledgement of receipt' annexed.

If space is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM AER

TO THE EUROPEAN COMMISSION

Directorate-General for Competition,
rue de la Loi 200
B-1049 Brussels.

A. Application for negative clearance pursuant to Article 3(2) of Council Regulation (EEC) No 3975/87 relating to implementation of Article 85(1) or of Article 86 of the Treaty establishing the European Community, and/or Article 53(1) and/or Article 54 of the Agreement on the European Economic Area.[1]

B. Application pursuant to Article 5 of Council Regulation (EEC) No 3975/87 with a view to obtaining a decision pursuant to Article 85(3) of the Treaty establishing the European Community, and/or Article 53(3) of the Agreement on the European Economic Area.[1]

Identity of the parties

1. *Identity of applicant/notifier*

Full name and address, telephone, telex and facsimile numbers, and brief description of the undertaking(s) or association(s) of undertakings submitting the application.

For partnerships, sole traders or any other unincorporated body trading under a business name, give, also, the name, forename(s) and address of the proprietor(s) or partner(s).

Where an application is submitted on behalf of some other person (or is submitted by more than one person) the name, address and position of the representative (or joint representative) must be given, together with proof of his authority to act. Where an

[1] Hereinafter referred to as 'the EEA Agreement'.

application or notification is submitted by or on behalf of more than one person they should appoint a joint representative (Article 2(2) and (3) of Commission Regulation (EEC) No 4261/88).

2. *Identity of any other parties*

Full name and address and brief description of any other parties to the agreement, decision or concerted practice (hereinafter referred to as 'the arrangements').

State what steps have been taken to inform these other parties of this application.

(This information is not necessary in respect of standard contracts which an undertaking submitting the application has concluded or intends to conclude with a number of parties (e.g. a contract appointing dealers).

Purpose of this application (see Complementary Note) *(Please answer yes or no to the questions.)*

Are you asking for negative clearance alone? (See Complementary Note — Section V, end of first paragraph — for the consequence of such a request.)

Are you applying for negative clearance, and also applying for a decision pursuant to Article 85(3) of the EC Treaty and/or Article 53(3) of the EEA Agreement in case the Commission does not grant negative clearance?

Are you only applying for a decision pursuant to Article 85(3) of the EC Treaty and/or Article 53(3) of the EEA Agreement?

Would you be satisfied with a comfort letter? (See the end of Section VIII of the Complementary Note.)

The undersigned declare that the information given above and in the ..... pages annexed hereto is correct to the best of their knowledge and belief, that all estimates are identified as such and are their best estimates of the underlying facts and that all opinions expressed are sincere.

They are aware of the provisions of Article 12(1)(a) of Regulation (EEC) No 3975/87 (see attached Complementary Note).

Place and date: ....

Signatures: ....

....

....

EUROPEAN
COMMISSION

Directorate-General for Competition

Brussels, ...

To

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if the top half is completed in a single copy by the person lodging it.)

Your application dated: .....

Concerning: .....

Your reference: .....

Parties:

1. .....

2. .....and others

(There is no need to name the other undertakings party to the arrangement.)

(To be completed by the Commission.)

was received on: .....

and registered under No: IV/AER/ .....

Please quote the above number in all correspondence.

Address: rue de la Loi 200 B-1049 Brussels.

Telephone: Direct line: 29 ..... Telephone exchange: 299 11 11.

Fax No: 29.....

COMPLEMENTARY NOTE

CONTENTS

Additions or alterations to the information given in these Annexes will be published by the Commission from time to time.

NB: Any undertaking uncertain about how to complete an application or wishing further explanation may contact the Directorate-General for Competition (DG IV) or the Competition Directorate of the EFTA Surveillance Authority in Brussels. Alternatively, any Commission Information Office (those in the Community and in the EFTA States are listed in Annex III) will be able to obtain guidance or indicate an official in Brussels who speaks the preferred official Community language or official language of one of the EFTA States.[2]

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[1] The texts of Annexes I, II and III are reproduced in OJ L 336, 31.12.1993, pages 16 to 23.

[2] For the purposes of this note, any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. See the relevant text of the Protocol adjusting the Agreement on the European Economic Area in Annex II to this note, as well as the list in Annex III.

I. Purpose of the EC and EEA competition rules

1. *Purpose of the Community competition rules*

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

Article 85(1) of the Treaty establishing the European Community (the text of Articles 85 and 86 is reproduced in Annex I to this note) prohibits restrictive agreements, decisions or concerted practices which may affect trade between Member States, and Article 85(2) declares agreements and decisions containing such restrictions void (although the European 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 practices 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 a declaration applying Article 85(3), were laid down for the maritime transport sector in Regulation (EEC) No 4056/86 and for the air transport sector in Regulation (EEC) No 3975/87 (the reference to these and all other acts mentioned in this note or relevant to applications made on the forms are listed in Annex II to this note).

2. *Purpose of the EEA competition rules*

The competition rules of the Agreement on the European Economic Area[1] (concluded between the Community, the Member States and the EFTA States)[2] 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 restrictive practices 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 to this note) prohibits restrictive agreements, decisions or concerted practices which may affect trade between the Community and one or more EFTA States (or between EFTA States), and Article 53(2) declares agreements and decisions containing such restrictions void (although the European Court of Justice has held that if restrictive terms of agreements are severable, only those terms are void); Article 53(3), however, provides for exemption of practices 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 procedure for implementing these Articles, which provide for negative clearance and a declaration applying Article 53(3) are laid down for the maritime transport sector in Regulation (EEC) No 4056/86 and for the air transport sector in Regulation (EEC) No 3975/87, supplemented for EEA purposes, by Protocols 21, 22 and 23 to the EEA Agreement.

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[1] Hereinafter referred to as 'the EEA Agreement'.
[2] See list in Annex III.

II. Competence of the commission and of the EFTA surveillance authority to apply the EEA competition rules

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. Notifications and applications relating to restrictive 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 (OJ No C 231, 12.9.1986, p. 2). Furthermore, all restrictive agreements, decisions or concerted practices affecting trade between one Member State and one or more EFTA States should be notified to the Commission, provided the undertakings concerned achieve more than 67% of their combined EEA-wide turnover within the Community.[1] 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 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 listed in Annex III).

Applications for negative clearance regarding Article 54 of the EEA Agreement should be lodged with the Commission if dominance exists only in the Community, or with the EFTA Surveillance Authority, if dominance exists only within the territory of the EFTA States or a substantial part of it. Only where dominance 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 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.

III. Negative clearance

The negative clearance procedure has been provided only for the air transport sector. Its purpose is to allow businesses ('undertakings') to ascertain whether or not the Commission considers that any of their arrangements or behaviour are prohibited pursuant to Article 85(1) or 86 of the Treaty and/or Article 53(1) or 54 of the EEA Agreement. (It is governed by Article 3 of Regulation (EEC) No 3975/87.) Clearance takes the form of a decision by the Commission certifying that, on the basis of the facts in its possession, there are no grounds pursuant to Article 85(1) or 86 of the Treaty and/or Article 53(1) or 54 of the EEA Agreement, for action on its part in respect of the arrangements or behaviour.

Any party may apply for negative clearance, even without the consent (but not without the knowledge) of other parties to arrangements. There would be little point in applying, however, where arrangements or behaviour clearly do not fall within the scope of Article 85(1) or 86 of the Treaty, and/or Article 53(1) or 54 of the EEA Agreement, as the case

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

may be. Nor is the Commission obliged to give negative clearance — Article 3(2) of Regulation (EEC) No 3975/87 states that '... the Commission may certify ...'. The Commission does not usually issue negative clearance decisions in cases which, in its opinion, so clearly do not fall within the scope of the prohibition of Article 85(1) of the Treaty and/or Article 53(1) of the EEA Agreement that there is no reasonable doubt for it to resolve by such a decision.

IV. Exemption

The application for a decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement allows undertakings to enter into arrangements which, in fact, offer economic advantages even though they restrict competition. (It is governed by Articles 12 and 13 of Regulation (EEC) No 4056/86 and Articles 4, 5 and 6 of Regulation (EEC) No 3975/87; with respect to existing agreements falling under Article 53(1) of the EEA Agreement by virtue of its entry into force, it is governed by Articles 5 to 13 of Protocol 21 to the EEA Agreement.) Upon such application the Commission may take a decision declaring Article 85(1) of the Treaty and/or Article 53(1) of the EEA Agreement to be inapplicable to the arrangements described in the decision. The Commission is required to specify the period of validity of any such decision, it can attach conditions and obligations and it can amend or revoke decisions or prohibit specified acts by the parties in certain circumstances notably if the decisions were based on incorrect information or if there is any material change in the facts.

Any party may submit an application even without the consent (but not without the knowledge) of other parties.

Regulation (EEC) No 4056/86 and (EEC) No 3975/87 provide for an 'opposition procedure' under which applications can be handled expeditiously. If an application is admissible pursuant to the relevant Regulation, if it is complete and if the arrangement which is the subject of the application has not given rise to a complaint or to an own-initiation proceeding, the Commission publishes a summary of the request in the *Official Journal of the European Communities* and invites comments from interested third parties, from Member States and from EFTA States where requests relate to Article 53(3) of the EEA Agreement. Unless the Commission notifies applicants within 90 days of the date of such publication that there are serious doubts as to the applicability of Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement, the arrangement will be deemed exempt for the time already elapsed and for a maximum of six years from the date of publication. Where the Commission does notify applicants that there are serious doubts, the applicable procedure is outlined in point VIII of this Complementary Note.

The Commission has adopted a number of regulations granting exemption to categories of agreements in the air transport sector (see Annex II for the latest list). These group exemptions also apply with respect to the EEA.

A decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement may have retroactive effect. Should the Commission find that arrangements in respect of which the application was submitted are indeed prohibited by Article 85(1) of the Treaty

and/or Article 53(1) of the EEA Agreement and cannot benefit from the application of Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement and, therefore, take a decision condemning them, the parties are nevertheless protected, from the date of application, against fines for any infringement described in the application (Article 19(4) of Regulation (EEC) No 4056/86 and Article 12(5) of Regulation (EEC) No 3975/87).

V. Purpose of the form

The purpose of Form AER is to allow undertakings, or associations of undertakings, wherever situated, to apply to the Commission for negative clearance for arrangements or behaviour, or to apply to have them exempted from the prohibition of Article 85(1) of the Treaty by virtue of its Article 85(3) and/or of Article 53(1) of the EEA Agreements by virtue of its Article 53(3). The form allows undertakings applying for negative clearance to apply, at the same time, in order to obtain a decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement. It should be noted that only an application in order to obtain a decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement affords immunity from fines. Form MAR only provides for an application for a decision pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement.

To be valid, applications in respect of maritime transport must be made on Form MAR (by virtue of Article 4 of Regulation (EEC) No 4260/88) and in respect of air transport of Form AER (by virtue of Article 3 of Regulation (EEC) No 4621/88).

The applications made on Forms MAR and AER issued by the EFTA side are equally valid. However, if the arrangement of behaviour concerned falls solely under Articles 85 or 86 of the Treaty, i.e. has no EEA relevance whatsoever, it is advisable to use the present form established by the Commission.

VI. Nature of the form

The forms consist of a single sheet calling for the identity of the applicant(s) and of any other parties. This must be supplemented by further information given under the headings and references detailed below (see X). For preference the paper used should be A4 (21 × 29.7 cm — the same size as the form) but must not be bigger. Leave a margin of at least 25 mm or one inch on the left-hand side of the page and, if you use both sides, on the right-hand side of the reverse.

VII. The need for complete and accurate information

It is important that applicants give all the relevant facts. Although the Commission has the right to seek further information from applicants or third parties, and is obliged to publish a summary of the application before granting negative clearance or a decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement, it will usually base its decision on the information provided by the applicant. Any decision taken on the basis of

incomplete information could be without effect in the case of a negative clearance, or voidable in that of a declaration applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement. For the same reason, it is also important to inform the Commission of any material changes to your arrangements made after your application.

Complete information is of particular importance in order to benefit from the application of Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement, by means of the opposition procedure. This procedure can only apply where the Commission 'is in possession of all the available evidence'.

Moreover, you should be aware that Article 19(1) of Regulation (EEC) No 4056/86 and Article 12(1) of Regulation (EEC) No 3975/87 enable the Commission to impose fines of from ECU 100 to ECU 5 000[1] on undertakings or associations of undertakings where, intentionally or negligently, they supply incorrect or misleading information in connection with an application.

They key words here are 'incorrect or misleading information'. However it often remains a matter of judgment how much detail is relevant; the Commission accepts estimates where accurate information is not readily available in order to facilitate applications, and the Commission calls for opinions as well as facts.

You should therefore note that the Commission will use these powers only where applicants have, intentionally or negligently, provided false information or grossly inaccurate estimates or suppressed readily available information or estimates, or have deliberately expressed false opinions in order to obtain negative clearance or a decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement.

VIII. Subsequent procedure

The application 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. The application might be considered invalid if obviously incomplete or not on the obligatory form.

Further information might be sought from the applicants or from third parties and suggestions might be made as to amendments to the arrangements that might make them acceptable.

An application for a decision pursuant to Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement may be opposed by the Commission either because the Commission does not agree that the arrangements should benefit from Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement or to allow for more information to be sought.

If, after examination, the Commission intends to issue a decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement, it is obliged to publish a summary of the application and invite comments from third parties. Subsequently, a preliminary draft

[1] The value of the European currency unit (ecu) is published daily in the 'C' series of the *Official Journal of the European Communities*.

decision has to be submitted to and discussed with the Advisory Committee on Restrictive Practices and Dominant Positions in Air Transport or in Maritime Transport. Where the case falls under the EEA Agreement, representatives of the EFTA Surveillance Authority and EFTA States will be invited to attend. Members of the Advisory Committee and representatives of the EFTA Surveillance Authority and EFTA States will already have received a copy of the application. Only then, and providing nothing has happened to change the Commission's intention, can it adopt a decision.

Sometimes files are 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 the applicants are satisfied by a less formal letter from the Commission's departments (sometimes called a 'comfort letter') indicating that the arrangements do not call for any action by the Commission, at least in present circumstances. 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 if necessary — if, for example, it were to be asserted that a contract was void pursuant to Article 85(2) of the Treaty and/or Article 53(2) of the EEA Agreement — take an appropriate decision.

IX. Secrecy

The Commission, Member States, the EFTA Surveillance Authority and EFTA States are under a duty not to disclose information of the kind covered by the obligation of professional secrecy. On the other hand, the Commission has to publish a summary of your application, should it intend to grant it, before taking the relevant decision. In this publication, the Commission shall have regard to the legitimate interest of undertakings in the protection of their business secrets. In this connection, if you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, please put all such information in a second Annex with each page clearly marked 'Business secrets'; in the principal Annex, under any affected heading state 'see second Annex' or 'see also second Annex'; in the second Annex repeat the affected heading(s) and reference(s) and give the information you do not wish to have published, together with your reasons for this. Do not overlook the fact that the Commission may have to publish a summary of your application.

Before publishing a summary of your application, the Commission will show the undertakings concerned a copy of the proposed text.

X. Further information and headings to be used in the annex to the forms

The further information is to be given under the following headings and reference numbers. Wherever possible, give exact information. If this is not readily available, give your best estimate, and identify what you give as an estimate. If you believe any detail asked for to be unavailable or irrelevant, please explain why. This may, in particular, be the case if one party is notifying arrangements alone without the cooperation of other parties. Do not overlook the fact that Commission officials are ready to discuss what detail is relevant (see the *nota bene* at the beginning of this Complementary Note).

1. *Brief description*

Give a brief description of the arrangements or behaviour (nature, purpose, date(s) and duration) — (full details are requested below).

2. *Market*

The nature of the transport services affected by the arrangements or behaviour. A brief description of the structure of the market (or markets) for these services — e.g. who sells in it, who buys in it, its geographical extent, the turnover in it, how competitive it is, whether it is easy for new suppliers to enter the market, whether there are substitute services. If you are submitting a standard contract, say how many you expect to conclude. If you know of any studies of the market, it would be helpful to refer to them.

3. *Fuller details of the party or parties*

3.1. Do any of the parties form part of a group of companies? A group relationship is deemed to exist where a firm:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, the board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs of another.

If the answer is yes, give:

— the name and address of the ultimate parent company,

— a brief description of the business of the group (and, if possible, one copy of the last set of group accounts),

— the name and address of any other company in the group competing in a market affected by the arrangements or in any related market, that is to say any other company competing directly or indirectly with the parties ('relevant associated company').

3.2. The most recently available total, and total EEA-wide turnover of each of the parties and, as the case may be, of the group of which it forms part (it could be helpful also if you could provide one copy of the last set of accounts). The figures and percentage of the EEA-wide total turnover achieved within the Community and within the territory of the EFTA States.

3.3. The sales turnover of each party in the services affected by the arrangements in the Community, in the territory of the EFTA States, in the EEA territory and worldwide. If the turnover in the Community or in the territory of the EFTA States or in the EEA territory is material (say more than a 5% market share), please also give figures for each Member State and for each EFTA State,[1] and for previous years (in order to show any significant trends), and give each party's sales targets for the future. Provide the same figures for any relevant

[1] See list in Annex III.

associated company. (Under this heading, in particular, your best estimate might be all that you can readily supply.)

3.4. In relation to the market (or markets) for the services described at 2, give, for each of the sales or turnover figures in 3.3, your estimate of the market share it represents, within the Community, within the territory of the EFTA States and within the EEA territory as a whole.

3.5. If you have a substantial interest falling short of control (more than 25% but less than 50%) in some other company competing in a market affected by the arrangements, or if some other such company has a substantial interest in yours, give its name and address and brief details.

4. *Full details of the arrangements*

4.1. If the contents are reduced to writing give a brief description of the purpose of the arrangements and attach three copies of the text (except that purely technical descriptions may be omitted; in such cases, however, indicate parts omitted).

If the contents are not, or are only partially, reduced to writing, give a full description.

4.2. Detail any provisions contained in the arrangements 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 nature, frequency or capacity of 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 services,

— whether to offer different services separately or together.

4.3. State between which Member States and/or EFTA States[1] trade may be affected by the arrangements, and whether trade between the Community or the EEA territory, and any third countries is affected.

5. *Reasons for negative clearance*

If you are applying for negative clearance state, under the reference:

5.1. why, i.e. state which provision or effects of the arrangements 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 arrangements or behaviour that you wish to have resolved by a negative clearance decision.

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[1] See list in Annex III.

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

5.2. why the arrangements 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

5.3. why the arrangements 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

5.4. why the arrangements 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.

6. *Reasons for a decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement*

If you are requesting a decision applying Article 85(3) of the Treaty and/or Article 53(3) of the EEA Agreement, even if only as a precaution, explain how:

6.1. the arrangements contribute to improving production or distribution, and/or promoting technical or economic progress;

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

6.3. all restrictive provision of the arrangements are indispensable to the attainment of the aims set out under 6.1.;

6.4. the arrangements do not eliminate competition in respect of a substantial part of the services concerned.

7. *Other information*

7.1. Mention any earlier proceedings or informal contracts, of which you are aware, with the Commission and/or the EFTA Surveillance Authority and any earlier proceedings with any national EC or EFTA authorities or courts even indirectly concerning these arrangements or this behaviour.

7.2. Give any other information presently available that you think might be helpful in allowing the Commission to appreciate whether there are any restrictions contained in the agreement, or any benefits that might justify them.

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

7.4. State, with reasons, the urgency of your application.

XI. Languages

You are entitled to notify your agreements in any of the official languages of the European Community or of an EFTA State. In order to ensure rapid proceedings, you are, however, invited to use, if possible, in case of 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 notification to the Commission, one of the official languages of the European Community or the working language of the EFTA Surveillance Authority.

COUNCIL REGULATION (EEC) No 3976/87[1] OF 14 DECEMBER 1987

on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector

As amended by Council Regulation (EEC) No 2344/90 of 24 July 1990[2] and Council Regulation (EEC) No 2411/92 of 23 July 1992.[3]

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Article 87 thereof,

Having regard to the proposal from the Commission,[4]

Having regard to the opinions of the European Parliament,[5]

Having regard to the opinions of the Economic and Social Committee,[6]

Whereas Council Regulation (EEC) No 3975/87 lays down the procedure for the application of the rules on competition to undertakings in the air transport sector; whereas Regulation No 17 of the Council[7] lays down the procedure for the application of these rules to agreements, decisions and concerted practices other than those directly relating to the provision of air transport services;

Whereas Article 85(1) of the Treaty may be declared inapplicable to certain categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85(3);

Whereas common provisions for the application of Article 85(3) should be adopted by way of Regulation pursuant to Article 87; whereas, according to Article 87(2)(b), such a Regulation must lay down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other; whereas, according to Article 87(2)(d), such a Regulation is required to define the respective functions of the Commission and of the Court of Justice;

Whereas the air transport sector has to date been governed by a network of international agreements, bilateral agreement between States and bilateral and multilateral agreements between air carriers; whereas the changes required to this international regulatory system to ensure increased competition should be effected gradually so as to provide time for the air-transport sector to adapt;

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[1] OJ L 374, 31.12.1987, p. 9.
[2] OJ L 217, 11.8.1990, p. 15.
[3] OJ L 240, 24.8.1992, p. 19.
[4] OJ C 182, 9.7.1984, p. 3.
[5] OJ C 262, 14.10.1985, p. 44; OJ C 190, 20.7.1987, p. 182 and OJ C 345, 21.12.1987.
[6] OJ C 303, 25.11.1985, p. 31 and OJ C 333, 29.12.1986, p. 27.
[7] OJ 13, 21.2.1962, p. 204/62.

Whereas the Commission should be enabled for this reason to declare by way of Regulation that the provisions of Article 85(1) do not apply to certain categories of agreements between undertakings, decisions by associations of undertakings and concerted practices;

Whereas it should be laid down under what specific conditions and in what circumstances the Commission may exercise such powers in close and constant liaison with the competent authorities of the Member States;

Whereas it is desirable, in particular, that block exemptions be granted for certain categories of agreements, decisions and concerted practices; whereas these exemptions should be granted for a limited period during which air carriers can adapt to a more competitive environment; whereas the Commission, in close liaison with the Member States, should be able to define precisely the scope of these exemptions and the conditions attached to them;

Whereas there can be no exemption if the conditions set out in Article 85(3) are not satisfied; whereas the Commission should therefore have power to take the appropriate measures where an agreement proves to have effects incompatible with Article 85(3); whereas the Commission should consequently be able first to address recommendations to the parties and then to take decisions;

Whereas this Regulation does not prejudge the application of Article 90 of the Treaty;

Whereas the heads of State or Government, at their meeting in June 1986, agreed that the internal market in air transport should be completed by 1992 in pursuance of Community actions leading to the strengthening of its economic and social cohesion; whereas the provisions of this Regulation, together with those of Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States and those of Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air service routes between Member States, are a first step in this direction and the Council will therefore, in order to meet the objective set by the Heads of State or Government, adopt further measures of liberalization at the end of a three-year initial period,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation shall apply to air transport between Community airports.

Article 2

1. Without prejudice to the application of Regulation (EEC) No 3975/87 and in accordance with Article 85(3) or the Treaty, the Commission may by regulation declare that Article 85(1) shall not apply to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices.

2. The Commission may, in particular, adopt such Regulations in respect of agreements, decisions or concerted practices which have as their object any of the following:

— joint planning and coordination of airline schedules,

— consultations on tariffs for the carriage of passengers and baggage and of freight on scheduled air services,

— joint operations on new less busy scheduled air services,

— slot allocation at airports and airport scheduling; the Commission shall take care to ensure consistency with the Code of Conduct adopted by the Council,

— common purchase, development and operation of computer reservation systems relating to timetabling, reservations and ticketing by air transport undertakings; the Commission shall take care to ensure consistency with the Code of Conduct adopted by the Council.

3. Without prejudice to paragraph 2, such Commission regulations shall define the categories of agreements, decisions or concerted practices to which they apply and shall specify in particular:

(a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;

(b) the clauses which must be contained in the agreements, decisions and concerted practices, or any other conditions which must be satisfied.

Article 3

Any Regulation adopted pursuant to Article 2 shall be for a specified period.

It may be repealed or amended where circumstances have changed with respect to any of the factors which prompted its adoption; in such case, a period shall be fixed for amendment of the agreements and concerted practices to which the earlier Regulation applied before repeal or amendment.

Article 4

Regulations adopted pursuant to Article 2 shall include a provision that they apply with retroactive effect to agreements, decisions and concerted practices wich were in existence at the date of the entry into force of such Regulations.

Article 5

Before adopting a regulation, the Commission shall publish a draft thereof and invite all persons and organizations concerned to submit their comments within such reasonable time limit, being not less than one month, as the Commission shall fix.

Article 6

The Commission shall consult the Advisory Committee on Agreements and Dominant Positions in Air Transport established by Article 8(3) of Regulation (EEC) No 3975/87 before publishing a draft Regulation and before adopting a Regulation.

Article 7

1. Where the persons concerned are in breach of a condition or obligation which attaches to an exemption granted by a Regulation adopted pursuant to Article 2, the Commission may, in order to put an end to such a breach:

— address recommendations to the persons concerned, and

— in the event of failure by such persons to observe those recommendations, and depending on the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out, or requires them to perform specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption in accordance with Article 4(2) of Regulation (EEC) No 3975/87 or withdraws the benefit of the block exemption which they enjoyed.

2. Where the Commission either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case an agreement, decision or concerted practice to which a block exemption granted by a regulation adopted pursuant to Article 2(2) applies, nevertheless has effects which are incompatible with Article 85(3) or are prohibited by Article 86, it may withdraw the benefit of the block exemption from those agreements, decisions or concerted practices and take, pursuant to Article 13 of Regulation (EEC) No 3975/87, all appropriate measures for the purpose of bringing these infringements to an end.

3. Before taking a decision under paragraph 2, the Commission may address recommendations for termination of the infringement to the persons concerned.

Article 8

This Regulation shall enter into force on 1 January 1988.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EC) No 3652/93 OF 22 DECEMBER 1993

on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computerized reservation systems for air transport services[1]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector,[2] as last amended by Regulation (EEC) No 2411/92,[3] and in particular Article 2 thereof,

Having published a draft of this Regulation,[4]

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas:

(1) Regulation (EEC) No 3976/87 empowers the Commission to apply Article 85(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices relating directly or indirectly to the provision of air transport services.

(2) Commission Regulation (EEC) No 83/91,[5] as last amended by Regulation (EEC) No 1618/93,[6] grants a block exemption to certain agreements establishing computerized reservation systems, providing they satisfy the conditions imposed by that Regulation. The block exemption expires on 31 December 1993.

(3) Agreements for the common purchase, development and operation of computerized reservation systems relating to timetabling, reservations and ticketing are liable to restrict competition and affect trade between Member States.

(4) Computerized reservation systems (CRS) can render useful services to air carriers, travel agents and air travellers alike by giving ready acces to up-to-date and detailed information in particular about flight possibilities, fare options and seat availability. They can also be used to make reservations and in some cases to print tickets and issue boarding passes. They thus help the air traveller to exercise choice on the basis of fuller information in order to meet his travel needs in the optimal manner. However, in order for these benefits to be obtained, flight schedules and fares displays must be as complete and unbiased as possible.

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[1] OJ L 333, 31.12.1993, p. 37.
[2] OJ L 374, 31.12.1987, p. 9.
[3] OJ L 240, 24.8.1992, p. 19.
[4] OJ C 253, 30.9.1992, p. 11.
[5] OJ L 10, 15.1.1991, p. 9.
[6] OJ L 155, 26.6.1993, p. 23.

(5) The CRS market is such that few individual European undertakings could on their own make the investment and achieve the economies of scale required to compete with the more advanced existing systems.

Cooperation in this field should therefore be permitted. A block exemption should therefore be granted for such cooperation.

(6) In accordance with Council Regulation (EEC) No 2299/89,[1] as amended by Regulation (EEC) No 3089/93,[2] concerning the code of conduct for computerized reservation systems, the cooperation should not allow the parent carriers to create undue advantages for themselves and thereby distort competition. It is therefore necessary to ensure that no discrimination exists between parent carriers and participating carriers with regard in particular to access and neutrality of display. The block exemption should be subject to conditions which will ensure that all air carriers can participate in the systems on a non-discriminatory basis as regards access, display, information loading and fees. Moreover, in order to maintain competition in an oligopolistic market subscribers must be able to switch from one system to another at short notice and without penalty, and system vendors and air carriers must not act in ways which would restrict competition between systems.

(7) In order to maintain effective competition between CRSs, it is necessary to ensure that system vendors do not refrain from competing with each other.

(8) Refusal on the part of parent carriers to provide the same information on schedules, fares and availability to competing CRSs and to accept bookings made by those systems can seriously distort competition between CRSs. Parent carriers should not be obliged to incur costs in this connection except for reproduction of the information to be provided and for accepted bookings; parent carriers must not seek reimbursement of costs that cannot be fully justified.

(9) Billing information should be sufficiently detailed to allow participating carriers and subscribers to control their costs. A parent carrier should accept or reject any bookings/transactions made through a competing CRS on the same terms or conditions as it applies for bookings/transactions made through its own CRS.

(10) In accordance with Article 4 of Regulation (EEC) No 3976/87, this Regulation should apply with retroactive effect to agreements in existence on the date of entry into force of this Regulation provided that they meet the conditions for exemption set out in this Regulation.

(11) For the purposes of Article 7 of Regulation (EEC) No 3976/87, this Regulation should also specify the circumstances in which the Commission may withdraw the block exemption in individual cases.

(12) The agreements which are exempted automatically by this Regulation need not be notified under Council Regulation No 17[3] as last amended by the Act of Accession of Spain and Portugal. However when real doubt exists, undertakings may request the Commission to declare whether their agreements comply with this Regulation,

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[1] OJ L 220, 29.7.1989, p. 1.
[2] OJ L 278, 11.11.1993, p. 1.
[3] OJ 13, 21.2.1962, p. 204/62.

HAS ADOPTED THIS REGULATION:

Article 1

Exemptions

Pursuant to Article 85(3) of the Treaty and subject to the conditions set out in Articles 2 to 14 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements between undertakings the purpose of which is one or more of the following:

(a) to purchase or develop a CRS in common;

(b) to create a system vendor to market and operate the CRS;

or

(c) to regulate the provision of distribution facilities by the system vendor or by distributors.

The exemption shall apply only to the following obligations:

(i) an obligation not to engage directly or indirectly in the development, marketing or operation of another CRS;

(ii) an obligation on the system vendor to appoint parent carriers or participating carriers as distributors in respect of all or certain subscribers in a defined area of the common market;

(iii) an obligation on the system vendor to grant a distributor exclusive rights to solicit all or certain subscribers in a defined area of the common market;

or

(iv) an obligation on the system vendor not to allow distributors to sell distribution facilities provided by other system vendors.

Article 2

Definitions

For the purpose of this Regulation:

(a) 'air transport product' means the carriage by air of a passenger between two airports, including any related ancillary services and additional benefits offered for sale and/or sold as an integral part of that product;

(b) 'scheduled air service' means a series of flights each possessing all the following characteristics:

— it is performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that on each flight seats are available for individual purchase by consumers (either directly from the air carrier or from its authorized agents),

— it is operated so as to serve traffic between the same two or more points, either:

1. according to a published timetable; or

2. with flights so regular or frequent that they constitute a recognizably systematic series;

(c) 'fare' means the price to be paid for air transport products and the conditions under which this price applies;

(d) 'computerized reservation system' (CRS) means a computerized system containing information about, *inter alia*, air carriers':

— schedules,

— availability,

— fares, and

— related services,

with or without facilities through which

— reservations can be made or

— tickets may be issued,

to the extent that some or all of these services are made available to subscribers;

(e) 'distribution facilities' means facilities provided by a system vendor for the provision of information about air carriers' schedules, availability, fares and related services and for making reservations and/or issuing tickets, and for any other related services;

(f) 'system vendor' means any entity and its affiliated which is or are responsible for the operation or marketing of a CRS;

(g) 'parent carrier' means any air carrier which directly or indirectly, jointly with others, owns or effectively controls a system vendor, as well as any air carrier which it owns or effectively controls;

(h) 'effective control' means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:

— the right to use all or part of the assets of an undertaking.

— rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking;

(i) 'participating carrier' means an air carrier which has an agreement with a system vendor for the distribution of air transport products through a CRS. To the extent that a parent carrier uses the facilities of its own CRS which are covered by this Regulation it shall be considered a participating carrier;

(j) 'subscriber' means a person or an undertaking, other than a participating carrier, using the distribution facilities for air transport products of a CRS under contract or other arrangement with a system vendor;

(k) 'consumer' means any person seeking information about and/or intending to purchase an air transport product;

(l) 'principal display' means a comprehensive neutral display of data concerning air services between city pairs, within a specified time period;

(m) 'elapsed journey time' means the time difference between scheduled departure and arrival time;

(n) 'service enhancement' means any product or service offered by a system vendor on its own behalf to subscribers in conjunction with a CRS, other than distribution facilities;

(o) 'distributor' means an undertaking which is authorized by the system vendor to provide distribution facilities to subscribers.

Article 3

Access

1. A system vendor shall allow any air carrier the opportunity to participate, on an equal and non-discriminatory basis, in its distribution facilities within the available capacity of the system concerned and subject to any technical constraints outside the control of the system vendor.

2. (a) A system vendor shall not:

— attach unreasonable conditions to any contract with a participating carrier,

— require the acceptance of supplementary conditions which, by their nature or according to commercial usage, have no connection with participation in its CRS and shall apply the same conditions for the same level of service.

(b) A system vendor shall not make it a condition of participation in its CRS that a participating carrier may not at the same time be a participant in another system.

(c) A participating carrier may terminate its contract with a system vendor on giving notice which need not exceed six months, to expire no earlier than the end of the first year.

In such a case a system vendor shall not be entitled to recover more than the costs directly related to the termination of the contract.

3. If a system vendor has decided to add any improvement to the distribution facilities provided or the equipment used in the provision of the facilities, it shall provide information on these improvements and offer them to all participating carriers, including parent carriers, with equal timeliness and on the same terms and conditions, subject to any technical

constraints outside the control of the system vendor and in such a way that there will be no difference in leadtime for the implementation of the new improvements between parent and participating carriers.

Article 4

Participation

1. (a) A parent carrier may not discriminate against a competing CRS by refusing to provide the latter, on request and with equal timeliness, the same information on schedules, fares and availability relating to its own air services as that which it provides to its own CRS or to distribute its air transport products through another CRS, or by refusing to accept or to confirm with equal timeliness a reservation made through a competing CRS or any of its air transport products which are distributed through its own CRS. The parent carrier shall be obliged to accept and to confirm only those bookings which are in conformity with its fares and conditions.

   (b) The parent carrier shall not be obliged to accept any costs in this connection except for reproduction of the information to be provided and for accepted bookings.

   (c) The parent carrier shall be entitled to carry out checks to ensure that Article 7(1) is complied with by the competing CRS.

2. The obligation imposed by paragraph 1 shall not apply in favour of a competing CRS when, in accordance with the procedures of Article 6(5), Article 7(3) or Article 7(4) of Regulation (EEC) No 2299/89, it has been decided that the CRS is in breach of Article 4a of that Regulation or that a system vendor cannot give sufficient guarantees that obligations under Article 6 of that Regulation concerning unauthorized access of parent carriers to information are complied with.

Article 5

Information loading

1. Participating carriers and other providers of air transport products shall ensure that the data they decide to submit to a CRS are accurate, nonmisleading, transparent and no less comprehensive than for any other CRS.

The data shall, *inter alia*, enable a system vendor to meet the requirements of the ranking criteria as set out in the Annex to Regulation (EEC) No 2299/89.

Data submitted via intermediaries shall not be manipulated by them in a manner that would lead to inaccurate, misleading or discriminatory information.

2. A system vendor shall not manipulate the material referred to in paragraph 1 in a manner that would lead to the provision of inaccurate, misleading or discriminatory information.

3. A system vendor shall load and process data provided by participating carriers with equal care and timeliness, subject only to the constraints of the loading method selected by individual participating carriers and to the standard formats used by the said vendor.

Article 6

Loading, processing and distribution

1. Loading and/or processing facilities provided by a system vendor shall be offered to all parent and participating carriers without discrimination. Where relevant and generally accepted air transport industry standards are available, system vendors shall offer facilities compatible with them.

2. A system vendor shall not reserve any specific loading and/or processing procedure or any other distribution facility for one or more of its parent carrier(s).

3. A system vendor shall ensure that its distribution facilities are separated, in a clear and verifiable manner, from any carrier's private inventory and manangement and marketing facilities. Separation may be established either logically by means of software or physically in such a way that any connection between the distribution facilities and the private facilities may be achieved only by means of an application-to-application interface. Irrespective of the method of separation adopted, any such interface shall be made available to all parent and participating carriers on a non-discriminatory basis and shall provide equality of treatment in respect of procedures, protocols, inputs and outputs. Where relevant and generally accepted air transport industry standards are available, system vendors shall offer interfaces compatible with them.

Article 7

Displays

1. (a) Displays generated by a CRS shall be clear and non-discriminatory.

   (b) A system vendor shall not intentionally or negligently display in its CRS inaccurate or misleading information.

2. (a) A vendor shall provide through its CRS a principal display or displays for each individual transaction and shall include therein the data provided by participating carriers on flight schedules, fare types and seat availability in a clear and comprehensive manner and without discrimination or bias, in particular as regards the order in which information is presented.

   (b) A consumer shall be entitled to have, on request, a principal display limited to scheduled or non-scheduled services only.

   (c) No discrimination on the basis of airports serving the same city shall be exercised in constructing and selecting flights for a given city pair for inclusion in a principal display.

   (d) Ranking of flight options in a principal display shall be as set out in the Annex to Regulation (EEC) No 2299/89.

   (e) The criteria to be used for ranking shall not be based on any factor directly or indirectly relating to carrier identity and shall be applied on a non-discriminatory basis to all participating carriers.

3. Where a system vendor provides information on fares the display shall be neutral and non-discriminatory and shall contain at least the fares provided for all flights of participating carriers shown in the principal display. The source of such information shall be acceptable to the participating carrier(s) concerned and the system vendor concerned.

4. A CRS shall not be considered in breach of this to the extent that it changes a display in order to meet the specific request(s) of a consumer.

Article 8

Provision of information

1. The following provisions shall govern the availability of information, statistical or otherwise, from a system vendor's CRS:

(a) information concerning individual bookings shall be provided on an equal basis and only to the air carrier(s) participating in the service covered by the booking and to the subscriber(s) involved in the booking;

(b) any marketing, booking and sales data made available shall be on the basis that:

(i) such data are offered with equal timeliness and on a non-discriminatory basis to all participating carriers, including parent carriers;

(ii) such data may, and, on request, shall cover all participating carriers and/or subscribers, but shall not include any identification or personal information on a passenger or a corporate user;

(iii) all requests for such data are treated with equal care and timeliness subject to the transmission method selected by the individual carrier.

2. A system vendor shall not make available personal information concerning a passenger to others not involved in the transaction without the consent of the passenger.

3. A system vendor shall ensure that the provisions in paragraphs 1 and 2 are complied with, by technical means and/or appropriate safeguards regarding at least software, in such a way that information provided by or created for air carriers cannot be accessed by any means by one or more of the parent carriers except as permitted by paragraphs 1 and 2.

Article 9

Reciprocity

1. The obligations of a system vendor under Articles 3 and 5 to 8 shall not apply in respect of an air carrier of a third country, which controls a CRS either alone or jointly, to the extent that its CRS outside the territory of the Community does not offer Community air carriers equivalent treatment to that provided under this Regulation and under Regulation (EEC) No 2299/89.

2. The obligations of parent or participating carriers under Articles 4, 5 and 10 shall not apply in respect of a CRS controlled by (an) air carrier(s) of one or more third country (countries) to the extent that the parent or participating carrier(s) is (are) not accorded equivalent treatment outside the territory of the Community to that provided under this Regulation and under Regulation (EEC) No 2299/89.

3. A system vendor or an air carrier proposing to avail itself of the provisions of paragraphs 1 or 2 must notify the Commission of its intentions and the reasons therefor at least 14 days in advance of such action. In exceptional circumstances, the Commission may, at the request of the vendor or the air carrier concerned, grant a waiver from the 14-day rule.

4. Upon receipt of a notification, the Commission shall without delay determine whether discrimination within the meaning of paragraphs 1 and 2 exists. If this is found to be the case, the Commission shall so inform all systems vendors or the air carriers concerned in the Community as well as Member States. If discrimination within the meaning of paragraph 1 or 2 does not exist, the Commission shall so inform the system vendor or air carriers concerned.

Article 10

Relations with subscribers

1. A parent carrier shall not, directly or indirectly, link the use of any specific CRS by a subscriber with the receipt of any commission or other incentive or disincentive for the sale of air transport products available on its flights.

2. A parent carrier shall not, directly or indirectly, require use of any specific CRS by a subscriber for any sale or issue of tickets for any air transport products provided either directly or indirectly by itself.

3. Any condition which an air carrier may require of a travel agent when authorizing it to sell and issue tickets for its air transport products shall be without prejudice to paragraphs 1 and 2.

Article 11

Contracts with subscribers

1. A system vendor shall make any of the distribution facilities of a CRS available to any subscriber on a non-disciminatory basis.

2. A system vendor shall not require a subscriber to sign an exclusive contract, nor directly or indirectly prevent a subscriber from subscribing to, or using, any other system or systems.

3. A service enhancement offered to any other subscriber shall be offered by the system vendor to all subscribers on a non-discriminatory basis.

4. (a) A system vendor shall not attach unreasonable conditions to any subscriber contract allowing for the use of its CRS and, in particular, a subscriber may terminate its contract with a system vendor by giving notice which need not exceed three months to expire no earlier than the end of the first year.

In such a case a system vendor shall not be entitled to recover more than the costs directly related to the termination of the contract.

(b) Subject to paragraph 2, the supply of technical equipment is not subject to the conditions set out in (a).

5. A system vendor shall provide in each subscriber contract that:

(a) the principal display, conforming to Article 7, is accessed for each individual transaction except where a consumer requests information for only one air carrier;

(b) the subscriber does not manipulate material supplied by CRSs in a manner that would lead to inaccurate, misleading or discriminatory presentation of information to consumers.

6. A system vendor shall not impose any obligation on a subscriber to accept an offer of technical equipment or software, but may require that equipment and software used are compatible with its own system.

Article 12

Fees

1. Any fee charged by a system vendor shall be non-discriminatory, reasonably structured and reasonably related to the cost of the service provided and used, and shall, in particular, be the same for the same level of service.

The billing for the services of a CRS shall be sufficiently detailed to allow the participating carriers and subscribers to see exactly which services have been used and the fees therefor.

As a minimum, booking fee bills must include the following information for each segment:

— type of CRS booking,

— passenger name,

— country,

— IATA/ARC agency identification code,

— city code,

— city pair or segment,

— booking date (transaction date),

— flight date,

— flight number,

— status code (booking status),

— service type (class of service),

— PNR record locator,

— booking/cancellation indicator.

The billing information shall be offered on magnetic media.

A participating air carrier shall be offered the facility of being informed at the time that any booking/transaction is made for which a booking fee will be charged. Where a carrier elects to be so informed it shall be offered the option to disallow such bookings/transactions, unless the booking/transaction has already been accepted.

2. A system vendor shall, on request, provide to interested parties details of current procedures, fees and system facilities, including interfaces, editing and display criteria used. However, this provision does not oblige a system vendor to disclose proprietary information such as software programmes.

3. Any changes to fee levels, conditions or facilities offered and the basis therefor shall be communicated to all participating carriers and subscribers on a non-discriminatory basis.

Article 13

Competition between system vendors

The system vendor shall not enter into any agreement or engage in a concerted practice with other system vendors with the object or effect of partitioning the market.

Article 14

Pursuant to Article 7 of Regulation (EEC) No 3976/87, the benefit of this Regulation may be withdrawn where it is found in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down by Article 85(3) or which are prohibited by Article 86 of the Treaty, and in particular where:

(i) the agreement hinders the maintenance of effective competition in the market for CRSs;

(ii) the agreement has the effect of restricting competition in the air transport or travel related markets;

(iii) the system vendor directly or indirectly imposes unfair prices, fees or charges on subscribers or on participating carriers;

(iv) the system vendor refuses to enter into a contract for the use of a CRS without an objective and non-discriminatory reason of a technical or commercial nature;

(v) the system vendor denies participating carriers access to any facilities other than distribution facilities without an objective and non-discriminatory reason of a technical or commercial nature.

Article 15

This Regulation shall enter into force on 1 January 1994 and expire on 30 June 1998.

It shall apply with retroactive effect to agreements which were in existence at the date of its entry into force, from the time when the conditions of application of this Regulation were fulfilled.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EEC) No 1617/93 OF 25 JUNE 1993

on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports[1]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector,[2] as last amended by Regulation (EEC) No 2411/92,[3] and in particular Article 2 thereof,

Having published a draft of this Regulation,[4]

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas:

(1) Regulation (EEC) No 3976/87 empowers the Commission to apply Article 85(3) of the Treaty by regulation to certain categories of agreements, decisions or concentrated practices relating directly or indirectly to the provision of air transport services.

(2) Agreements, decisions or concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on tariffs and slot allocation at airports are liable to restrict competition and affect trade between Member States.

(3) Joint planning and coordination of the schedule of an air service can help to ensure the maintenance of services at less busy times of the day, during less busy periods or on less busy routes, and to develop onward connections, thus benefiting air transport users. However, any clauses concerning extra flights must not require the approval of the other parties or involve financial penalties. The arrangements must also allow parties to withdraw from them at reasonably short notice.

(4) Arrangements whereby a smaller airline receives marketing and financial support from another airline may help that smaller airline to operate air services on new or less busy routes. However, in order to avoid restrictions which are not indispensable to the attainment of that aim, the duration of such joint operations must be limited to the time necessary to gain sufficient commercial standing. The block exemption must not be granted to joint operations where both parties could reasonably be expected to operate the air service independently. Those conditions are without prejudice to the

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[1] OJ L 155, 26.6.1993, p. 18.
[2] OJ L 374, 31.12.1987, p. 9.
[3] OJ L 240, 24.8.1992, p. 19.
[4] OJ C 253, 30.9.1992, p. 5.

possibility, in appropriate cases, of an application made under Article 5 of Council Regulation (EEC) No 3975/87,[1] as last amended by Regulation (EEC) No 2410/92,[2] with a view to obtaining an individual exemption where the conditions are not met or where the parties need to extend the duration of the joint operation. In particular where the parties wish to avail themselves, a joint operation, through the market access opportunities created by Council Regulation (EEC) No 2408/92[3] on routes which are neither new nor less busy, but which otherwise fulfil the conditions set forth herein, an individual exemption may be warranted.

(5) Consultations on passenger and cargo tariffs may contribute to the generalized acceptance of interlinable fares and rates to the benefit of air carriers as well as air transport users. However, consultations must not exceed the aim of facilitating interlining. Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services,[4] is based on the principle of free pricing and therefore increases the possibility of price competition in air transport. Hence, competition may not be eliminated thereby. Consultations between air carriers on passenger and cargo tariffs may therefore be permitted for the time being, provided that they are limited to fares and rates which give rise to actual interlining, that the participation in such consultations is optional, that they do not lead to an agreement in respect of fares, rates or related conditions, that in the interests of transparency the Commission and the Member States concerned can send observers to them, and that air carriers participating in the consultation mechanism are obliged to interline with all other carriers concerned, at the tariffs applied by the carrying airline for the tariff category under discussion.

The Commission will reassess the effects of tariff consultations on price competition in the light of the operation of Regulation (EEC) No 2409/92 and in the light of the development of the Community air transport industry, and may make appropriate changes to the exemption in the course of its life-time;

(6) Arrangements on slot allocation at airports and airport scheduling can improve the utilization of airport capacity and airspace, facilitate air-traffic control and help to spread the supply of air transport services from the airport. However, if competition is to be eliminated, entry to congested airports must remain possible. In order to provide a satisfactory degree of security and transparency, such arrangements can only be accepted if all air carriers concerned can participate in the negotiations, and if the allocation is made on a non-discriminatory and transparent basis.

(7) In accordance with Article 4 of Regulation (EEC) No 3976/87, this Regulation should apply with retroactive effect to agreements, decisions and concerted practices in existence on the date of entry into force of this Regulation, provided that they meet the conditions for exemption set out in this Regulation.

(8) In conformity with Article 7 of Regulation (EEC) No 3976/87, this Regulation should also specify the circumstances in which the Commission may withdraw the block exemption in individual cases.

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[1] OJ L 374, 31.12.1987, p. 1.
[2] OJ L 240, 24.8.1992, p. 18.
[3] OJ L 240, 24.8.1992, p. 8.
[4] OJ L 240, 24.8.1992, p. 15.

(9) No applications under Article 3 or 5 of Regulation (EEC) No 3975/87 need be made in respect of agreements automatically exempted by this Regulation. However, when real doubt exists, undertakings may request the Commission to declare whether their arrangements comply with this Regulation.

(10) This Regulation is without prejudice to the application of Article 86 of the Treaty,

HAS ADOPTED THIS REGULATION:

TITLE I

EXEMPTIONS

Article 1

Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements between undertakings in the air transport sector, decisions by associations of such undertakings and concerted practices between such undertakings which have as their purpose one or more of the following:

— joint planning and coordination of the schedule of an air service between Community airports,

— the joint operation of a scheduled air service on a new or on a low-density route between Community airports,

— the holding of consultations on tariffs for the carriage of passengers, with their baggage, and of freight on scheduled air services between Community airports,

— slot-allocation and airport scheduling in so far as they concern air services between airports in the Community.

TITLE II

SPECIAL PROVISIONS

Article 2

Special provisions for joint planning and coordination of schedules

The exemption concerning joint planning and coordination of the schedule of an air service shall apply only if the following conditions are met:

(a) the planning and coordination are intended

(i) to ensure by means of a non-binding arrangement a satisfactory supply of services at less busy times of the day, during less busy periods or on less busy routes; or

(ii) to establish by means of a binding arrangement schedules which will facilitate interline connections for passengers of freight between services operated by the participants and minimum capacity to be provided for such schedules;

(b) the agreements, decisions and concerted practices do not include arrangements such as to limit, directly or indirectly, the capacity to be provided by the participants or to share capacity;

(c) the agreements, decisions and concerted practices do not prevent carriers taking part in the planning and coordination from introducing additional services, without incurring penalties and without being required to obtain the approval of the other participants;

(d) the agreements, decisions and concerted practices do not prevent carriers from withdrawing from the planning and coordination for future seasons without penalty, on giving notice of not more than three months to that effect;

(e) the agreements decisions and concerted practices do not seek to influence the schedules adopted by carriers not participating in them.

Article 3

Special provisions for joint operations

The exemption concerning the joint operation of an air service shall apply only if the following conditions are met:

(a) the joint operation concerns the sharing, by one air carrier, of the costs and revenues of another air carrier in respect of a scheduled air service which the latter is operating;

(b) (i) there was no direct air service between the two airports concerned during all of the four traffic seasons preceding the beginning of the joint operation; or

(ii) the capacity on the route covered by the joint operation does not exceed 30 000 seats per year in each direction; this capacity may be doubled on routes of over 750 kilometres on which there is at most a twice-daily direct air service;

(c) the air carrier operating the air service offers a capacity, in addition to the jointly operated air service, of no more than 90 000 seats per year at one of the airports involved;

(d) the revenues from air transport within the geographical scope of this Regulation for the air carrier operating the air service and for any other air carriers which directly or indirectly participate in a controlling shareholding in the operating air carrier, do not exceed ECU 400 million per year;

(e) neither party is prevented from operating additional air services on its own account between the two airports concerned nor from independently determining the fares, capacity and schedules of such air services;

(f) the duration of the joint operation does not exceed three years;

(g) either party can terminate the joint operation on giving notice of not more than three months, to expire at the end of a traffic season.

Article 4

Special provisions for consultations on passenger and cargo tariffs

1. The exemption concerning the holding of consultations on passenger and cargo tariffs shall apply only if the following conditions are met:

(a) the participants only discuss air fares and cargo rates to be paid by air transport users directly to a participating air carrier or to its authorized agents, for carriage as passengers or for the airport-to-airport transport of freight on a scheduled service, as well as the conditions relating to those fares and rates. The consultations shall not extend to the capacity for which such tariffs are to be available;

(b) the consultations give rise to interlining, that is to say, air transport users must be able, in respect of the types of fares or rates and of the seasons which were the subject of the consultations:

(i) to combine on a single transportation document the service which was the subject of the consultations, with services on the same or on connecting routes operated by other air carriers, whereby the applicable fares, rates and conditions are set by the airline(s) effecting carriage; and

(ii) in so far as is permitted by the conditions governing the initial reservation, to change a reservation on a service which was the subject of the consultations onto a service on the same route operated by another air carrier at the fares, rates and conditions applied by that other carrier;

provided that an air carrier may refuse to allow such combinations and changes of reservation for objective and non-discriminatory reasons of a technical or commercial nature, in particular where the air carrier effecting carriage is concerned with the credit worthiness of the air carrier who would be collecting payment for this carriage; in such case the latter air carrier must be notified thereof in writing;

(c) the passenger or cargo tariffs which are the subject of the consultations are applied by participating air carriers without discrimination on grounds of passengers nationality or place of residence or on ground of the origin of the freight within the Community;

(d) participation in the consultations is voluntary and open to any air carrier who operates or intends to operate direct or indirect services on the route concerned;

(e) the consultations are not binding on participants, that is to say, following the consultations the participants retain the right to act independently in respect of passenger and cargo tariffs;

(f) the consultations do not entail agreement on agents' remuneration or other elements of the tariffs discussed;

(g) where filing of tariffs is required, each participant individually files each tariff which was not the subject of the consultations, with the competent authorities of the Member States concerned; in so doing it may act itself or through its filing agent or through its general sales agent.

2. (a) The Commission and the Member States concerned shall be entitled to send observers to tariff consultations. For this purpose, air carriers shall give the Member States concerned and the Commission the same notice as is given to participants, but not less than 10 days' notice, of the date, venue and subject matter of the consultations.

(b) Such notice shall be given:

(i) to the Member States concerned according to procedures to be established by the competent authorities of those Member States;

(ii) to the Commission according to procedures to be published in the *Official Journal of the European Communities.*

(c) A full report on these consultations shall be submitted to the Commission by or on behalf of the air carriers involved at the same time as it is submitted to participants, but not later than six weeks after those consultations were held.

Article 5

Special provisions for slot allocation and airport scheduling

1. The exemption concerning slot allocation and airport scheduling shall apply only if the following conditions are met:

(a) the consultations on slot allocation and airport scheduling are open to all air carriers having expressed an interest in the slots which are the subject of the consultations;

(b) rules of priority are established and supplied without discrimination, that is to say that they neither directly nor indirectly relate to carrier identity or nationality or category of service, take into account constraints or air traffic distribution rules laid down by competent national or international authorities and give due consideration to the needs of the travelling publics and of the airport concerned. Subject to paragraph (d), such rules of priority may take account of rights acquired by air carriers through the use of particular slots in the previous corresponding season;

(c) the rules of priority, once established are made available on request to any interested party;

(d) new entrants as defined in Article 2(b) of Council Regulation (EEC) No 95/93[1] are allocated 50% of newly created or unused slots and slots which have been given up by a carrier during or by the end of the season or which otherwise become available, to the extent that those new entrants have outstanding slot requests;

[1] OJ No L 14, 22.1.1993, p. 1.

(e) air carriers participating in the consultations have access, at the time of the consultations at the latest, to information relating to:

— historical slots by airline, chronologically, for all air carriers at the airport,

— requested slots (initial submissions) by air carriers and chronologically for all air carriers,

— allocated slots, and outstanding slot requests listed individually in chronological order, by air carriers, for air carriers,

— remaining slots available,

— full details on the criteria being used in the allocation.

If a request for slots is not accepted, the air carrier concerned shall be entitled to a statement of the reasons therefor.

2. (a) The Commission and the Member States concerned shall be entitled to send observers to consultations on slot allocation and airport scheduling held in the context of a multilateral meeting in advance of each season. For this purpose, air carriers shall give the Member States concerned and the Commission the same notice as is given to participants, but not less than 10 days' notice, of the date, venue and subject matter of the consultations.

(b) Such notice shall be given:

(i) to the Member States concerned according to procedures to be established by the competent authorities of those Member States;

(ii) to the Commission according to procedures to be published in the *Official Journal of the European Communities.*

TITLE III

FINAL PROVISIONS

Article 6

Withdrawal of the block exemption

The Commission may withdraw the benefit of the block exemption under this Regulation, pursuant to Article 7 of Regulation (EEC) No 3976/87 where it finds in a particular case that an agreement, decision or concerted practice exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down by Article 85(3) or are prohibited by Article 86 of the Treaty, and in particular where:

(i) there is no effective price competition on any route or group of routes which was the subject of tariff consultations. In such cases the benefit of this Regulation shall be withdrawn in respect of the air carriers which participated in the tariff consultations concerning such routes;

(ii) an air service which is jointly operated under Article 3 is not exposed to effective competition by direct or indirect air transport services between the two airports connected or between nearby airports, or by other modes of transport which offer speed, convenience and prices comparable to air transport between the cities served by the two airports connected. In such cases the withdrawal of the benefit of this Regulation shall be in respect of the jointly operated service in question;

(iii) the operation of Article 5 has not enabled new entrants to obtain such slots as may be required at a congested airport in order to establish schedules which enable those carriers to compete effectively with established carriers on any route to and from that airport, and where competition on those routes is thereby substantially impaired. In such cases the withdrawal of the benefit of this Regulation shall be in respect of the slot allocation at the airport in question.

Article 7

This Regulation shall enter into force on 1 July 1993.

It shall apply until 30 June 1998.

This Regulation shall apply with retroactive effect to agreements, decisions and concerted practices in existence when it enters into force, from the time when the conditions of application of this Regulation were fulfilled.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

V — Regulation in the field of agriculture

COUNCIL REGULATION No 26/62[1] OF 4 APRIL 1962

applying certain rules on competition to production of and trade in agricultural products amended by the Council Regulation No 49/62[2] of 29 June 1962

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 42 and 43 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Whereas by virtue of Article 42 of the Treaty one of the matters to be decided under the common agricultural policy is whether the rules on competition laid down in the Treaty are to apply to production of and trade in agricultural products, and accordingly the provisions hereinafter contained will have to be supplemented in the light of developments in that policy.

Whereas the proposals submitted by the Commission for the formulation and implementation of the common agricultural policy show that certain rules on competition must forthwith be made applicable to production of and trade in agricultural products in order to eliminate practices contrary to the principles of the common market and prejudicial to attainment of the objectives set out in Article 39 of the Treaty and in order to provide a basis for the future establishment of a system of competition adapted to the development of the common agricultural policy;

Whereas the rules on competition relating to the agreements, decisions and practices referred to in Article 85 of the Treaty and to the abuse of dominant positions must be applied to production of and trade in agricultural products, in so far as their application does not impede the functioning of national organizations of agricultural markets or jeopardize attainment of the objectives of the common agricultural policy;

Whereas special attention is warranted in the case of farmers' organizations which are particularly concerned with the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition or jeopardizes attainment of the objectives of Article 39 of the Treaty;

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[1] OJ 30, 20.4.1962, p. 993/62 (Special Edition 1959-62, p. 129).
[2] OJ 53, 1.7.1962, p. 1571/62.

Whereas, in order both to avoid compromising the development of a common agricultural policy and to ensure certainty in the law and non-discriminatory treatment of the undertakings concerned, the Commission must have sole power, subject to review by the Court of Justice, to determine whether the conditions provided for in the two preceding recitals are fulfilled as regards the agreements, decisions and practices referred to in Article 85 of the Treaty;

Whereas, in order to enable the specific provisions of the Treaty regarding agriculture, and in particular those of Article 39 thereof, to be taken into consideration, the Commission must, in questions of dumping, assess all the causes of the practices complained of and in particular the price level at which products from other sources are imported into the market in question; whereas it must, in the light of its assessment, make recommendations and authorize protective measures as provided in Article 91(1) of the Treaty;

Whereas, in order to implement, as part of the development of the common agricultural policy, the rules on aids for production of or trade in agricultural products, the Commission should be in a position to draw up a list of existing, new or proposed aids, to make appropriate observations to the Member States and to propose suitable measures to them,

HAS ADOPTED THIS REGULATION:

Article 1

From the entry into force of this Regulation, Articles 85 to 90 of the Treaty and provisions made in implementation thereof shall, subject to Article 2 below, apply to all agreements, decisions and practices referred to in Articles 85(1) and 86 of the Treaty which relate to production of or trade in the products listed in Annex II to the Treaty.[1]

Article 2

1. Article 85(1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate,

[1] Nevertheless, Article 85(1) of the Treaty shall not apply to the agreements and concerted practices of recognized inter-branch organizations intended to implement the measures referred to in Article 2(3) of Council Regulation (EEC) No 2077/92 of 30 June 1992 (OJ L 215, 30.7.1992, p. 80) concerning inter-branch organizations and agreements in the tobacco sector.

the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.

3. The Commission shall undertake such determination either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings.

4. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 3

1. Without prejudice to Article 46 of the Treaty, Article 91(1) thereof shall apply to trade in the products listed in Annex II to the Treaty.

2. With due regard for the provisions of the Treaty to agriculture, and in particular those of Article 39, the Commission shall assess all the causes of the practices complained of, in particular the price level at which products from other sources are imported into the market in question.

In the light of its assessment, it shall make recommendations and authorize protective measures as provided in Article 91(1) of the Treaty.

Article 4

The provisions of Article 93(1) and of the first sentence of Article 93(3) of the Treaty shall apply to aids granted for production of or trade in the products listed in Annex II to the Treaty.

Article 5

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*, with the exception of Articles 1 to 3, which shall enter into force on 30 July 1962.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

C — Merger control

I — General procedural rules

COUNCIL REGULATION (EEC) No 4064/89[1] OF 21 DECEMBER 1989

on the control of concentrations between undertakings

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 235 thereof,

Having regard to the proposal from the Commission,[2]

Having regard to the opinion of the European Parliament,[3]

Having regard to the opinion of the Economic and Social Committee,[4]

(1) Whereas, for the achievement of the aims of the Treaty establishing the European Economic Community, Article 3(f) gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted';

(2) Whereas this system is essential for the achievement of the internal market by 1992 and its further development;

(3) Whereas the dismantling of internal frontiers is resulting and will continue to result in major corporate reorganizations in the Community, particularly in the form of concentrations;

(4) Whereas such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community;

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

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[1] OJ L 395, 30.12.1989, p. 1; corrected in OJ L 257, 21.9.1990, p. 13.
[2] OJ C 130, 19.5.1988, p. 4.
[3] OJ C 309, 5.12.1988, p. 55.
[4] OJ C 208, 8.8.1988, p. 11.

(6) Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;

(7) Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective control of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

(8) Whereas this Regulation should, therefore, be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, including with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty;

(9) Whereas the provisions to be adopted in this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any Member State;

(10) Whereas the scope of application of this Regulation should therefore be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension; whereas, at the end of an intitial phase of the application of this Regulation, these thresholds should be reviewed in the light of the experience gained;

(11) Whereas a concentration with a Community dimension exists where the combined aggregate turnover of the undertakings concerned exceeds given levels worldwide and within the Community and where at least two of the undertakings concerned have their sole or main fields of activities in different Member States or where, although the undertakings in question act mainly in one and the same Member State, at least one of them has substantial operations in at least one other Member State; whereas that is also the case where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there;

(12) Whereas the arrangements to be introduced for the control of concentrations should, without prejudice to Article 90(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors; whereas, in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of dicision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them;

(13) Whereas it is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to maintain and develop effective competition in the common market; whereas, in so doing, the Commission must place its appraisal within the general framework of the

achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a;

(14) Whereas this Regulation should establish the principle that a concentration with a Community dimension which creates or strengthens a position as a result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market;

(15) Whereas concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; whereas, without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it;

(16) Whereas the Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore effective competition;

(17) Whereas to ensure effective control undertakings should be obliged to give prior notification of concentrations with a Community dimension and provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary; whereas in the interests of legal certainty the validity of transactions must nevertheless be protected as much as necessary;

(18) Whereas a period within which the Commission must initiate proceedings in respect of a notified concentration and periods within which it must give a final decision on the compatibility or incompatibility with the common market of a notified concentration should be laid down;

(19) Whereas the undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; whereas the members of the management and supervisory bodies and the recognized representtives of the employees of the undertakings concerned, and third parties showing a legitimate interest, must also be given the opportunity to be heard;

(20) Whereas the Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information;

(21) Whereas, for the purposes of this Regulation, and in accordance with the case-law of the Court of justice, the Commission must be afforded the assistance of the member States and must also be empowered to require information to be given and to carry out the necessary investigations in order to appraise concentrations;

(22) Whereas compliance with this Regulation must be enforceable by means of fines and periodic penalty payments; whereas the Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 172 of the Treaty;

(23) Whereas it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a lasting change in the structure of the undertakings concerned; whereas it is therefore necessary to exclude from the scope of this Regulation those operations which have as their object or effect the coordination of the competitive behaviour of undertakings which remain independent, since such operations fall to be examined under the appropriate provisions of the Regulations implementing Article 85 and 86 of the Treaty; whereas it is appropriate to make this distinction specifically in the case of the creation of joint ventures;

(24) Whereas there is no coordination of competitive behaviour within the meaning of this Regulation where two or more undertakings agree to acquire jointly control of one or more other undertakings with the object and effect of sharing amongst themselves such undertakings or their assets;

(25) Whereas this Regulation should still apply where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration;

(26) Whereas the Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice;

(27) Whereas the Member States may not apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefore; whereas the relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation; whereas the Member States concerned must act promptly in such cases; whereas this Regulation cannot, because of the diversity of national law, fix a single deadline for the adoption of remedies;

(28) Whereas, furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 223 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law;

(29) Whereas concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States; whereas, however, the Commission should have the power to act, at the request of a Member State concerned, in cases where effective competition could be significantly impeded within that Member State's territory;

(30) Whereas the conditions in which concentrations involving Community undertakings are carried out in non-member countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for Community undertakings;

(31) Whereas this Regulation in no way detracts from the collective rights of employees as recognized in the undertakings concerned,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 22 this Regulation shall apply to all concentrations with a Community dimension as defined in paragraph 2.

2. For the purposes of this Regulation, a concentration has a Community dimension where:

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

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

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

3. The thresholds laid down in paragraph 2 will be reviewed before the end of the fourth year following that of the adoption of this Regulation by the Council acting by a qualified majority on a proposal from the Commission.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge; or

(b) — one or more persons already controlling at least one undertaking, or

— one or more undertakings,

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1(b).

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b).

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, involvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies,[1] as last amended by Directive 84/569/EEC,[2] provided, however, that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

Article 5

Calculation of turnover

1. Aggregate turnover within the meaning of Article 1(2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value-added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

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[1] OJ L 222, 14.8.1978, p. 11
[2] OJ L 314, 4.12.1984, p. 28.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, as regards Article 1(2)(a), one-tenth of their total assets.

As regards Article 1(2)(b) and the final part of Article 1(2), total Community-wide turnover shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with Community residents and the total sum of those loans and advances.

As regards the final part of Article 1(2), total turnover within one Member State shall be replaced by one tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with residents of that Member State and the total sum of those loans and advances;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and the final part of Article 1(2), gross premiums received from Community residents and from residents on one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of Article 1(2) shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

— own more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

— has the right to manage the undertakings' affairs;

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

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

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of Article 1(2):

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

(c) If, on the other hand, it finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

2. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

1. For the purposes of paragraph 2 a concentration as defined in Article 1 shall not be put into effect either before its notification or within the first three weeks following its notification.

2. Where the Commission, following a preliminary examination of the notification within the period provided for in paragraph 1, finds it necessary in order to ensure the full effectiveness of any decision taken later pursuant to Article 8(3) and (4), it may decide on its own initiative to continue the suspension of a concentration in whole or in part until it takes a final decision, or to take other interim measures to that effect.

3. Paragraphs 1 and 2 shall not prevent the implementtion of a public bid which has been notified to the Commission in accordance with Article 4(1), provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission under paragraph 4.

4. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1, 2 or 3 in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

5. The validity of any transaction carried out in contravention of paragraph 1 or 2 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(2) or (3) or on a presumption pursuant to Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1 or 2.

Article 8

Powers of decision of the Commission

1. Without prejudice to Article 9, all proceedings initiated pursuant to Article 6(1)(c) shall be closed by means of a decision as provided for in paragraphs 2 to 5.

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2), it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan. The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion laid down in Article 2(3), it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

5. The Commission may revoke the decision it has taken pursuant to paragraph 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

6. In the cases referred to in paragraph 5, the Commission may take a decision under paragraph 3, without being bound by the deadline referred to in Article 10(3).

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission, which shall inform the undertakings concerned, that a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a distinct market, be it a substantial part of the common market or not.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned; or

(b) it shall refer the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

(a) as a general rule within the six-week period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or

(b) within three months at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), second subparagraph, (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the three months referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186, for the purpose of applying its national competition law.

10. This Article will be reviewed before the end of the fourth year following that of the adoption of this Regulation.

Article 10

Time-limits for initiating proceedings and for decisions

1. The decisions referred to in Article 6(1) must be taken within one month at most. That period shall begin on the day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following that of the receipt of the complete information.

That period shall be increased to six weeks if the Commission receives a request from a Member State in accordance with Article 9(2).

2. Decisions taken pursuant to Article 8(2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3.

3. Without prejudice to Article 8(6), decisions taken pursuant to Article 8(3) concerning notified concentrations must be taken within not more than four months of the date on which proceedings are initiated.

4. The period set by paragraph 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13.

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision taken under this Regulation, the periods laid down in this Regulation shall start again from the date of the judgment.

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b) or (c) or Article 8(2) or (3) within the deadlines set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

Requests for information

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the governments and competent authorities of the Member States, from the persons referred to in Article 3(1)(b), and from undertakings and associations of undertakings.

2. When sending a request for information to a person, an undertaking or an association of undertakings, the Commission shall at the same time send a copy of the request to the competent authority of the Member State within the territory of which the residence of the person or 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 14(1)(c) for supplying incorrect information.

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

5. Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14(1)(c) and 15(1)(a) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

Article 12

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member states shall undertake the investigations which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(3). The officials of the competent authorities of the Member States responsible for conducting those investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State within the territory of which the investigation is to be carried out. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State within the territory of which the investigation is to be carried out, officials of the Commission may assist the officials of that authority in carrying out their duties.

Article 13

Investigative powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To that end the officials authorized by the Commission shall be empowered:

(a) to examine the books and other business records;

(b) to take or demand 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 to carry out the investigations shall exercise their powers on production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 14(1)(d) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform, in writing, the competent authority of the Member State within the territory of which the investigation is to be carried out of the investigation and of the identities 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 shall begin and state the penalties provided for in Articles 14(1)(d) and 15(1)(b) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall in good time and in writing inform the competent authority of the Member State within the territory of which the investigation is to be carried out of its intention of taking a decision pursuant to paragraph 3. It shall hear the competent authority before taking its decision.

5. Officials of the competent authority of the Member State within the territory of which the investigation is to be carried out may, at the request of that authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking or association of undertakings 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 carry out their investigations. To this end the Member State shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this Regulation.

Article 14

Fines

1. The Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings fines of from ECU 1 000 to 50 000 where intentionally or negligently:

(a) they fail to notify a concentration in accordance with Article 4;

(b) they supply incorrect or misleading information in a notification pursuant to Article 4;

(c) they supply incorrect information in response to a request made pursuant to Article 11 or fail to supply information within the period fixed by a decision taken pursuant to Article 11;

(d) they produce the required books or other business records in incomplete form during investigations under Article 12 or 13, or refuse to submit to an investigation ordered by decision taken pursuant to Article 13.

2. The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they:

(a) fail to comply with an obligation imposed by decision pursuant to Article 7(4) or 8(2), second subparagraph;

(b) put into effect a concentration in breach of Article 7(1) or disregard a decision taken pursuant to Article 7(2);

(c) put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not take the measures ordered by decision pursuant to Article 8(4).

3. In setting the amount of a fine, regard shall be had to the nature and gravity of the infringement.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

Article 15

Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings concerned periodic penalty payments of up to ECU 25 000 for each day of delay calculated from the date set in the decision, in order to compel them:

(a) to supply complete and correct information which it has requested by decision pursuant to Article 11;

(b) to submit to an investigation which it has ordered by decision pursuant to Article 13.

2. The Commission may by decision impose on the persons referred to in Article 3(1)(b) or on undertakings periodic penalty payments of up to ECU 100 000 for each day of delay calculated from the date set in the decision, in order to compel them:

(a) to comply with an obligation imposed by decision pursuant to Article 7(4) or Article 8(2), second subparagraph, or

(b) to apply the measures ordered by decision pursuant to Article 8(4).

3. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to inforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would rise under the original decision.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payments imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of Article 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Articles 4(3), 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

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

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Articles 7(2) and (4), Article 8(2), second subparagraph, and (3) to (5) and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making know their views on the objections against them.

2. By the way of derogation from paragraph 1, a decision to continue the suspension of a concentration or to grant a derogation from suspension as referred to in Article 7(2) or (4) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8(2) to (5), 14 or 15, or any provisions are adopted pursuant to Article 23.

4. The Advisory Committee shall consist of representatives of the authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 14 days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish shall take due account of the legitimate interest of undertakings in the protection of their business secrets and of the interest of the undertakings concerned in such publication's taking place.

Article 20

Publication of decisions

1. The Commission shall publish the decision which it takes pursuant to Article 8(2) to (5) in the *Official Journal of the European Communities*.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Jurisdiction

1. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

2. No Member State shall apply its national legislation on competition to any consideration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Article 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or (5), to take the measures strictly necessary for the application of Article 9(8).

3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of this decision within one month of that communication.

Article 22

Application of the Regulation

1. This Regulation alone shall apply to concentrations as defined in Article 3.

2. Regulations No 17,[1] (EEC) No 1017/68,[2] (EEC) No 4056/86[3] and (EEC) No 3975/87[4] shall not apply to concentrations as defined in Article 3.

3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, in so far as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).

4. Articles 2(1)(a) and (b), 5, 6, 8 and 10 to 20 shall apply. The period within which proceedings may be initiated pursuant to Article 10(1) shall begin on the date of the receipt of the request from the Member State. The request must be made within one month at most of the date on which the concentration was made known to the Member State or effected. This period shall begin on the date of the first of those events.

5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or store effective competition within the territory of the Member State at the request of which it intervenes.

6. Paragraphs 3 to 5 shall continue to apply until the thresholds referred to in Article 1(2) have been reviewed.

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[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 175, 23.7.1968, p. 1.
[3] OJ L 378, 31.12.1986, p. 4.
[4] OJ L 374, 31.12.1987, p. 1.

Article 23

Implementing provisions

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time-limits pursuant to Article 10, and hearings pursuant to Article 18.

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Relations with non-member countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in non-member country.

2. Initially not more than one year after the entry into force of this Regulation and thereafter periodically the Commission shall draw up a report examining the treatment accorded to Community undertakings, in the terms referred to in paragraphs 3 and 4, as regards concentrations in non-member countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a non-member country does not grant Community undertakings treatment comparable to that granted by the Community to undertakings from that non-member country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for Community undertakings.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 234 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Entry into force

1. This Regulation shall enter into force on 21 September 1990.

2. This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION REGULATION (EEC) No 2367/90[1] OF 25 JULY 1990

on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (as amended by Commission Regulation (EC) No 3666/93 of 15 December 1993)[2]

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings,[3] and in particular Article 23 thereof,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty,[4] as last amended by the Act of Accession of Spain and Portugal, and in particular Article 24 thereof,

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway,[5] as last amended by the Act of Accession of Spain and Portugal, and in particular Article 29 thereof,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport,[6] and in particular Article 26 thereof,

Having regard to Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down detailed rules for the application of the competition rules to undertakings in air transport,[7] and in particular Article 19 thereof,

Having consulted the Advisory Committee on Concentrations, as well as the Advisory Committees on Restrictive Practices and Monopolies in the Transport Industry, in Maritime Transport and in Air Transport,

1. Whereas Article 23 of Regulation (EEC) No 4064/89 empowers the Commission to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time-limits pursuant to Article 10, and hearings pursuant to Article 18;

2. Whereas Regulation (EEC) No 4064/89 is based on the principle of compulsory notification of concentrations before they are put into effect; whereas, on the one hand, a notification has important legal consequences which are favourable to the parties, while, on the other hand, failure to comply with the obligation to notify renders the parties

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[1] OJ L 219, 14.8.1990, p. 5.
[2] OJ L 336, 31.12.1993, p. 1.
[3] OJ L 395, 30.12.1989, p. 1, as corrected in OJ L 257, 21.9.1990, p. 13.
[4] OJ 13, 21.2.1962, p. 204/62.
[5] OJ L 175, 23.7.1968, p. 1.
[6] OJ L 378, 31.12.1986, p. 4.
[7] OJ L 374, 31.12.1987, p. 1.

liable to a fine and may also entail civil law disadvantages for them; whereas it is therefore necessary in the interests of legal certainty to define precisely the subject matter and content of the information to be provided in the notification;

3. Whereas it is for the parties concerned to make full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration;

4. Whereas in order to simplify and expedite examination of the notification it is desirable to prescribe that a form be used;

5. Whereas since notification sets in motion legal time-limits for initiating proceedings and for decisions, the conditions governing such time-limits and the time when they become effective must also be determined;

6. Whereas rules must be laid down in the interests of legal certainty for calculating the time-limits provided for in Regulation (EEC) No 4064/89; whereas in particular the beginning and end of the period and the circumstances suspending the running of the period must be determined; whereas the provisions should be based on the principles of Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time-limits,[1] subject to certain adaptations made necessary by the exceptionally short legal time-limits referred to above;

7. Whereas the provisions relating to the Commission's procedure must be framed in such way as to safeguard fully the right to be heard and the rights of defence;

8. Whereas the Commission will give the parties concerned, if they so request, an opportunity before notification to discuss the intended concentration informally and in strict confidence; whereas in addition it will, after notification, maintain close contact with the parties concerned to the extent necessary to discuss with them any practical or legal problems which it discovers on a first examination of the case and if possible to remove such problems by mutual agreement;

9. hereas in accordance with the principle of the right to be heard, the parties concerned must be given the opportunity to submit their comments on all the objections which the Commission proposes to take into account in its decisions;

10. Whereas third parties having sufficient interest must also be given the opportunity of expressing their views where they make a written application;

11. Whereas the various persons entitled to submit comments should do so in writing, both in their own interest and in the interest of good administration, without prejudice to their right to request an oral hearing where appropriate to supplement the written procedure; whereas in urgent cases, however, the Commission must be able to proceed immediately to oral hearings of the parties concerned or third parties; whereas in such cases the persons to be heard must have the right to confirm their oral statements in writing;

12. Whereas it is necessary to define the rights of persons who are to be heard, to what extent they should be granted access to the Commission's file and on what conditions they may be represented or assisted;

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[1] OJ L 124, 8.6.1971, p. 1.

13. Whereas it is also necessary to define the rules for fixing and calculating the time-limits for reply fixed by the Commission;

14. Whereas the Advisory Committee on Concentrations shall deliver its opinion on the basis of a preliminary draft decision; whereas it must therefore be consulted on a case after the inquiry into that case has been completed; whereas such consultation does not, however, prevent the Commission from re-opening an inquiry if need be,

HAS ADOPTED THIS REGULATION:

SECTION I

NOTIFICATIONS

Article 1

Persons entitled to submit notifications

1. Notifications shall be submitted by the persons or undertakings referred to in Article 4(2) of Regulation (EEC) No 4064/89.

2. Where notifications are signed by representatives of persons or of undertakings, such representatives shall produce written proof that they are authorized to act.

3. Joint notifications should be submitted by a joint representative who is authorized to transmit and to receive documents on behalf of all notifying parties.

Article 2

Submission of notifications

1. Notifications shall be submitted in the manner prescribed by form CO as shown in Annex I. Joint notifications shall be submitted on a single form.

2. Twenty-one copies of each notification and 16 copies of the supporting documents shall be submitted to the Commission at the address indicated in form CO.

3. The supporting documents shall be either originals or copies of the originals; in the latter case the notifying parties shall confirm that they are true and complete.

4. Notifications shall be in one of the official languages of the Community. This language shall also be the language of the proceeding for the notifying parties. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation into the language of the proceeding shall be attached.

5. Where notifications are made pursuant to Article 57 of the Agreement on the European Economic Area, they may also be in one of the official languages of the EFTA States or the working language of the EFTA Surveillance Authority. If the language for the notifications is not an official language of the Community, the notifying parties shall simultaneously supplement all documentation with a translation into an official language of the Community. The language which is chosen for translation shall determine the language used by the Commission as the language of the proceedings for the notifying parties.

Article 3

Information to be provided

1. Notifications shall contain the information requested by form CO. The information must be correct and complete.

2. Material changes in the facts specified in the notification which the notifying parties know or ought to have known must be communicated to the Commisssion voluntarily and without delay.

3. Incorrect or misleading information shall be deemed to be incomplete information.

Article 4

Effective date of notifications

1. Subject to paragraph 2 notifications shall become effective on the date on which they are received by the Commission.

2. Subject to paragraph 3, where the information contained in the notification is incomplete in a material respect, the Commission shall without delay inform the notifying parties or the joint representative in writing and shall fix an appropriate time-limit for the completion of the information; in such cases, the notification shall become effective on the date on which the complete information is received by the Commission.

3. The Commission may dispense with the obligation to provide any particular information requested by form CO where the Commission considers that such information is not necessary for the examination of the case.

4. The Commission shall without delay acknowledge in writing to the notifying parties or the joint representative receipt of the notification and of any reply to a letter sent by the Commission pursuant to paragraph 2 above.

Article 5

Conversion of notifications

1. Where the Commission finds that the operation notified does not constitute a concentration within the meaning of Article 3 of Regulation (EEC) No 4064/89 it shall inform the

notifying parties or the joint representative in writing. In such a case, the Commission may, if requested by the notifying parties, as appropriate and subject to paragraph 2 below, treat the notification as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Regulation No 17, as an application within the meaning of Article 12 or a notification within the meaning of Article 14 of Regulation (EEC) No 1017/68, as an application within the meaning of Article 12 of Regulation (EEC) No 4056/86 or as an application within the meaning of Article 3(2) or of Article 5 of Regulation (EEC) No 3975/87.

2. In cases referred to in paragraph 1, second sentence, the Commission may require that the information given in the notification be supplemented within an appropriate time-limit fixed by it in so far as this is necessary for assessing the operation on the basis of the abovementioned Regulations. The application or notification shall be deemed to fulfil the requirements of such Regulations from the date of the original notification where the additional information is received by the Commission within the time-limit fixed.

SECTION II

TIME-LIMITS FOR INITIATING PROCEEDING AND FOR DECISIONS

Article 6

Beginning of the time-limit

1. The periods referred to in Article 10(1) of Regulation (EEC) No 4064/89 shall start at the beginning of the day following the effective date of the notification, within the meaning of Article 4(1) and (2) of this Regulation.

2. The period referred to in Article 10(3) of Regulation (EEC) No 4064/89 shall start at the beginning of the day following the day on which proceedings were initiated.

3. Where the first day of a period is not a working day within the meaning of Article 19, the period shall start at the beginning of the following working day.

Article 7

End of the time-limit

1. The period referred to in the first subparagraph of Article 10(1) of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the month following that in which the period began falls on the same date as the day from which the period runs. Where such a day does not occur in that month, the period shall end with the expiry of the last day of that month.

2. The period referred to in the second sub-paragraph of Article 10(1) of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the sixth week following that in which the period began is the same day of the week as the day from which the period runs.

3. The period referred to in Article 10(3) of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the fourth month following that in which the period began falls on the same date as the day from which the period runs. Where such a day does not occur in that month, the period shall end with the expiry of the last day of that month.

4. Where the last day of the period is not a working day within the meaning of Article 19, the period shall end with the expiry of the following working day.

5. Paragraphs 2 to 4 above shall be subject to the provisions of Article 8.

Article 8

Addition of holidays

Where public holidays or other holidays of the Commission as defined in Article 19 fall within the periods referred to in Article 10(1) and in Article 10(3) of Regulation (EEC) No 4064/89, these periods shall be extended by a corresponding number of days.

Article 9

Suspension of the time-limit

1. The period referred to in Article 10(3) of Regulation (EEC) No 4064/89 shall be suspended where the Commission, pursuant to Articles 11(5) or 13(3) of the same Regulation, has to take a decision because:

(a) information which the Commission has requested pursuant to Article 11(2) of Regulation (EEC) No 4064/89 from an undertaking involved in a concentration is not provided or not provided in full within the time-limit fixed by the Commission;

(b) an undertaking involved in the concentration has refused to submit to an investigation deemed necessary by the Commission on the basis of Article 13(1) of Regulation (EEC) No 4064/89 or to cooperate in the carrying out of such an investigation in accordance with the abovenmentioned provision;

(c) the notifying parties have failed to inform the Commission of material changes in the facts specified in the notification.

2. The period referred to in Article 10(3) of Regulation (EEC) No 4064/89 shall be suspended:

(a) in the cases referred to in subparagraph 1(a) above, for the period between the end of the time-limit fixed in the request for information and the receipt of the complete and correct information required by decision;

(b) in the cases referred to in subparagraph 1(b) above, for the period between the unsuccessful attempt to carry out the investigation and the completion of the investigation ordered by decision;

(c) in the cases referred to in subparagraph 1(c) above, for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information requested by decision or the completion of the investigation ordered by decision.

3. The suspension of the time-limit shall begin on the day following that on which the event causing the suspension occurred. It shall end with the expiry of the day on which the reason for suspension is removed. Where such day is not a working day within the meaning of Article 19, the suspension of the time-limit shall end with the expiry of the following working day.

Article 10

Compliance with the time-limit

The time-limits referred to in Article 10(1) and (3) of Regulation (EEC) No 4064/89 shall be met where the Commission has taken the relevant decision before the end of the period. Notification of the decision to the undertakings concerned must follow without delay.

SECTION III

HEARING OF THE PARTIES AND OF THIRD PARTIES

Article 11

Decisions on the suspension of concentrations

1. Where the Commission intends to take a decision under Article 7(2) of Regulation (EEC) No 4064/89 or a decision under Article 7(4) of that Regulation which adversely affects the parties, it shall, pursuant to Article 18(1) of that Regulation, inform the parties concerned in writing of its objections and shall fix a time-limit within which they may make known their views.

2. Where the Commission pursuant to Article 18(2) of Regulation (EEC) No 4064/89 has taken a decision referred to in paragraph 1 provisionally without having given the parties concerned the opportunity to make known their views, it shall without delay and in any event before the expiry of the suspension send them the text of the provisional decision and shall fix a time-limit within which they may make known their views.

Once the parties concerned have made known their views, the Commission shall take a final decision annulling, amending or confirming the provisional decision. Where the parties concerned have not made known their view within the time-limit fixed, the Commission's provisional decision shall become final with the expiry of that period.

3. The parties concerned shall make known their views in writing or orally within the time-limit fixed. They may confirm their oral statements in writing.

Article 12

Decisions on the substance of the case

1. Where the Commission intends to take a decision pursuant to Article 8(2), second subparagraph, Article 8(3), (4) and (5), Article 14 or Article 15 of Regulation (EEC) No 4064/89, it shall, before consulting the Advisory Committee on Concentrations, hold a hearing of the parties concerned pursuant to Article 18 of that Regulation.

2. The Commission shall inform the parties concerned in writing of its objections. The communication shall be addressed to the notifying parties or to the joint representative. The Commission shall, when giving notice of objections, fix a time-limit within which the parties concerned may inform the Commission of their views.

3. Having informed the parties of its objections, the Commission shall upon request give the parties concerned access to the file for the purposes of preparing their observations. Documents shall not be accessible in so far as they contain business secrets of other parties concerned or of third parties, or other confidential information including sensitive commercial information the disclosure of which would have a significant adverse effect on the supplier of such information or where they are internal documents of the authorities.

4. The parties concerned shall, within the time-limit fixed, make known in writing their views on the Commission's objections. They may in their written comments set out all matters relevant to the case and may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

Article 13

Oral hearings

1. The Commission shall afford parties concerned who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose a fine or periodic penalty payment on them. It may also in other cases afford the parties concerned the opportunity of expressing their views orally.

2. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

3. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

Article 14

Hearings

1. Hearings shall be conducted by persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall either appear in person or be represented by legal representatives or representatives authorized by their constitution. Undertakings and associations of undertakings may be represented by a duly authorized agent appointed from among their permanent staff.

3. Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the Protocol on the Statute (EEC) of the Court of Justice, or by other qualified persons.

4. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

5. The statements made by each person heard shall be recorded.

Article 15

Hearing of third parties

1. If natural or legal persons showing a sufficient interest, and especially members of the administrative or management organs of the undertakings concerned or recognized workers' representatives of those undertakings, apply in writing to be heard pursuant to the second sentence of Article 18(4) of Regulation (EEC) No 4064/89, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall fix a time-limit within which they may make known their views.

2. The third parties referred to in paragraph 1 above shall make known their views in writing or orally within the time-limit fixed. They may confirm their oral statements in writing.

3. The Commission may likewise afford to any other third parties the opportunity of expressing their views.

SECTION IV

MISCELLANEOUS PROVISIONS

Article 16

Transmission of documents

1. Transmission of documents and summonses from the Commission to the addressees may be effected in any of the following ways:

(a) delivery by hand against receipt;

(b) registered letter with acknowledgement of receipt;

(c) telefax with a request for acknowledgement of receipt;

(d) telex.

2. Subject to Article 18(1), paragraph 1 above also applies to the transmission of documents from the parties concerned or from third parties to the Commission.

3. Where a document is sent by telex or by telefax, it shall be presumed that it has been received by the addressee on the day on which it was sent.

Article 17

Setting of time-limits

1. In fixing the time-limits provided for in Articles 4(2), 5(2), 11(1) and (2), 12(2) and 15(1), the Commission shall have regard to the time required for preparation of statements and to the urgency of the case. It shall also take account of public holidays in the country of receipt of the Commission's communication.

2. The day on which the addressee received a communication shall not be taken into account for the purpose of fixing time-limits.

Article 18

Receipt of documents by the Commission

1. Subject to Article 4(1), notifications must be delivered to the Commission at the address indicated in form CO or have been dispatched by registered letter before expiry of the period referred to in Article 4(1) of Regulation (EEC) No 4064/89. Additional information requested to complete notifications pursuant to Article 4(2) or to supplement notifications pursuant to Article 5(2) of this Regulation must reach the Commission at the aforesaid or have been dispatched by registered letter before the expiry of the time-limit fixed in each case. Written comments on Commission communications pursuant to Articles 11(1) and (2), 12(2) and 15(1) must be delivered to the Commission at the aforesaid address before the time-limit fixed in each case.

2. Where the last day of a period referred to in paragraph 1 is a day by which documents must be received and that day is not a working day within the meaning of Article 19, the period shall end with the expiry of the following working day.

3. Where the last day of a period referred to in paragraph 1 is a day by which documents must be dispatched and that day is a Saturday, Sunday or public holiday in the country of dispatch, the period shall end with the expiry of the following working day in that country.

Article 19

Definition of Commission working days

The term 'working days' in Articles 6(3), 7(4), 9(3) and 18(2) means all days other than Saturdays, Sundays, public holidays set out in Annex II and other holidays as determined by the Commission and published in the *Official Journal of the European Communities*, before the beginning of each year.

Article 20

Entry into force

This Regulation shall enter into force on 21 September 1990.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

ANNEX

FORM CORRELATING TO THE NOTIFICATION OF A CONCENTRATION PURSUANT TO COUNCIL REGULATION (EEC) No 4064/89

A. Introduction

This form specifies the information to be provided by an undertaking or undertakings when notifying the Commission of a concentration with a Community dimension. A 'concentration' is defined in Article 3 and 'Community dimension' by Article 1 of Regulation (EEC) No 4064/89.

Your attention is particularly drawn to Regulation (EEC) No 4064/89, to Article 57 of the Agreement of the European Economic Area[1] (point 1 of Annex XIV to the EEA Agreement and Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice), to Commission Regulation (EEC) No 2367/90 as well as to Protocols 21, 22 and 24 to the EEA Agreement and to Article 1, as well as the Agreed Minutes of the Protocol adjusting the Agreement on the European Economic Area. In particular you should note that:

(a) all information requested by this form must by provided. However if, in good faith, you are unable to provide a response to a question or can only respond to a limited extent on the basis of available information, indicate this and give reasons. If you consider that any particular information requested by this form may not be necessary for the Commission's examination of the case, you may ask the Commission to dispense with the obligation to provide that information, pursuant to Article 4(3) of Regulation (EEC) No 2367/90;

(b) unless all sections are completed in full or good reasons are given explaining why it has not been possible to complete unanswered questions (for example, because of the unavailability of information on a target company during a contested bid) the notification will be incomplete and will only become effective on the date on which all the information is received. The notification will be deemed to be incomplete if information is incorrect or misleading;

(c) incorrect or misleading information where supplied intentionally or negligently could make you liable to a fine;

(d) the notifications made by using Form CO issued by the Commission and Form CO issued by the EFTA side are equally valid.

B. Who must notify

In the case of a merger (within the meaning of Article 3(1)(a) of Regulation (EEC) No 4064/89 or the acquisition of joint control in an undertaking within the meaning of Arti-

[1] Hereinafter referred to as 'the EEA Agreement'. In particular, any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement.

cle 3(1)(b) of Regulation (EEC) No 4064/89, the notification shall be completed jointly by the parties to merger or by those acquiring joint control as the case may be.

In the case of the acquisition of a controlling interest in an undertaking by another, the acquirer must complete the notification.

In the case of a public bid to acquire an undertaking, the bidder must complete the notification.

Each party completing the notification is responsible for the accuracy of the information which it provides.

For the purposes of this form 'the parties to the concentration' ('the parties') includes the undertaking in which a controlling interest is being acquired or which is the subject of a public bid.

C. Supporting documentation

The completed notification must be accompanied by the following:

(a) copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties concerned, acquisition of a controlling interest or a public bid;

(b) in a public bid, a copy of the offer document. If unavailable on notification it should be submitted as soon as possible and not later than when it is posted to shareholders;

(c) copies of the most recent annual reports and accounts of all the parties to the concentration;

(d) copies of reports or analyses which have been prepared for the purpose of the concentration and from which information has been taken in order to provide the information requested in Section 5 and 6;

(e) a list and short description of the contents of all other analyses, reports, studies and surveys prepared by or for any of the notifying parties for the purpose of assessing or analysing the proposed concentration with respect to competitive conditions, competitors (actual and potential), and market conditions. Each item in the list must include the name and position held of the author.

D. How to notify

The notification must be completed in one of the official languages of the European Community. This language shall thereafter be the language of the proceeding for all notifying parties. Where notifications are made in accordance with Article 12 of Protocol 24 to the EEA Agreement in an official language of an EFTA State which is not an official language of the Community, the notification and all supporting documents shall simultaneously be supplemented with a translation into an official language of the Community.

The information requested by this form is to be set out using the sections and paragraph numbers of the form.

Supporting documents shall be submitted in their original language; where this is not an official language of the Community they shall be translated into the language of the proceeding (Article 2(4) of Regulation (EEC) No 2367/90).

The supporting documents may be originals or copies of the originals. In the latter case the notifying party shall confirm that they are true and complete.

The financial data requested in Section 2.4 must be provided in ecus at the average conversion rates prevailing for the years or other period in question.

Twenty-one copies of each notification and 16 copies of all supporting documents must be provided.

The notification should be sent to:

European Commission
Directorate-General for Competition (DG IV),
Merger Task Force (Cort. 150),
rue de la Loi 200
B-1049 Brussels,

or be delivered by hand during normal Commission working hours at the following address:

European Commission
Directorate-General for Competition (DG IV),
Merger Task Force,
avenue de Cortenberg 150
B-1040 Brussels.

E. Secrecy

Article 214 of the Treaty and Article 17(2) of Regulation (EEC) No 4064/89 as well as Article 122 of the EEA Agreement, Article 9 of Protocol 24 to the EEA Agreement and Article 17(2) of Chapter XIII of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (ESA Agreement) require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality as between notifying parties.

If you believe that your interest would be harmed if any of the information you are asked to supply was to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked 'Business secrets'. You should also give reasons why this information should not be divulged or published.

In the case of merger or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an Annex. In such cases the notification will be considered complete on receipt of all the Annexes.

F. References

All references contained in this form are to the relevant articles and paragraphs of Regulation (EEC) No 4064/89.

SECTION 1

1.1. Information on notifying party (or parties)

Give details of:

1.1.1. name and address of undertaking;

1.1.2. nature of the undertaking's business;

1.1.3. name, address, telephone, fax and/or telex of, and position held by, the person to be contacted.

1.2. Information on other parties to the concentration[1]

For each party to the concentration (except the notifying party) give details of:

1.2.1. names and address of undertaking;

1.2.2. nature of the undertaking's business;

1.2.3. name, address, telephone, fax and/or telex of, and position held by, the person to be contacted.

1.3. Address for service

Give an address in Brussels, if available, to which all communications may be made and documents delivered in accordance with Article 1(4) of Regulation (EEC) No 2367/90.

1.4. Appointment of representatives

Article 1(2) of Regulation (EEC) No 2367/90 states that where notifications are signed by representatives of undertakings, such representatives shall produce written proof that they are authorized to act. Such written authorization must accompany the notification and the following details of the representatives of the notifying party or parties and other parties to the concentration are to be given below:

1.4.1. is this a joint notification?

1.4.2. if 'yes', has a joint representative been appointed?

if 'yes', please give the details requested in 1.4.3 to 1.4.6;

if 'no', please give details of the representatives who have been authorized to act for each of the parties to the concentration indicating whom they represent;

1.4.3. name of representative;

1.4.4. address of representative;

1.4.5. name of person to be contacted (and address if different from 1.4.4);

1.4.6. telephone, telefax and/or telex.

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[1] This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

SECTION 2

Details of the concentration

2.1. Briefly describe the nature of the concentration being notified. In doing so state:

— whether the proposed concentration is a full legal merger, an acquisition, a concentrative joint venture or a contract or other means conferring direct or indirect control within the meaning of Article 3(3) of Regulation (EEC) No 4064/89,

— whether the whole or parts of parties are subject to the concentration,

— whether any public offer for the securities of one party by another has the support of the former's supervisory boards, boards of directors or other bodies legally representing the party concerned.

2.2. List the economic sectors involved in the concentration.

2.3. Give a brief explanation of the economic and financial details of the concentration. In doing so provide, where relevant, information about the following:

— any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support,

— the proposed or expected date of any major events designed to bring about the completion of the concentration,

— the proposed structure of ownership and control after the completion of the concentration.

2.4. For each of the parties, the notifying party shall provide the following data for the last three financial years:

2.4.1. world-wide turnover;[1]

2.4.2. Community-wide turnover;[1,2]

2.4.3. EFTA-wide turnover;[1,2]

2.4.4. turnover in each Member State;[1,2]

2.4.5. turnover in each EFTA State;[1,2]

2.4.6. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved;[1,2]

2.4.7. the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved;[1,2]

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[1] See Article 5 for the definition of turnover and note the special provisions for credit, insurance, other financial institutions and joint undertakings. For insurance undertakings, credit and other financial institutions, Community residents and residents of a Member State are defined as natural or legal persons having their residence in a Member State, thereby following the respective national legislation. The corporate customer is to be treated as resident in the country in which it is legally incorporated. The same rules apply as regards the notion of residents in the territory of the EFTA States. For the calculation of turnover, the notifying party should also refer to the examples: guidance note I for credit and other financial institutions; guidance note II for insurance undertakings; guidance note III for joint undertakings.

[2] See guidance note IV for the calculation of turnover in one Member State with respect to Community-wide turnover.

2.4.8. profits before tax world-wide;[1]

2.4.9. number of employees world-wide.[2]

2.5. Provide the following information with respect to the last financial year;

2.5.1. does the combined turnover of the undertakings concerned in the territory of the EFTA States equal 25% or more of their total turnover in the EEA territory?

2.5.2. does each of at least two undertakings concerned have a turnover exceeding ECU 250 million in the territory of the EFTA States?

SECTION 3

Ownership and control[3]

For each of the parties provide a list of all undertakings belonging to the same group. This list must include:

3.1. all undertakings controlled by the parties, directly or indirectly, within the meaning of Article 3(3);

3.2. all undertakings or persons controlling the parties directly or indirectly within the meaning of Article 3(3);

3.3. for each undertaking or person identified in 3.2, a complete list of all undertakings controlled by them directly or indirectly, within the meaning of Article 3(3).

For each entry to the list the nature and means of control shall be specified:

3.4. provide details of acquisitions made during the last three years, by the groups identified above, of undertakings active in affected markets as defined in Section 5.

The information sought in this Section may be illustrated by the use of charts or diagrams where this helps to give a better understanding of the pre-concentration structure of ownership and control of the undertakings.

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[1] 'Profit before tax' shall comprise profit on ordinary activities before tax on profit.
[2] Employees shall comprise all persons employed in the enterprise who have a contract of employement and receive remuneration.
[3] See Article 3(3), (4) and (5).

SECTION 4

Personal and financial links

With respect to each undertaking or person disclosed in response to Section 3 provide:

4.1. a list of all other undertakings which are active on affected markets (affected markets are defined in Section 5) in which the undertakings of the group hold individually or collectively 10% or more of the voting rights or issued share capital. In each case state the percentage held;

4.2. a list of all other undertakings which are active on affected markets in which the persons disclosed in response to Section 3 hold 10% or more of the voting rights or issued share capital. In each case state the percentage held;

4.3. a list for each undertaking of the members of their boards of management who are also members of the boards of management or of the supervisory boards of any other undertaking, which is active on affected markets; and (where applicable) for each undertaking a list of the members of their supervisory boards who are also members of the board of management of any other undertaking which is active on affected markets;

in each case stating the name of the other undertaking and the position held.

Information provided here may be illustrated by the use of charts or diagrams where this helps to give a better understanding.

SECTION 5

Information on affected markets

The notifying party shall provide the data requested having regard to the following definitions:

PRODUCT MARKETS

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

A relevant product market may in some cases be composed of a number of individual product groups. An individual product group is a product or small group of products which present largely identical physical or technical characteristics and are fully interchangeable. The difference between products within the group will be small and usually only a matter of brand and/or image. The product market will usually be the classification by the undertaking in its marketing operations.

RELEVANT GEOGRAPHIC MARKET

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 the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preferences, appreciable differences of the undertakings' market shares between neighbouring areas or substantial price differences.

AFFECTED MARKETS

Affected markets consists of relevant product markets or individual product groups in the EEA territory, in the common market, in the territory of the EFTA States, in a Member State or in an EFTA State or, where different, in any relevant geographic market where:

(a) two or more of the parties (including undertakings belonging to the same group as defined in Section 3) are engaged in business activities in the same product market or individual product group and where the concentration will lead to a combined market share of 10% or more. These are horizontal relationships; or

(b) any of the parties (including undertakings belonging to the same group as defined in Section 3) is engaged in business activities in a product market which is upstream or downstream of a product market or individual product group in which any other party is engaged and any of their market shares is 10% or more, regardless of whether there is not any existing supplier/customer relationship between the parties concerned. These are vertical relationships.

I. *Explanation of the affected relevant product markets*

5.1. Describe each affected relevant product market and explain why the products and/or services in these markets are included (and why others are excluded) by reason of their characteristics, their prices and their intended use.

5.2. List the individual product groups defined internally by your undertaking for marketing purposes which are covered by each relevant product market described under 5.1.

II. *Market data on affected markets*

For each affected relevant product market and, where different, individual product group, for each of the last three financial years:

(a) for the EEA territory;

(b) for the Community as a whole;

(c) for the territory of the EFTA States as a whole;

(d) individually for each Member State where the parties (including undertakings belonging to the same group as defined in Section 3) do business;

(e) individually for each EFTA State where the parties (including undertakings belonging to the same group as defined in Section 3) do business;

(f) and where different, for any relevant geographic market;

provide the following:

5.3. an estimate of the value of the market and, where appropriate, of the volume (for example in units shipped or delivered) of the market.[1] If available, include statistics prepared by other sources to illustrate your answer. Also provide a forecast of the evolution of demand on the affected markets;

5.4. the turnover of each of the groups to which the parties belong (as defined in Section 3);

5.5. an estimate of the market share of each of the groups to which the parties belong;

5.6. an estimate of the market share (in value and where appropriate volume) of all competitors having at least 10% of the geographic market under consideration. Provide the name, address and telephone number of these undertakings;

5.7. a comparison of prices charged by the groups to which the parties belong in each of the Member States and each of the EFTA States and a similar comparison of such price levels between the Community, the EFTA States and their major trading partners (e.g. the United States and Japan);

5.8. an estimate of the value (and where appropriate volume) and source of imports to the relevant geographic market;

5.9. the proportion of such imports that are derived from the groups to which the parties belong;

5.10. an estimate of the extent to which any of these imports are affected by any tariff or non-tariff barriers to trade.

III. *Market data on conglomerate aspects*

In the absence of horizontal or vertical relationship, where any of the parties (including undertakings belonging to the same group as defined in Section 3) holds a market share of 25% or more for any product market or individual product group, provide the following information:

5.11. a description of each relevant product market and explain why the products and/or services in these markets are included (and why others are excluded) by reason of their characteristics, their prices and their intended use;

5.12. a list of the individual product groups defined internally by your undertaking for marketing purposes which are covered by each relevant product market described;

5.13. an estimate of the value of the market and the market shares of each of the groups to which the parties belong for each affected relevant product market and, where different, individual product group, for the last financial year:

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[1] The value and volume of a market should reflect output less exports plus imports for the geographic market under consideration.

(a) for the EEA territory as a whole;

(b) for the Community as a whole;

(c) for the territory of the EFTA States as a whole;

(d) individually for each Member State where the groups to which the parties belong do business;

(e) individually for each EFTA State where the groups to which the parties belong do business;

(f) and where different, for any relevant geographical market.

In each response in Section 5 the notifying party shall explain the basis of the estimates used or assumptions made.

SECTION 6

General conditions in affected markets

The following information shall be provided in relation to the affected relevant product markets and, where different, affected individual product groups.

RECORD OF MARKET ENTRY

6.1. Over the last five years (or a longer period if this is more appropriate) has there been any significant entry to these markets in the Community or in the territory of the EFTA States? If the answer is 'yes', provide information on these entrants, estimating their current market shares.

6.2. In the opinion of the notifying party are there undertakings (including those at present operating only in extra-Community or extra-EEA markets) that could enter the Community's or EFTA's markets? If the answer is 'yes', provide information on these potential entrants.

6.3. In the opinion of the notifying party what is the likelihood of significant market entry over the next five years?

FACTORS INFLUENCING MARKET ENTRY

6.4. Describe the various factors influencing entry into affected markets that exist in the present case, examining entry from both a geographical and product viewpoint. In so doing take account of the following where appropriate:

— the total costs of entry (capital, promotion, advertising, necessary distribution systems, servicing, etc.) on a scale equivalent to a significant viable competitor, indicating the market share of such a competitor,

— 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 licensing patents, know-how and other rights in these markets.

VERTICAL INTEGRATION

6.5. Describe the nature and extent of vertical integration of each of the parties.

RESEARCH AND DEVELOPMENT

6.6. Give an account of the importance of research and development in the ability of a firm operating on the relevant market to compete in the long term. Explain the nature of the research and development in affected markets carried out by the undertakings to the concentration.

In so doing take account of the following where appropriate:

— the research and development intensities[1] for these markets and the relevant research and development intensities for the parties concerned,

— the course of technological development for these markets over an appropriate time period (including developments in products and/or services, production processes, distribution systems etc.),

— the major innovations that have been made in these markets over this time period and the undertakings responsible for these innovations,

— the cycle of innovation in these markets and where the parties are in this cycle of innovation,

— describe the extent to which the parties concerned are licensees or licensors of patents, know-how and other rights in affected markets.

DISTRIBUTION AND SERVICE SYSTEMS

6.7. Explain the distribution channels and service networks that exist on the affected markets. In so doing take account of the following where appropriate:

— the distribution systems prevailing on the market and their importance. To what extent is distribution performed by third parties and/or undertakings belonging to the same group as the parties as disclosed in Section 3?

— the service networks (for example maintenance and repair) prevailing and their importance in these markets. To what extent are such services performed by third parties and/or undertakings belonging to the same group as the parties as disclosed in Section 3?

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

COMPETITIVE ENVIRONMENT

6.8. Give details (names, addresses and contacts) of the five largest suppliers to the notifying parties and their individual share of the purchases of the notifying parties.

6.9. Give details (names, addresses and contacts) of the five largest customers of the notifying parties and their individual share of the sales of the notifying parties.

6.10. Explain the structure of supply and demand in affected markets. This explanation should allow the Commission further to appreciate the competitive environment in which the parties carry out their business. In so doing take account of the following where appropriate:

— the phases of the markets in terms of, for example, take-off, expansion, maturity and decline. In the opinion of the notifying party, where are the affected products in these phases?

— the structure of supply. Give details of the various identifiable categories that comprise the supply side and describe the 'typical supplier' of each category,

— the structure of demand. Give details of the various identifiable groups that comprise the demand side and describe the 'typical customer' of each group,

— whether public authorities, government agencies or State enterprises or similar bodies are important participants as sources of supply or demand. In any instance where this is so give details of this participation,

— the total Community-wide and EFTA-wide capacity for the last three years. Over the period what proportion of each of these capacities is accounted for by the parties and what have been their respective rates of capacity utilization?

COOPERATIVE AGREEMENTS

6.11. to what extent do cooperative agreements (horizontal and/or vertical) exist in the affected markets?

6.12. Give details of the most important cooperative agreements, research and development, specialization, distribution, long-term supply and exchange of information agreements.

TRADE ASSOCIATIONS

6.13. List the names and addresses of the principal trade associations in the affected markets.

WORLD-WIDE CONTEXT

6.14. Describe the world-wide context of the proposed concentration indicating the position of parties in this market.

SECTION 7

General matters

7.1. Describe how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers, and the development of technical progress.

7.2. In the event that the Commission finds that the operation notified does not constitute a concentration within the meaning of Article 3 of Regulation (EEC) No 4064/89, do you request that the notification be treated as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Regulation No 17, as an application within the meaning of Article 12 or a notification within the meaning of Article 14 of Regulation (EEC) No 1017/68, as an application within the meaning of Article 12 of Regulation (EEC) No 4056/86 or as an application within the meaning of Article 3(2) or 5 of Regulation (EEC) No 3975/87?

SECTION 8

Declaration

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

The undersigned declare that the information given in this notification is correct to the best of their knowledge and belief, 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 provisions of Article 14(1)(b) of Regulation (EEC) No 4064/89.

Place and date: ....

Signatures: ....

....

....

GUIDANCE NOTE I[1]

CALCULATION OF TURNOVER FOR CREDIT AND OTHER FINANCIAL INSTITUTIONS

(Article 5(3)(a))

For the calculation of turnover for credit institutions and other financial institutions, we give the following example (proposed merger between bank A and bank B)

I. Consolidated balance sheets

(in million ecu)

Assets	Bank A		Bank B	
Loans and advances to credit institutions:	20 000		1 000	
— to credit institutions within the Community:		(10 000)		(500)
— to credit institutions within one (and the same) Member State X:		(5 000)		(500)
Loans and advances to customers:	60 000		4 000	
— to Community residents:		(30 000)		(2 000)
— to residents of one (and the same) Member State X:		(15 000)		(500)
Other assets:	20 000		1 000	
Total assets:	100 000		6 000	

II. Calculation of turnover

In place of turnover, the following figures shall be used:

	Bank A	*Bank B*
1. *Aggregate worldwide turnover* is replaced by one tenth of total assets: the total sum of which is more than ECU 5 000 million.	10 000	600

2. *Community-wide turnover*
   is replaced by, for each bank, one tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers within the Community; to the total sum of loans and advances to credit institutions and customers.

[1] In the following guidance notes, the terms 'institution' or 'undertaking' are used subject to the exact delimitation in each case.

	Bank A	*Bank B*
This is calculated as follows:		
one tenth of total assets:	10 000	600
which is multiplied for each bank by the ratio between:		
loans and advances to credit institutions	10 000	500
and customers within the Community	30 000	2 000
	40 000	2 500
and		
the total sum of loans and advances to credit institutions	20 000	1 000
and customers	60 000	4 000
	80 000	5 000

For

Bank A: 10 000 multiplied by (40 000 : 80 000) = 5 000

Bank B: 600 multiplied by (2 500 : 5 000) = 300

which exceeds ECU 250 million for each of the banks.

3. *Total turnover within one (and the same) Member State X*

	Bank A	*Bank B*
is replaced by one tenth of total assets:	10 000	600

which is multiplied for each bank by the ratio between loans and advances to credit institutions and customers within one and the same Member State X; to the total sum of loans and advances to credit institutions and customers.

	Bank A	*Bank B*
This is calculated as follows:		
loans and advances to credit institutions	5 000	500
and customers within one (and the same) Member State X	15 000	500
	20 000	1 000
and		
the total sum of loans and advances to credit institutions and customers	80 000	5 000

For

Bank A: 10 000 multiplied by (20 000 : 80 000) = 2 500

Bank B: 600 multiplied by (1 000 : 5 000) = 120

Result:

50% of bank A's and 40% of bank B's Community-wide turnover are achieved in one (and the same) Member State X.

III. Conclusion

Since

(a) the aggregate worldwide turnover of bank A plus bank B is more than ECU 5 000 million;

(b) the Community-wide turnover of each of the banks is more than ECU 250 million; and

(c) each of the banks achieve less than two thirds of its Community-wide turnover in one (and the same) Member State,

the proposed merger would fall under the scope of the Regulation.

GUIDANCE NOTE II

CALCULATION OF TURNOVER FOR INSURANCE UNDERTAKINGS

(Article 5(3)(b))

For the calculation of turnover for insurance undertakings, we give the following example (proposed concentration between insurances A and B):

I. Consolidated profit and loss account

(in million ecu)

Income	Insurance A	Insurance B
Gross premiums written	5 000	300
— gross premiums received from Community residents:	(4 500)	(300)
— gross premiums received from residents of one (and the same) Member State X:	(3 600)	(270)
Other income:	500	50
Total income:	5 500	350

II. Calculation of turnover

1. *Aggregate worldwide turnover*

   is replaced by the value of gross premiums written worldwide, the sum of which is ECU 5 300 million.

2. *Community-wide turnover*

   is replaced, for each insurance undertakings, by the value of gross premiums written with Community residents. For each of the insurance undertakings, this amount is more than ECU 250 million.

3. *Turnover within one (and the same) Member State X*

   is replaced, for insurance undertakings, by the value of gross premiums written with residents of one (and the same) Member State X.

   For insurance A, it achieves 80% of its gross premiums written with Community residents within Member State X, whereas for insurance B, it achieves 90% of its gross premiums written with Community residents in that Member State X.

III. Conclusion

Since

(a) the aggregate worldwide turnover of insurances A and B, as replaced by the value of gross premiums written worldwide, is more than ECU 5 000 million;

(b) for each of the insurance undertakings, the value of gross premiums written with Community residents is more than ECU 250 million; but

(c) each of the insurance undertakings achieves more than two thirds of the gross premiums written with Community residents in one (and the same) Member State X,

the proposed concentration would not fall under the scope of the Regulation.

GUIDANCE NOTE III

CALCULATION OF TURNOVER FOR JOINT UNDERTAKINGS

A. *CREATION OF A JOINT UNDERTAKING* (Article 3(2))

In a case where two (or more) undertakings create a joint undertaking that constitutes a concentration, turnover is calculated for the undertakings concerned.

B. *EXISTENCE OF A JOINT UNDERTAKING* (Article 5(5))

For the calculation of turnover in case of the existence of a joint undertaking C between two undertakings A and B concerned in a concentration, we give the following example:

I. Profit and loss accounts

(in million ecu)

Turnover	Undertaking A	Undertaking B
Sales revenues worldwide	10 000	2 000
— Community	(8 000)	(1 500)
— Member State Y	(4 000)	(900)

(in millionn ecu)

Turnover	Joint undertaking C
Sales revenues worldwide	100
— with undertaking A	(20)
— with undertaking B	(10)
Turnover with third undertakings	70
— Community-wide	(60)
— in Member State Y	(50)

II. Consideration of the joint undertaking

(a) The undertaking C is jointly controlled (in the meaning of Article 3(3) and (4)) by the undertakings A and B concerned by the concentration, irrespective of any third undertaking participating in that undertaking C.

(b) The undertaking C is not consolidated by A and B in their profit and loss accounts.

(c) The turnover of C resulting from operations with A and B shall not be taken into account.

(d) The turnover of C resulting from operations with any third undertaking shall be apportioned equally amongst the undertakings A and B, irrespective of their individual shareholdings in C.

(e) Any joint undertaking existing between one of the undertakings concerned and any third undertaking shall (unless already consolidated) not be taken into account.

III. Calculation of turnover

(a) Undertaking A's aggregate worldwide turnover shall be calculated as follows: ECU 10 000 million and 50% of C's worldwide turnover with third undertakings (i.e. ECU 35 million), the sum of which is ECU 10 035 million.

Undertaking B's aggregate worldwide turnover shall be calculated as follows: ECU 2 000 million and 50% of C's worldwide turnover with third undertakings (i.e. ECU 35 million), the sum of which is ECU 2 035 million.

(b) The aggregate worldwide turnover of the undertakings concerned is ECU 12 070 million.

(c) Undertaking A achieves ECU 4 025 million within Member State Y (50% of C's turnover in this Member State taken into account), and a Community-wide turnover of ECU 8 030 million (including 50% of C's Community-wide turnover);

and undertaking B achieves ECU 925 million within Member State Y (50% of C's turnover in this Member State taken into account), and a Community-wide turnover of ECU 1 530 million (including 50% of C's Community-wide turnover.

IV. Conclusion

Since

(a) the aggregate worldwide turnover of undertakings A and B is more than ECU 5 000 million,

(b) each of the undertakings concerned by the concentration achieves more than ECU 250 million within the Community,

(c) each of the undertakings concerned (undertaking A 50.1% and undertaking B 60.5%) achieves less than two thirds of its Community-wide turnover in one (and the same) Member State Y,

the proposed concentration would fall under the scope of the Regulation.

GUIDANCE NOTE IV

APPLICATION OF THE TWO-THIRDS RULE

(Article 1)

For the application of the two-thirds rule for undertakings, we give the following examples (proposed concentration between undertakings A and B):

I. Consolidated profit and loss accounts

EXAMPLE 1

(in million ecu)

Turnover	Undertaking A	Undertaking B
Sales revenues worldwide	10 000	500
— within the Community	(8 000)	(400)
— in Member State X	(6 000)	(200)

EXAMPLE 2 (a)

(in million ecu)

Turnover	Undertaking A	Undertaking B
Sales revenues worldwide	4 800	500
— within the Community	(2 400)	(400)
— in Member State X	(2 100)	(300)

EXAMPLE 2 (b)

same figures as in example 2 (a), BUT undertaking B achieves ECU 300 million in Member State Y.

II. Application of the two-thirds rule

EXAMPLE 1

1. *Community-wide turnover*

   is, for undertaking A, ECU 8 000 million and for undertaking B, ECU 400 million.

2. *Turnover in one (and the same) Member State X*

   is, for undertaking A (ECU 6 000 million), 75% of its Community-wide turnover and is, for undertaking B (ECU 200 million), 50% of its Community-wide turnover.

3. *Conclusion*

   In this case, although undertaking A achieves more than two thirds of its Community-wide turnover in Member State X. the proposed concentration would fall under the scope of the Regulation due to the fact that undertaking B achieves less than two thirds of its Community-wide turnover in Member State X.

EXAMPLE 2 (a)

1. *Community-wide turnover*
   of undertaking A is ECU 2 400 million and of undertaking B, ECU 400 million.

2. *Turnover in one (and the same) Member State X*
   is, for undertaking A, ECU 2 100 million (i.e. 87.5% of its Community-wide turnover); and, for undertaking B, ECU 300 million (i.e. 75% of its Community-wide turnover).

3. *Conclusion*
   In this case, each of the undertakings concerned achieves more than two thirds of its Community-wide turnover in one (and the same) Member State X; the proposed concentration would not fall under the scope of the Regulation.

EXAMPLE 2 (b)

Conclusion

In this case, the two-thirds rule would not apply due to the fact that undertakings A and B achieve more than two thirds of their Community-wide turnover in different Member States X and Y. Therefore, the proposed concentration would fall under the scope of the Regulation.

II — Commission notices

Commission notice regarding restrictions ancillary to concentrations[1]

(90/C 203/05)

I. Introduction

1. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ('the Regulation')[2] states in its 25th recital that its application is not excluded where the undertakings concerned accept restrictions which are directly related and necessry to the implementation of the concentration, hereinafter referred to as 'ancillary restrictions'. In the scheme of the Regulation, such restrictions are to be assessed together with the concentration itself. It follows, as confirmed by Article 8(2), second subparagraph, last sentence of the Regulation, that a decision declaring the concentration compatible also covers these restrictions. In this situation, under the provisions of Article 22, paragraphs 1 and 2, the Regulation is solely applicable, to the exclusion of Regulation No 17[3] as well as Regulations (EEC) No 1017/68,[4] (EEC) No 4056/86[5] and (EEC) No 3975/87.[6] This avoids parallel Commission proceedings, one concerned with the assessment of the concentration under the Regulation, and the other aimed at the application of Articles 85 and 86 to the restrictions which are ancillary to the concentration.

2. In this notice, the Commission sets out to indicate the interpretation it gives to the notion of 'restrictions directly related and necessary to the implementation of the concentration'. Under the Regulation such restrictions must be assessed in relation to the concentration, whatever their treatment might be under Articles 85 and 86 if thery were to be considered in isolation or in a different economic context. The Commission endeavours, within the limits set by the Regulation, to take the greatest account of business practice and of the conditions necessary for the implementation of concentrations.

This motive is without prejudice to the interpretation which may be given by the Court of Justice of the European Communities.

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[1] OJ C 203, 14.8.1990, p. 5.
[2] OJ L 395, 30.12.1989, p. 1, as amended in OJ L 257, 21.9.1990, p. 13.
[3] OJ 13, 21.2.1962, p. 204/62.
[4] OJ L 175, 23.7.1968, p. 1.
[5] OJ L 378, 31.12.1986, p. 4.
[6] OJ L 374, 31.12.1987, p. 1.

II. Principles of evaluation

3. The 'restrictions' meant are those agreed on between the parties to the concentration which limit their own freedom of action in the market. They do not include restrictions to the detriment of third parties. If such restrictions are the inevitable consequence of the concentration itself, they must be assessed together with it under the provisions of Article 2 of the Regulation. If, on the contrary, such restrictive effects on third parties are separable from the concentration they may, if appropriate, be the subject of an assessment of compatibility with Articles 85 and 86 of the EEC Treaty.

4. For restrictions to be considered 'directly related' they must be ancillary to the implementation of the concentration, that is to say subordinate in importance to the main object of the concentration. They cannot be substantial restrictions wholly different in nature from those which result from the concentration itself. Neither are they contractual arrangements which are among the elements constituting the concentration, such as those establishing economic unity between previously independent parties, or organizing joint control by two undertakings of another undertaking. As integral parts of the concentration, the latter arrangements constitute the very subject matter of the evaluation to be carried out under the Regulation.

Also excluded, for concentrations which are carried out in stages, are the contractual arrangements relating to the stages before the establishment of control within the meaning of Article 3, paragraphs 1 and 3 of the Regulation. For these, Articles 85 and 86 remain applicable as long as the conditions set out in Article 3 are not fulfilled.

The notion of directly related restrictions likewise excludes from the application of the Regulation additional restrictions agreed at the same time which have no direct link with the concentration. It is not enough that the additional restrictions exist in the same context as the concentration.

5. The restrictions must likewise be 'necessary to the implementation of the concentration', which means that in their absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success. This must be judged on an objective basis.

6. The question of whether a restriction meets these conditions cannot be answered in general terms. In particular as concerns the necessity of the restriction, it is proper not only to take account of its nature, but equally to ensure, in applying the rule of proportionality, that its duration and subject matter, and geographic field of application, do not exceed what the implementation of the concentration reasonably requires. If alternatives are available for the attainment of the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.

These principles will be followed and further developed by the Commission's practice in individual cases. However, it is already possible, on the basis of past experience, to indicate the attitude the Commission will take to those restrictions most commonly encountered in relation to the transfer of undertakings or parts of undertakings, the division of undertakings or of their assets following a joint acquisition of control, or the creation of concentrative joint ventures.

III. Evaluation of common ancillary restrictions in cases of the transfer of an undertaking

A. *Non-competition clauses*

1. Among the ancillary restrictions which meet the criteria set out in the Regulation are contractual prohibitions on competition which are imposed on the vendor in the context of a concentration achieved by the transfer of an undertaking or part of an undertaking. Such prohibitions guarantee the transfer to the acquirer of the full value of the assets transferred, which in general include both physical assets and intangible assets such as the goodwill which the vendor has accumulated or the know-how he has developed. These are not only directly related to the concentration, but are also necessary for its implementation because, in their absence, there would be reasonable grounds to expect that the sale of the undertaking or part of an undertaking could not be accomplished satisfactorily. In order to take over fully the value of the assets transferred, the acquirer must be able to benefit from some protection against competitive acts of the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such protection cannot generally be considered necessary when *de facto* the transfer is limited to physical assets (such as land, buildings or machinery) or to exclusive industrial and commercial property rights (the holders of which could immediately take action against infringements by the transfer of such rights).

However, such a prohibition on competition is justified by the legitimate objective sought of implementing the concentration only when its duration, its geographical field of application, its subject matter and the persons subject to it do not exceed what is reasonably necessary to that end.

2. With regard to the acceptable duration of a prohibition on competition, a period of five years has been recognized as appropriate when the transfer of the undertaking includes the goodwill and know-how, and a period of two years when it includes only the goodwill. However, these are not absolute rules; they do not preclude a prohibition of longer duration in particular circumstances, where for example the parties can demonstrate that customer loyalty will persist for a period longer than two years or that the economic life cycle of the products concerned is longer than five years and should be taken into account.

3. The geographic scope of the non-competition clause must be limited to the area where the vendor had established the products or services before the transfer. It does not appear objectively necessary that the acquirer be protected from competition by the vendor in territories which the vendor had not previously penetrated.

4. In the same manner, the non-competition clause must be limited to products and services which form the economic activity of the undertaking transferred. In particular, in the case of a partial transfer of assets, it does not appear that the acquirer needs to be protected from the competition of the vendor in the products or services which constitute the activities which the vendor retains after the transfer.

5. The vendor may bind himself, his subsidiaries and commercial agents. However, an obligation to impose similar restrictions on others would not qualify as an ancillary restriction. This applies in particular to clauses which would restrict the scope for resellers or users to import or export.

6. Any protection of the vendor is not normally an ancillary restriction and is therefore to be examined under Articles 85 and 86 of the EEC Treaty.

B. *Licences of industrial and commercial property rights and of know-how*

1. The implementation of a transfer of an undertaking or part of an undertaking generally includes the transfer to the acquirer, with a view to the full exploitation of the assets transferred, of rights to industrial or commercial property or know-how. However, the vendor may remain the owner of the rights in order to exploit them for activities other than those transferred. In these cases, the usual means for ensuring that the acquirer will have the full use of the assets transferred is to conclude licensing agreements in his favour.

2. Simple or exclusive licences of patents, similar rights or existing know-how can be accepted as necessary for the completion of the transaction, and likewise agreements to grant such licences. They may be limited to certain fields of use, to the extent that they correspond to the activities of the undertaking transferred. Normally it will not be necessary for such licences to include territorial limitations on manufacture which reflect the territory of the activity transferred. Licences may be granted for the whole duration of the patent or similar rights or the duration of the normal economic life of the know-how. As such licences are economically equivalent to a partial transfer of rights, they need not be limited in time.

3. Restrictions in licence agreements, going beyond what is provided above, fall outside the scope of the Regulation. They must be assessed on their merits according to Article 85(1) and (3). Accordingly, where they fulfil the conditions required, they may benefit from the block exemptions provided for by Regulation (EEC) No 2349/84 on patent licences[1] or Regulation (EEC) No 559/89 on know-how licences.[2]

4. The same principles are to be applied by analogy in the case of licences of trademarks, business names or similar rights. There may be situations where the vendor wishes to remain the owner of such rights in relation to activities retained, but the acquirer needs the rights to use them to market the products constituting the object of the activity of the undertaking or part of an undertaking transferred.

In such circumstances, the conclusion of agreements for the purpose of avoiding confusion between trademarks may be necessary.

C. *Purchase and supply agreements*

1. In many cases, the transfer of an undertaking or part of an undertaking can entail the disruption of traditional lines of internal procurement and supply resulting from the previous integration of activities within the economic entity of the vendor. To make possible the break-up of the economic unity of the vendor and the partial transfer of the assets to the acquirer under reasonable conditions, it is often necessary to maintain, at least for a transitional period, similar links between the vendor and the acquirer. This objective is normally attained by the conclusion of purchase and supply agreements

[1] OJ L 219, 16.8.1984, p. 15.
[2] OJ L 61, 4.3.1989, p. 1.

between the vendor and the acquirer of the undertaking or part of an undertaking. Taking account of the particular situation resulting from the break-up of the economic unity of the vendor such obligations, which may lead to restrictions of competition, can be recognized as ancillary. They may be in favour of the vendor as well as the acquirer.

2. The legitimate aim of such obligations may be to ensure the continuity of supply to one or other of the parties of products necessary to the activities retained (for the vendor) or taken over (for the acquirer). Thus, there are grounds for recognizing, for a transitional period, the need for supply obligations aimed at guaranteeing the quantities previously supplied within the vendor's integrated business or enabling their adjustment in accordance with the development of the market.

Their aim may also be to provide continuity of outlets for one or the other of the parties, as they were previously assured within the single economic entity. For the same reason, obligations providing for fixed quantities, possibly with a variation clause, may be recognized as necessary.

3. However, there does not appear to be a general justification for exclusive purchase or supply obligations. Save in exceptional circumstances, for example resulting from the absence of a market or the specificity of products, such exclusivity is not objectively necessary to permit the implementation of a concentration in the form of a transfer of an undertaking or part of an undertaking.

In any event, in accordance with the principle of proportionality, the undertakings concerned are bound to consider whether there are no alternative means to the ends pursued, such as agreements for fixed quantities, which are less restrictive than exclusivity.

4. As for the duration of procurement and supply obligations, this must be limited to a period necessary for the replacement of the relationship of dependency by autonomy in market. The duration of such a period must be objectively justified.

IV. Evaluation of ancillary restrictions in the case of a joint acquisition

1. As set out in the 24th recital, the Regulation is applicable when two or more undertakings agree to acquire jointly the control of one or more other undertakings, in particular by means of a public tender offer, where the object or effect is the division among themselves of the undertakings or their assets. This is a concentration implemented in two successive stages; the common strategy is limited to the acquisition of control. For the transaction to be concentrative, the joint acquisition must be followed by a clear separation of the undertakings or assets concerned.

2. For this purpose, an agreement by the joint acquirers of an undertaking to abstain from making separate competing offers for the same undertaking, or otherwise acquiring control, may be considered an ancillary restriction.

3. Restrictions limited to putting the division into effect are to be considered directly related and necessary to the implementation of the concentration. This will apply to arrangements made between the parties for the joint acquisition of control in order to divide among

themselves the production facilities or the distribution networks together with the existing trademarks of the undertaking acquired in common. The implementation of this division may not in any circumstances lead to the coordination of the future behaviour of the acquiring undertakings.

4. To the extent that such a division involves the break-up of a pre-existing economic entity, arrangements that make the break-up possible under reasonable conditions must be considered ancillary. In this regard, the principles explained above in relation to purchase and supply arrangements over a transitional period in cases of transfer of undertakings should be applied by analogy.

V. Evaluation of ancillary restrictions in cases of concentrative joint ventures within the meaning of Article 3(2) subparagraph 2 of the Regulation

This evaluation must take account of the characteristics peculiar to concentrative joint ventures, the constituent elements of which are the creation of an autonomous economic entity exercising on a long-term basis all the functions of an undertaking, and the absence of coordination of competitive behaviour between the parent undertakings and between them and the joint venture. This condition implies in principle the withdrawal of the parent undertakings from the market assigned to the joint venture and, therefore, their disappearance as actual or potential competitors of the new entity.

A. *Non-competition obligations*

To the extent that a prohibiton on the parent undertakings competing with the joint venture aims at expressing the reality of the lasting withdrawal of the parents from the market assigned to the joint venture, it will be recognized as an integral part of the concentration.

B. *Licences for industrial and commercial property rights and know-how*

The creation of a new autonomous economic entity usually involves the transfer of the technology necessary for carrying on the activities assigned to it, in the form of a transfer of rights and related know-how. Where the parent undertakings intend none the less to retain the property rights, particularly with the aim of exploitation in other fields of use, the transfer of technology to the joint venture may be accomplished by means of licences. Such licences may be exclusive, without having to be limited in duration or territory, for they serve only as a substitute for the transfer of property rights. They must therefore be considered necessary to the implementation of the concentration.

C. *Purchase and supply obligations*

If the parent undertakings remain present in a market upstream or downstream of that of the joint venture, any purchase and supply agreements are to be examined in accordance with the principles applicable in the case of the transfer of an undertaking.

Commission notice[1] regarding the concentrative cooperative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[2]

(90/C 203/06)

I. Introduction

1. Article 3(1) of Council Regulation (EEC) No 4064//89 ('the Regulation') contains an exhaustive list of the factual circumstances which fall to be considered as concentrations. In accordance with the 23rd recital, this term refers only to operations that lead to a lasting change in the structures of the participating undertakings.

By contrast, the Regulation does not deal with operations whose object or effect is the coordination of the competitive activities of undertakings that remain independent of each other. Situations of this kind are cooperative in character. Accordingly, they fall to be assessed under the provisions of Regulations (EEC) No 17,[3] (EEC) No 1017/68,[4] No 4056/86[5] or No 3975/87.[6] The same applies to an operation which includes both a lasting structural change and the coordination of competitive behaviour, where the two are inseparable.

If the structural change can be separated from the coordination of competitive behaviour, the former will be assessed under the Regulation and the latter, to the extent that it does not amount to an ancillary restriction within the meaning of Article 8(2), second subparagraph of the Regulation, falls to be assessed under the other Regulations implementing Articles 85 and 86 of the EEC Treaty.

2. The purpose of this notice is to define as clearly as possible, in the interests of legal certainty, concentrative and cooperative situations. This is particularly important in the case of joint ventures. The same issue is raised in other forms of association between undertakings such as unilateral or reciprocal shareholdings and common directorships, and of certain operations involving more than one undertaking, such as unilateral or reciprocal transfers of undertakings or parts of undertakings, or joint acquisition of an undertaking with a view to its division. In all these cases, operations may not fall within the scope of the Regulation, where their object or effect is the coordination of the competitive behaviour of the undertakings concerned.

3. This notice sets out the main considerations which will determine the Commission's view to what extent the aforesaid operations are or are not caught by the Regulation. It is not concerned with the assessment of these operations, whether under the Regulation or any other applicable provisions, in particular Articles 85 and 86 of the EEC Treaty.

4. The principles set out in this notice will be followed and further developed by the Commission's practice in individual cases. As the operations considered are generally of a complex nature, this notice cannot provide a definitive answer to all conceivable situations.

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[1] OJ C 203, 14.8.1990, p. 10.
[2] OJ L 395, 30.12.1989, p. 1, as amended in OJ L 257, 21.9.1990, p. 13.
[3] OJ 13, 21.2.1962, p. 204/62.
[4] OJ L 175, 23.7.1968, p. 1.
[5] OJ L 378, 31.12.1986, p. 4.
[6] OJ L 374, 31.12.1987, p. 1.

5. This notice is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. Joint ventures within Article 3 of the Regulation

6. The Regulation in Article 3(2) refers to two types of joint venture: those which have as their object or effect the coordination of the competitive behaviour of undertakings which remain independent (referred to as 'cooperative joint ventures') and those which perform on a lasting basis all the functions of an autonomous economic entity and which do not give rise to coordination amongst themselves or between them and the joint venture (referred to as 'concentrative joint ventures'). The latter are concentrations and as such are caught by the Regulation. Cooperative joint ventures fall to be considered under other regulations implementing Articles 85 and 86.[1]

A. Concept of joint venture

7. To define the term 'joint venture' within the meaning of Article 3(2), it is necessary to refer to the provision of Article 3(1)(b) of the Regulation. According to the latter, JVs are undertakings that are jointly controlled by several other undertakings, the parent companies. In the context of the Regulation the term JV thus has several characteristics:

1. *Undertaking*

8. A JV must be an undertaking. That is to be understood as an organized assembly of human and material resources, intended to pursue a defined economic purpose on a long-term basis.

2. *Control by other undertakings*

9. In the context of the Regulation, a JV is controlled by other undertakings. Pursuant to Article 3(3) of the Regulation, control means the possibility of exercising, directly or indirectly, a decisive influence on the activities of the JV; whether this condition is fulfilled can only be decided by reference to all the legal and factual circumstances of the individual case.

10. Control of a JV can be based on legal, contractual or other means, within which the following elements are especially important:

— ownership or rights to the use of all or some of the JV's assets,

— influence over the composition, voting or decisions of the managing or supervisory bodies of the JV,

— voting rights in the managing or supervisory bodies of the JV,

— contracts concerning the running of the JV's business.

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[1] See footnotes 3 to 6 on previous page.

3. *Joint control*

11. A JV under the Regulation is jointly controlled. Joint control exists where the parent companies must agree on decisions concerning the JV's activities, either because of the rights acquired in the JV or because of contracts or other means establishing the joint control. Joint control may be provided for in the JV's constitution (memorandum or articles of association). However, it need not be present from the beginning, but may also be established later, in particular by taking a share in an existing undertaking.

12. There is no joint control where one of the parent companies can decide alone on the JV's commmercial activities. This is generally the case where one company owns more than half the capital or assets of the undertaking, has the right to appoint more than half of the managing or supervisory bodies, controls more than half of the votes in one of those bodies, or has the sole right to manage the undertaking's business. Where the other parent companies either have completely passive minority holdings or, while able to have a certain influence on the undertaking, cannot, individually or together, determine its behaviour, a relative majority of the capital or of the votes or seats on the decision-making bodies will suffice to control the undertaking.

13. In many cases, the joint control of the JV is based on agreements or concertation between the parent companies. Thus, a majority shareholder in a JV often extends to one or more minority shareholders a contractual right to take part in the control of the JV. If two undertakings each hold half of a JV, even if there is no agreement between them, both parent companies will be obliged permanently to cooperate so as to avoid reciprocal blocking votes on decisions affecting the JV's activity. The same applies to JVs with three or more parents, where each of them has a right of veto. A JV can even be controlled by a considerable number of undertakings that can together muster a majority of the capital or the seats or votes on the JV's decision-making bodies. However, in such cases, joint control can be presumed only if the factual and legal circumstances — especially a convergence of economic interests — support the notion of a deliberate common policy of the parent companies in relation to the JV.

14. If one undertaking's holding in another is, by its nature or its extent, insufficient to establish sole control, and if there is no joint control together with third parties, then there is no concentration within the meaning of Article 3(1)(b) of the Regulation. Articles 85 or 86 of the EEC Treaty may however be applicable on the basis of Regulation (EEC) No 17 or other implementing Regulations (see III.1).

B. Concentrative joint ventures

15. For a joint venture to be regarded as concentrative it must fulfil all the conditions of Article 3(2), subparagraph 2, which lays down a positive condition and a negative condition.

1. *Positive condition: joint venture performing on a lasting basis all the functions of an autonomous economic entity*

16. To fulfil this condition, a JV must first of all act as an independent supplier and buyer on the market. JVs that take over from their parents only specific partial responsibilities are

not to be considered as concentrations where they are merely auxiliaries to the commercial activities of the parent companies. This is the case where the JV supplies its products or services exclusively to its parent companies, or when it meets its own needs wholly from them. The independent market presence can even be insufficient if the JV achieves the majority of its supplies or sales with third parties, but remains substantially dependent on its parents for the maintenance and development of its business.

17. A JV exists on a lasting basis if it is intended and able to carry on its activity for an unlimited, or at least for a long time. If this is not the case there is generally no long-term change in the structures of the parent companies. More important than the agreed duration are the human and material resources of the JV. They must be of such nature and quantity as to ensure the JV's existence and independence in the long term. This is generally the case where the parent companies invest substantial financial resources in the JV, transfer an existing undertaking or business to it, or give it substantial technical or commercial know-how, so that after an initial starting-up period it can support itself by its own means.

18. A decisive question for assessing the autonomous character of the JV is whether it is in a position to exercise its own commercial policy. This requires, within the limits of its company objects, that it plans, decides and acts independently. In particular, it must be free to determine its competitive behaviour autonomously and according to its own economic interests. If the JV depends for its business on facilities that remain economically integrated with the parent companies' businesses, that weakens the case for the autonomous nature of the JV.

19. The JV's economic independence will not be contested merely because the parent companies reserve to themselves the right to take certain decisions that are important for the development of the JV, namely those concerning alterations of the objects of the company, increases or reductions of capital, or the application of profits. However, if the commercial policy of the JV remains in the hands of the parent undertakings, the JV may take on the aspect of an instrument of the parent undertakings' market interests. Such a situation will usually exist where the JV operates in the market of the parent undertakings. It may exist where the JV operates in markets neighbouring, or upstream or downstream of, those of the parent undertakings.

2. *Negative condition: absence of coordination of competitive behaviour*

20. Subject to what is said in the first paragraph of this notice a JV can only be considered to be concentrative within the meaning of Article 3(2), subparagraph 2 of the Regulation, if it does not have as its object or effect the coordination of the competitive behaviour of undertakings that remain independent of each other. There must not be such coordination either between the parent companies themselves or between any or all of them on the one hand and the JV on the other hand. Such coordination must not be an object of the establishment or operation of the JV, nor may it be the consequence thereof. The JV is not to be regarded as concentrative if as a result of the agreement to set up the JV or as a result of its existence or activities it is reasonably foreseeable that the competitive behaviour of a parent or of the JV on the relevant market will be influenced. Conversely, there will normally be no foreseeable coordination when all the parent companies withdraw entirely and permanently from the JV's market and do not operate on markets neighbouring those of the JV's.

21. Not every cooperation between parent companies with regard to the JV prevents a JV from being considered concentrative. Even concentrative JV's generally represent a means for parent companies to pursue common or mutually complementary interests. The establishment and joint control of a JV is, therefore, inconceivable without an understanding between the parent companies as concerns the pursuit of those interests. Irrespective of its legal form, such a concordance of interests is an essential feature of a JV.

22. As regards the relations of the parent undertakings, or any one of them, with the JV, the risk of coordination within the meaning of Article 3(2) will not normally arise where the parent undertakings are not active in the markets of the JV or in neighbouring or upstream or downstream markets. In other cases, the risk of coordination will be relatively small where the parents limit the influence they exercise to the JV's strategic decisions, such as those concerning the future direction of investment, and when they express their financial, rather than their market-oriented, interests. The membership of the JV's managing and supervisory bodies is also important. Common membership of the JV's and the parent companies' decision-making bodies may be an obstacle to the development of the JV's autonomous commercial policy.

23. The dividing line between the concordance of interests in a JV and a coordination of competitive behaviour that is incompatible with the notion of concentration cannot be laid down for all conceivable kinds of case. The decisive factor is not the legal form of the relationship between the parent companies and between them and the JV. The direct or indirect, actual or potential effects of the establishment and operation of the JV on market relationships, have determinant importance.

24. In assessing the likelihood of coordination of competitive behaviour, it is useful to consider some of the different situations which often occur:

(a) JVs that take over pre-existing activities of the parent companies;
(b) JVs that undertake new activities on behalf of the parent companies;
(c) JVs that enter the parent companies' markets;
(d) JVs that enter upstream, downstream or neighbouring markets.

(a) JVs that take over pre-existing activities of the parent companies

25. There is normally no risk of coordination where the parent companies transfer the whole of certain business activities to the JV and withdraw permanently from the JV's market so that they remain neither actual nor potential competitors — of each other nor of the JV. In this context, the notion of potential competition is to be interpreted realistically, according to the Commission's established practice.[1] A presumption of a competitive relationship requires not only that one or more of the parent companies could re-enter the JV's market at any time: this must be a realistic option and represent a commercially reasonable course in the light of all objective circumstances.

26. Where the parent companies transfer their entire business activities to the JV, and thereafter act only as holding companies, this amounts to complete merger from the economic viewpoint.

[1] See *Thirteenth Report on Competition Policy*, (1983), point 55.

27. Where the JV takes on only some of the activities that the parent companies formerly carried on independently, this can also amount to a concentration. In this case, the establishment and operation of the JV must not lead to a coordination of the parent companies' competitive behaviour in relation to other activities which they retain. Coordination of competitive behaviour between any or all of the parent companies and the JV must also be excluded. Such coordination is likely where there are close economic links between the areas of activity of the JV on one side and of the parent companies on the other. This applies to upstream, downstream and neighbouring product markets.

28. The withdrawal of the parent companies need not be simultaneous with the establishment of the JV. It is possible — so far as necessary — to allow the parent companies a short transitional period to overcome any starting-up problems of the JV, especially bottlenecks in production or supplies. This period should not normally exceed one year.

29. It is even possible for the establishment of a JV to represent a concentration situation where the parent companies remain permanently active on the JV's product or service market. In this case, however, the parent companies' geographic market must be different from that of the JV. Moreover, the markets in question must be so widely separated, or must present structures so different, that, taking account of the nature of the goods or services concerned and of the cost of (first or renewed) entry by either into the other's market, competitive interaction may be excluded.

30. If the parent companies' markets and the JV's are in different parts of the Community or neighbouring third countries, there is a degree of probability that either, if it has the necessary human and material resources, could extend its activities from the one market to the other. Where the territories are adjacent or very close to each other, this may even be assumed to be the case. At least in this last case, the actual allocation of markets gives reason to suppose that it follows from a coordination of competitive behaviour between parent companies and the JV.

(b) JVs that undertake new activities on behalf of the parent companies

31. There is normally no risk of coordination in the sense described above where the JV operates on a product or service market which the parent companies individually have not entered and will not enter in the foreseeable future, because they lack the organizational, technical or financial means or because, in the light of all the objective circumstances, such a move would not represent a commercially reasonable course. An individual market entry will also be unlikely where, after establishing the JV, the parent companies no longer have the means to make new investments in the same field, or where an additional individual operation on the JV's market would not make commercial sense. In both cases there is no competitive relationship between the parent companies and the JV. Consequently, there is no possibility of coordination of their competitive behaviour. However, this assessment is only true if the JV's market is neither upstream nor downstream of, nor neighbouring, that of the parent companies.

32. The establishment of a JV to operate in the same product or service market as the parent companies but in another geographic market involves the risk of coordination if there is competitive interaction between the parent companies' geographic market and that of the JV.

(c) JVs that enter the parent companies' market

33. Where the parent companies, or one of them, remain active on the JVs market or remain potential competitors of the JV, a coordination of competitive behaviour between the parent companies or between them and the JV must be presumed. So long as this presumption is not rebutted, the Commission will take it that the establishment of the JV does not fall under Article 3(2), subparagraph 2 of the Regulation.

(d) JVs that operate in upstream, downstream or neighbouring markets

34. If the JV is operating in a market that is upstream or downstream of that of the parent companies, then, in general, coordination of purchasing or, as the case may be, sales policy between the parent companies is likely where they are competitors on the upstream or downstream market.

35. If the parent companies are not competitors, it remains to be examined whether there is a real risk of coordination of competitive behaviour between the JV and any of the parents. This will normally be the case where the JV's sales or purchases are made in substantial measure with the parent companies.

36. It is not possible to lay down general principles regarding the likelihood of coordination of competitive behaviour in cases where the parent companies and the JV are active in neighbouring markets. The outcome will depend in particular on whether the JV's and the parent companies' products are technically or economically linked, whether they are both components of another product or are otherwise mutually complementary, and whether the parent companies could realistically enter the JV's market. If there are no concrete opportunities for competitive interaction of this kind, the Commisison will treat the JV as concentrative.

III. Other links between undertakings

1. *Minority shareholdings*

37. The taking of a minority shareholding in an undertaking can be considered a concentration within the meaning of Article 3(1)(b) of the Regulation if the new shareholder acquires the possibility of exercising a decisive influence on the undertaking's activity. If the acquisition of a minority shareholding brings about a situation in which there is an undertaking jointly controlled by two or more others, the principles described above in relation to JVs apply.

38. As long as the threshold of individual or joint decisive influence has not been reached, the Regulation is not in any event applicable. Accordingly, the assessment under competition law will be made only in relation to the criteria laid down in Articles 85 and 86 of the EEC Treaty and on the basis of the usual procedural rules for restrictive practices and abuses of dominant position.[1]

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[1] Judgment of the Court of Justice of the European Communities in Joined Cases 142 and 156/84 *BAT and Reynolds* ECR 1987, pp. 4566 and 4577.

39. There may likewise be a risk of coordination where an undertaking acquires a majority or minority interest in another in which a competitor already has a minority interest. If so, this acquisition will be assessed under Articles 85 and 86 of the EEC Treaty.

2. *Cross-shareholding*

40. In order to bring their autonomous and hitherto separate undertakings or groups closer together, company owners often cause them to exchange shareholdings in each other. Such reciprocal influences can serve to establish or to secure industrial of commercial cooperation between the undertakings or groups. But they may also result in establishing a 'single economic entity'. In the first case, the coordination of competitive behaviour between independent undertakings is predominant; in the second, the result may be a concentration. Consequently, reciprocal directorships and cross-shareholdings can only be evaluated in relation to their foreseeable effects in each case.

41. The Commission considers that two or more undertakings can also combine without setting up a parent-subsidiary relationship and without either losing its legal personality. Article 3(1) of the Regulation refers not only to legal, but also to economic concentrations. The condition for the recognition of a concentration in the form of a combined group is, however, that the undertakings or groups concerned are not only subject to a permanent, single economic management, but are also amalgamated into a genuine economic unit, characterized internally by profit and loss compensation between the various undertakings within the groups and externally by joint liability.

3. *Representation on controlling bodies of other undertakings*

42. Common membership of managing or supervisory boards of various undertakings is to be assessed in accordance with the same principles as cross-shareholdings.

43. The representation of one undertaking on the decision-making bodies of another is usually the consequence of an existing shareholding. It reinforces the influence of the investing undertaking over the activities of the undertaking in which it holds a share, because it affords it the opportunity of obtaining information on the activities of a competitor or of taking an active part in its commercial decisions.

44. Thus, common membership of the respective boards may be the vehicle for the coordination of the competitive behaviour of the undertakings concerned, or for a concentration of undertakings within the meaning of the Regulation. This will depend on the circumstances of the individual case, among which the economic link between the shareholding and the personal connection must always be examined. This is equally true of unilateral and reciprocal relationships between undertakings.

45. Personal connections not accompanied by shareholdings are to be judged according to the same criteria as shareholding relationships between undertakings. A majority of seats on the managing or supervisory board of an undertaking will normally imply control of the latter; a minority of seats at least a degree of influence over its commercial policy, which may further entail a coordination of behaviour. Reciprocal connections justify a presumption that the undertakings concerned are coordinating their business conduct. A very wide

communality of membership of the respective decision-making bodies — that is, up to half of the members or more — may be an indication of a concentration.

4. *Transfers of undertakings or parts of undertakings*

46. A transfer of assets or shares falls within the definition of a concentration, according to Article 3(1)(b) of the Regulation, if it results in the acquirer gaining control of all or of part of one or more undertakings. However, the situation is different where the transfer conferring control over part of an undertaking is linked with an agreement to coordinate the competitive behaviour of the undertakings concerned, or where it necessarily leads to or is accompanied by coordination of the business conduct of undertakings which remain independent. Cases of this kind are not covered by the Regulation: they must be examined according to Articles 85 and 86 of the EEC Treaty and under the appropriate implementing Regulations.

47. The practical application of this rule requires a distinction between unilateral and reciprocal arrangements. A unilateral acquisition of assets or shares strongly suggests that the Regulation is applicable. The contrary needs to be demonstrated by clear evidence of the likelihood of coordination of the parties' competitive behaviour. A reciprocal acquisition of assets or shares, by contrast, will usually follow from an agreement between the undertakings concerned as to their investments, production or sales, and thus serves to coordinate their competitive behaviour. A concentration situation does not exist where a reciprocal transfer of assets or shares forms part of a specialization or restructuring agreement or other type of coordination. Coordination presupposes in any event that the parties remain at least potential competitors after the exchange has taken place.

5. *Joint acquisition of an undertaking with a view to its division*

48. Where several undertakings jointly acquire another, the principles for the assessment of a joint venture are applicable, provided that within the acquisition operation, the period of joint control goes beyond the very short term. In this case the Regulation may or may not be applicable, depending on the concentrative or cooperative nature of the JV. If, by contrast, the sole object of the agreement is to divide up the assets of the undertaking and this agreement is put into effect immediately after the acquisition, then, in accordance with the 24th recital, the Regulation applies.

III — Commission declaration

Notes on council regulation (EEC) No 4064/89[1]

For all appropriate purposes and in particular with a view to clarifying the scope of certain articles of the Regulation, the following texts are drawn to the notice of interested parties:

re *Article 1*

• The Commission considers that the threshold for world turnover as set in Article 1(2)(a) of this regulation for the initial stage of implementation must be lowered to ECU 2 000 million at the end of that period. The *de minimis* threshold as set out in (b) should also be revised in the light of experience and the trend of the main threshold. It therefore undertakes to submit a proposal to that effect to the Council in due course.

• The Council and the Commission state their readiness to consider taking other factors into account in addition to turnover when the thresholds are revised.

• The Council and the Commission consider that the review of the thresholds as provided for in Article 1(3) will have to be combined with a special re-examination of the method of calculation of the turnover of joint undertakings as referred to in Article 5(5).

re *Article 2*

• The Commission states that among the factors to be taken into consideration for the purpose of establishing the compatibility or incompatibility of a concentration — factors as referred to in Article 2(1) and explained in Recital 13 — account should be taken in particular of the competitiveness of undertakings located in regions which are greatly in need of restructuring owing *inter alia* to slow development.

• Under the first subparagraph of Article 2(1), the Commission has to establish in respect of each concentration covered by the regulation whether that concentration is compatible or incompatible with the common market.

The appraisal necessary for this purpose will have to be made on the basis of the same factors as defined in Article 2(1)(a) and (b) and within that context of a single appraisal procedure.

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[1] Published in *Community merger control law*, Supplement 2/90 to the *Bulletin of the European Communities*.

If, at the end of the first stage of appraisal (within one month of notification), the Commission reaches the conclusion that the concentration is not likely to create or reinforce a dominant position within the meaning of Article 2(3), it will decide against initiating proceedings. Such a decision will then establish the concentration's compatibility with the common market. It will be presented in the form of a letter and will be notified to the undertakings concerned and to the competent authorities of the Member States.

If the Commission has decided to initiate proceedings because it concludes that there is *prima facie* a real risk of creating or reinforcing a dominant position, and if further investigation (within a maximum period of four months of the initiation of proceedings) confirms this suspicion it will declare the concentration incompatible with the common market. If, on the contrary, the initial assumption is proved to be unfounded in the light of the further investigation, possibly in view of the changes made by the undertakings concerned to their initial project, the Commission will adopt a final decision noting that the operation is compatible with operation of the common market.

The decision on compatibility is therefore only the counterpart to a decision on incompatibility or prohibition.

• The Commission considers that the concept of 'the structure of all the markets concerned' refers both to markets within the Community and to those outside it.

• The Commission considers that the concept of technical and economic progress must be understood in the light of the principles enshrined in Article 85(3) of the Treaty, as interpreted by the case-law of the Court of Justice.

re *Article 3(2), first indent*

The Commission considers that this rule also applies to consortia in the liner trades sector.

re *Article 5(3)(a)*

The Council and the Commission consider that the criterion defined as a proportion of assets should be replaced by a concept of banking income as referred to in Directive 86/635 on the annual accounts and consolidated accounts of banks and other financial institutions, either at the actual time of enty into force of the relevant provisions of that directive or at the time of the review of thresholds referred to in Article 1 of this regulation and in the light of experience acquired.

re *Article 9*

• The Council and the Commission consider that, when a specific market represents a substantial part of the common market, the referral procedure provided for in Article 9 should only be applied in exceptional cases. There are indeed grounds for taking as a basis the principle that a concentration which creates or reinforces a dominant position in a substantial part of the common market must be declared incompatible with the common market. The Council and the Commission consider that such an application of Article 9 should be confined to cases in which the interests in respect of competition of the Member State concerned could not be adequately protected in any other way.

They consider that the review of Article 9 referred to in paragraph 10 thereof should be carried out in the light of the experience gained in its application (which it is envisaged will be exceptional), having regard to the importance of the principle of exclusivity and the need to provide clarity and certainty for firms, with a view to considering whether it remains appropriate to include it in the regulation.

• The Commission states that the preparatory steps within the meaning of Article 9(4)(b) which must be taken during the period of three months are preliminary measures which should lead to a final decision within the remaining period of two-and-a-half months and normally take the form of the notification of objections within the meaning of Article 18(1).

re *Articles 9(5) and 10(5)*

The Commission states that it intends, in all cases of concentrations which are duly notified, to take the decisions provided for in Article 6(1), Article 8(2) and (3) and Article 9(3). Any Member State or undertaking concerned may ask the Commission to give written confirmation of its position with regard to the concentration.

re *Articles 12 and 13*

The Commission states that, pursuant to the principle of proportionality, it will carry out investigations within the meaning of Articles 12 and 13 only where particular circumstances so require.

re *Article 19*

The Council and the Commission agree that the arrangements for publication referred to in Article 19(7) will be reviewed after four years in the light of the experience acquired.

re *Article 21(3)*

1. Application of the general clause on 'legitimate interests' must be subject to the following principles:

• It shall create no new rights for Member States and shall be restricted to sanctioning the recognition in Community law of their present reserved powers to intervene in certain aspects of concentrations, affecting the territory coming within their jurisdiction on grounds other than those covered by this Regulation. The application of this clause therefore reaffirms Member States' ability on those grounds either to prohibit a concentration or to make it subject to additional conditions and requirements. It does not imply the attribution to them of any power to authorize concentrations which the Commission may have prohibited under this Regulation.

• Nor, by invoking the protection of the legitimate interests referred to, may a Member State justify itself on the basis of considerations which the Commission must take into account in assessing concentrations on a European scale. While mindful of the need to conserve and develop effective competition in the common market as required by the Treaty, the Commission must — in line with consistent decisions of the Court of Justice concerning the application of the rules of competition contained in the Treaty — place its assessment of the compatibility of a concentration in the overall context of the achievement of the fundamental objectives of the Treaty mentioned in Article 2, as well as that of strengthening the Community's economic and social cohesion referred to in Article 130a.

• In order that the Commission may recognize the compatibility of the public interest claimed by a Member State with the general principles and other provisions of Community law, it is essential that prohibitions or restrictions placed on the forming of concentrations should constitute neither a form of arbitrary discrimination nor a disguised restriction in trade between Member States.

• In application of the principle of necessity or efficacy and of the rule of proportionality, measures which may be taken by Member States must satisfy the criterion of appropriateness for the objective and must be limited to the minimum of action necessary to ensure protection of the legitimate interest in question. The Member States must therefore choose, where alternatives exist, the measure which is objectively the least restrictive to achieve the end pursued.

2. The Commission considers that the three specific categories of legitimate interests which any Member State may freely cite under this provision are to be interpreted as follows:

• The reference to 'public security' is made without prejudice to the provisions of Article 223 on national defence, which allow a Member State to intervene in respect of a concentration which would be contrary to the essential interests of its security and is connected with the production of or trade in arms, munitions and war material. The restriction set by that article concerning products not intended for specifically military purposes should be complied with.

There may be wider considerations of public security, both in the sense of Article 224 and in that of Article 36, in addition to defence interests in the strict sense. Thus the requirement for public security, as interpreted by the Court of Justice, could cover security of supplies to the country in question of a product or service considered of vital or essential interest for the protection of the population's health.

• The Member States' right to plead the 'plurality of the media' recognizes the legitimate concern to maintain diversified sources of information for the sake of plurality of opinion and multiplicity of views.

• Legitimate invocation may also be made of the prudential rules in Member States, which relate in particular to financial services; the application of these rules is normally confined to national bodies for the surveillance of banks, stockbroking firms and insurance companies. They concern, for example, the good repute of individuals, the honesty of transactions and the rules of solvency. These specific prudential criteria are also the subject of efforts aimed at a minimum degree of harmonization being made in order to ensure uniform 'rules of play' in the Community as a whole.

re *Article 22*

• The Commission states that it does not normally intend to apply Articles 85 and 86 of the Treaty establishing the European Economic Community to concentrations as defined in Article 3 other than by means of this regulation.

However, it reserves the right to take action in accordance with the procedures laid down in Article 89 of the Treaty, for concentrations as defined in Article 3, but which do not have a Community dimension within the meaning of Article 1, in cases not provided for by Article 22.

In any event, it does not intend to take action in respect of concentrations with a worldwide turnover of less than ECU 2 000 million or below a minimum Community turnover level of ECU 100 million or which are not covered by the threshold of two-thirds provided for in the last part of the sentence in Article 1(2), on the grounds that below such levels a concentration would not normally significantly affect trade between Member States.

• The Council and the Commission note that the Treaty establishing the European Economic Community contains no provisions making specific reference to the prior control of concentrations.

Acting on a proposal from the Commission, the Council has therefore decided, in accordance with Article 235 of the Treaty, to set up a new mechanism for the control of concentrations.

The Council and the Commission consider, for pressing reasons of legal security, that this new Regulation will apply solely and exclusively to concentrations as defined in Article 3.

• The Council and the Commission state that the provisions of Article 22(3) to (5) in no way prejudice the power of Member States other than that at whose request the Commission intervenes to apply their national laws within their respective territories.

D — Coal and steel

HIGH AUTHORITY DECISION No 24/54[1] OF 6 MAY 1954

laying down in implementation of Article 66(1) of the Treaty a Regulation on what constitutes control of an undertaking

THE HIGH AUTHORITY,

Having regard to Article 66 of the Treaty,

Whereas by virtue of Article 66(1) the High Authority must by regulation determine what constitutes control of an undertaking;

Whereas control may reside either in persons in whom certain rights are vested or in those who are entitled to exercise such rights with complete freedom,

After consulting the Council of Ministers,

DECIDES:

Article 1

The rights or contracts specified below shall constitute the elements of control of an undertaking, where either separately or jointly, and having regard to the considerations of fact or law involved, they make it possible to determine how an undertaking shall operate as regards production, prices, investments, supplies, sales and appropriation of profits:

(1) Ownership or the right to use all or part of the assets of an undertaking;

(2) Rights or contracts which confer power to influence the composition, voting or decisions of the organs of an undertaking;

(3) Rights or contracts which enable any person, by himself or in association with others, to manage the business of an undertaking;

(4) Contracts made with an undertaking concerning the computation or appropriation of its profits;

(5) Contracts made with an undertaking concerning the whole or an important part of its supplies or outlets, where the duration of these contracts or the quantities to which they relate exceed what is usual in commercial contracts dealing with those matters.

Article 2

There shall be no control of an undertaking within the meaning of Article 1 where, upon formation of an undertaking or increase of its capital, banks or financial institutions acquire shares in that undertaking with a view to selling them on the market but do not exercise voting rights in respect of those shares.

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[1] OJ of the High Authority No 9, 11.5.1954, p. 345 (Special Edition 1952-58, p. 16).

Article 3

1. The elements specified in Article 1 shall constitute control of an undertaking by individuals, undertakings or groups of persons or of undertakings who:

(1) are holders of the rights or entitled to rights under the contracts concerned;

(2) while not being holders of such rights or entitled to rights under such contracts, have power to exercise the rights deriving therefrom;

(3) in a fiduciary capacity own assets of an undertaking or shares in an undertaking, and have power to exercise the rights attaching thereto.

2. If, however, the power to exercise the rights of another person is derived from a legal act, the provisions contained in subparagraphs (2) and (3) of the preceding paragraph shall not apply where the holder of the power proves:

(1) that his power may be revoked at any time; and

(2) that he is bound by special instructions from the donor; and

(3) that he is authorized to communicate to the High Authority, should it so request, the name and address of the donor.

Article 4

This Decision shall enter into force within the Community on 1 June 1954.

This Decision was considered and adopted by the High Authority at its meeting on 6 May 1954.

HIGH AUTHORITY DECISION No 26/54[1] OF 6 MAY 1954
laying down in implementation of Article 66(4) of the Treaty a Regulation concerning information to be furnished

THE HIGH AUTHORITY,

Having regard to Article 66 of the Treaty,

Whereas transactions bringing about concentrations directly or indirectly involving undertakings in the Community may be carried out by natural or legal persons outside its jurisdiction;

Whereas it is necessary for the implementation of Article 66 that the requisite information should be obtainable from those participating in such transactions;

Whereas a general request for information should be made only in respect of transactions that are substantial both as regards their absolute value and the size of the undertakings involved;

Whereas however application of Article 66 presupposes the possibility that information may be obtained in other cases, subject to the scope of such information being defined in a general decision,

after consulting the Council of Ministers,

DECIDES:

PART ONE

Compulsory notification

Article 1

All natural and legal persons except engaged within the Community in the production of coal and steel or in the distribution of those products other than by way of sale to domestic consumers or small craft industries shall, where they effect transactions specified in the following Articles, furnish information as provided for in this Regulation.

Article 2

The persons referred to in Article 1 shall notify the High Authority of any acquisition of rights in an undertaking as defined in Article 80 of the Treaty and any acquisition of power to exercise on their own behalf or on behalf of third parties rights in any such undertaking, whereby they acquire more than 10% of the voting power at meetings of shareholders or other members of such undertaking and where the total value of the rights held by them exceeds 100 000 EPU units of account. Any rights, or power to exercise rights on behalf of others, held by the persons concerned before the transaction in question shall be included in that calculation.

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[1] OJ of the High Authority No 9, 11.5.1954, p. 350 (Special Edition 1952-58, p. 17).

Article 3

Article 1 shall also apply to the acquisition of rights in any undertaking which exercises control over an undertaking as defined in Article 80 of the Treaty.

Article 4

1. Banks and their agents shall be exempt from the obligation to notify the transactions mentioned in Article 2 and 3 where exercise of voting rights attaches:

— to shares belonging to customers of those or other banks; or

— to registered shares or stock in respect of which the bank is entitled to exercise such rights in a fiduciary capacity on behalf of its clients.

2. Paragraph 1 shall not affect:

— the obligation for banks to furnish information on such transactions under Article 7;

— the obligation for their customers to notify such transactions in accordance with Articles 2 and 3 or to furnish information under Article 7.

Article 5

The High Authority may, by special authorization and subject to certain conditions, grant exemption from the obligation to notify the transactions mentioned in Article 2 and 3 to duly accredited stockbrokers where they do not exercise the voting rights attaching to the stock held by them.

Article 6

The notification provided for in Article 2 and 3 shall be made within four weeks from the date on which the person required to make notification has knowledge of the transaction in question.

PART TWO

Special requests for information

Article 7

1. The High Authority may, by special request, obtain from the persons mentioned in Article 1 all information necessary for the implementation of Article 66 of the Treaty regarding:

(1) acquisition of ownership of or of rights to use premises, industrial plant or concessions of any undertaking if, before such acquisition, those premises, plant or concessions were used in the operations of that undertaking;

(2) acquisition of rights, in an undertaking, conferring voting powers at meetings of shareholders or other members of such undertaking;

(3) acquisition of the power to exercise on own behalf or on behalf of third parties rights of the kind referred to in subparagraph (2) belonging to third parties;

(4) acquisition by contract of the power to make decisions as to how the profits of an undertaking are shown in the accounts or applied;

(5) acquisition of the power to participate in the management of an undertaking, alone or with others, whether as owner, beneficiary, manager or member of the managing organs;

(6) appointment to the Board of Directors of an undertaking.

2. The persons subject to the obligation to furnish information must likewise declare to the High Authority at the latter's request the name and address of the actual owner of the rights concerned, where they are empowered:

— to exercise the rights referred to in paragraph 1 in a fiduciary capacity on behalf of a third party;

— to exercise on their own behalf or on behalf or third parties the rights referred to in paragraph 1 belonging to third parties.

Article 8

This Regulation shall enter into force within the Community on 1 June 1954.

This Decision was considered and adopted by the High Authority at its meeting on 6 May 1954.

HIGH AUTHORITY DECISION No 25/67[1] OF 22 JUNE 1967

laying down in implementation of Article 66(3) of the Treaty a Regulation concerning exemption from prior authorization, amended by Commission Decision No 2495/78/ECSC[2] of 20 October 1978 and Commission Decision No 3654/91/ECSC[3] of 13 December 1991

THE HIGH AUTHORITY,

Having regard to Articles 47, 66 and 80 of the Treaty,

Having regard to Decision No 25-54 of 6 May 1954 on rules for the application of Article 66(3) of the Treaty, relating to exemption from prior authorization (*Official Journal of the European Coal and Steel Community*, 11.5.1954, pp. 346 et seq.), as supplemented by Decision No 28-54 of 26 May 1954 (*Official Journal of the European Coal and Steel Community*, 31.5.1954, p. 381),

Whereas under Article 66(1), and subject to Article 66(3), any transaction which would in itself have the direct or indirect effect of bringing about a concentration between undertakings at least one of which falls within the scope of application of Article 80, requires the prior authorization of the High Authority; whereas the High Authority grants the authorization referred to in paragraph (1) if it finds that the proposed transaction will not give to the persons of undertakings concerned the power to influence competition within the common market, within the meaning of Article 66(2);

Whereas by Decision No 25-54 and with the concurring Opinion of the Council the High Authority in accordance with Article 66(3) exempted from the requirement of prior authorization certain classes of transaction which would bring about concentration of undertakings and which, in view of the size of the assets or of the undertakings to which they relate, taken in conjunction with the kind of concentration which they effect, and having regard to the totality of the undertakings grouped under the same control, must be deemed to meet the requirements of Article 66(2);

Whereas experience has shown that Decision No 25-54 should be adapted to take account of the changes which have occurred since that time in the volume of production in the economic structure, in market and competitive conditions; whereas this applies particularly to quantitative limits and to the ties which exist between Community undertakings and undertakings in other sectors and trading undertakings;

Whereas in concentrations between undertakings engaged in the production of coal and steel, the significance of the industrial entity being formed depends on the volume of production of the different types of products; whereas this volume should be limited both in absolute figures and in relation to production within the Community as shown in the official statistics;

Whereas in the case of concentration between undertakings engaged in production and undertakings which are not within the scope of the Treaty, account must be taken of the

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[1] OJ 154, 14.7.1967, p. 11 (Special Edition 1967, p. 186).
[2] OJ L 300, 27.10.1978, p. 21. The Text of Decision No 25-67, as amended by this Decision, was published in OJ C 255, 27.10.1978, p. 2.
[3] OJ L 348, 17.12.1991, p. 12.

privileged position which concentration can secure for Community undertakings by ensuring disposal of their products; whereas the relevant consumption of coal and steel in this respect is either the total consumption of the undertakings concerned or that of the different undertakings which are not within the scope of the Treaty but are involved in the concentration;

Whereas any concentration of undertakings in the wholesale trade which is subject to Article 66 should, in accordance with Article 80, be assessed on the basis of the volume of their sales of coal and turnover of steel, the ties which exist between a wholesale undertaking and an undertaking engaged in production not forming an obstacle to exemption for purposes of concentration with another wholesaler; whereas with regard to steel, repeated concentrations and concentrations which relate to several distribution undertakings at the same time should be limited;

Whereas special limits must be fixed for sales of scrap;

Whereas concentrations between producer undertakings and retailers and between distribution undertakings and undertakings which are not within the scope of the Treaty, may, in general, be exempted from the requirement of prior authorization;

Whereas, as regards concentrations effected by establishing control over groups, it is impossible to define general criteria for exemption; whereas concentrations of this type should accordingly be excluded from the field of application of this Decision, whether involving joint formation of new undertakings or control over groups of existing undertakings;

Whereas the High Authority should be informed of any concentration effected within the common market for coal and steel, even if exempt from prior authorization by virtue of this Decision; whereas the undertakings or the persons who obtained control should accordingly be required to declare any such concentration the size of which is not substantially below the limits fixed for exemption,

With the concurring opinion of the Council of Ministers,

DECIDES:

Concentrations between producers

Article 1

Transactions referred to in Article 66(1) which have the direct or indirect effect of bringing about concentration between undertakings engaged in production in the coal or the steel industry shall be exempted from the requirement of prior authorization where:

(1) The annual output of products specified below, achieved by all the undertakings involved in the concentration, does not exceed the following tonnages:

(a) Coal (net production screened and washed) 10 000 000 tonnes;

(b) Manufactured fuels made from coal 1 000 000 tonnes;

(c) Coke 3 000 000 tonnes;

(d) Iron ore (gross production): no limit;

(e) Agglomerated ore 4 000 000 tonnes;

(f) Pre-reduced ore 400 000 tonnes;

(g) Steelmaking pig iron 4 000 000 tonnes;

(h) Other forms of pig iron, ferro-alloys 250 000 tonnes;

(i) Crude steel (ordinary steel: ingots, semi-finished products and liquid steel) 6 000 000 tonnes;

(j) Alloy and non-alloy special steels (ingots, semi-finished products and liquid steel) 1 000 000 tonnes;

(k) Finished rolled steel products including end products 6 000 000 tonnes.

(2) The annual output of undertakings involved in the concentration shall not exceed, for any of the types of steel products listed in the Annex to this Decision, 30% of the overall output of products of this type within the Community. The overall output within the Community shall be determined according to the production statistics published by the Statistical Office of the European Communities.

Concentrations between coal producers and undertakings not falling within the scope of the Treaty

Article 2

Transactions referred to in Article 66(1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about concentration between:

(a) undertakings engaged in coal production; and

(b) undertakings not falling within the scope of Article 80,

if:

— either the annual coal consumption considered as a whole for all the undertakings involved in the concentration does not exceed 5 000 000 tonnes or

— the annual coal consumption of each of the undertakings referred to in (b) is less than 500 000 tonnes.

Concentrations between steel producers and undertakings not falling within the scope of the Treaty

Article 3

1. Transactions referred to in Article 66(1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about a concentration between:

(a) undertakings engaged in steel production; and

(b) undertakings not falling within the scope of Article 80, if:

— the annual production of undertakings referred to in (a) does not exceed 20% of the tonnages set out for the groups of products referred to in Article 1(1)(g) to (k), or

— the annual consumption of the products in question by the new group as a whole does not exceed 50% of its production of such products, or

— the undertakings referred to in (b) use no more than 50 000 tonnes of ordinary steel or 5 000 tonnes of special steels, and the resulting expansion in outlets by the undertakings referred to in (a) is no more than 100 000 tonnes of ordinary steel or 10 000 tonnes of special steels in any three-year period.

2. Tonnages used in the production of steel and in the upkeep and renewal of installations of the undertakings in question shall not be considered as steel consumption.

Concentrations between distributors

COAL

Article 4

1. Transactions referred to in Article 66(1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about concentration between undertakings engaged in coal distribution, other than sales to domestic consumers or to small craft industries (hereinafter called 'distribution undertakings') if:

(a) either the total volume of business dealt with annually by distribution undertakings involved in the concentration does not exceed 5 000 000 tonnes of coal; or

(b) the increase in the annual volume of business brought about by the concentration does not exceed 200 000 tonnes of coal. However, transactions of this type which are repeated or involve several distribution undertakings at the same time shall be exempted from the requirement of authorization only if the consequent total increase in the volume of business does not exceed 600 000 tonnes.

2. 'Volume of business' means the quantities sold by the distribution undertakings for their own account and for account of third parties. Sales to domestic consumers and to the small craft industries are not to be taken into account.

STEEL

Article 5

1. Transactions referred to in Article 66(1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about a concentration between undertakings engaged in steel distribution, other than sales to domestic consumers or to small craft industries (hereinafter called 'distribution undertakings'), if:

(a) either the total annual turnover of steel — not including scrap — achieved by the distribution undertakings involved in the concentration does not exceed ECU 500 million; or

(b) the annual turnover of steel — not including scrap — achieved by the distribution undertaking which represents one of the parties to a concentration involving only two parties does not exceed ECU 100 million. However, transactions of this type which are repeated shall be exempted from the requirement of prior authorization only if the consequent total increase in turnover does not exceed ECU 200 million in any three-year period.

2. Transactions referred to in Article 66(1) shall be exempted from the requirement of prior authorization where they have the direct or indirect effect of bringing about a concentration between undertakings engaged in scrap distribution, if:

(a) either the total annual volume of business of the distribution undertakings involved in the concentration does not exceed 1 500 000 tonnes of scrap; or

(b) the annual volume of business of the distribution undertaking which represents one of the parties to a concentration involving only two parties does not exceed 500 000 tonnes of scrap. However, transactions of this type which are repeated shall be exempted from the requirement of prior authorization only if the consequent total increase in the volume of business does not exceed 1 000 000 tonnes of scrap in any three-year period.

3. The turnover shall be ascertained by reference to the amount of products sold and invoiced for own account and for account of third parties. 'Volume of business' means the amounts sold by the distribution undertakings for their own account and for account of third parties.

Other concentrations exempted from authorization

Article 6

Transactions referred to in Article 66(1) shall be exempted from prior authorization to the extent that they have the effect of bringing about concentration:

— between undertakings engaged in production as defined in Article 80, and undertakings which sell coal or steel exclusively to domestic consumers or to small craft industries,

— between distribution undertakings and undertakings not coming within Article 80.

Concentrations effected by providing for group control

Article 7

1. Article 6 shall not apply to transactions referred to in Article 66(1) where a concentration results from the joint formation of a new undertaking or the establishment of joint control of an existing undertaking and where the transaction has the effect of bringing about a concentration between:

(a) on the one hand, a number of undertakings of which at least one falls within the scope of Article 80 and which are not concentrated among themselves but which, in fact or in law, exercise joint control (group control) over the undertaking or undertakings at (b); and

(b) on the other hand, one or more undertakings which produce, distribute or process coal or steel as a raw material.

2. Articles 1 to 5 shall not apply to transactions referred to in paragraph 1 where the production, consumption, volume of business or turnover, expressed in terms of tonnes or in terms of ecus respectively, of the undertakings involved in the concentration exceeds 50% of the levels fixed in whichever of Articles 1 to 5 would be applicable to the transaction.

3. This Article shall be without prejudice to the possible application of Article 65 to the formation of joint ventures on a cooperative basis and to restrictions which are not directly related and necessary to the implementation of the concentration.

General problem

Article 8

1. The figures to be considered in applying Articles 1 to 5 above shall be the average annual figures for production, consumption, turnover and volume of business attained during the last three financial years preceding the date of concentration.

2. In the case of undertakings which have been in existence for less than three years, the figures to be considered shall be the yearly averages calculated on the basis of production, consumption, turnover and volume of business since those undertakings came into existence.

Article 9

1. In applying Articles 1 to 7 regard shall be had to the whole of the undertakings and activities already grouped under one control or which would, as a result of concentration, be under such control.

2. Transactions within the meaning of Article 66(1), to which more than one of Articles 1 to 6 above apply, shall only be exempted from the requirements of prior authorization if the conditions of each of the relevant Articles are satisfied.

Articles 10

1. Transactions referred to in Article 66(1) which in accordance with Articles 1 to 5 are exempted from authorization, shall be notified to the Commission within two months from the time when the concentration was effected.

The notification shall be made by the undertakings or persons who have acquired control.

The notification shall contain the following information:

— a description of the transaction leading to concentration,

— the description of the undertakings which will be directly or indirectly concentrated,

— an estimate of production, sales or consumption of coal or steel of the concentrated undertakings.

2. Paragraph 1 shall not apply to concentrations which achieve less than 50% of the figures required under Articles 1 to 5 of this Decision for exemption from authorization.

Article 11

This Decision shall be published in the *Official Journal of the European Communities*. It shall enter into force on 15 July 1967.

On the same date, Decisions Nos 25-54 and 28-54 shall cease to be in force.

This Decision was considered and adopted by the High Authority at its meeting on 22 June 1967.

ANNEX

to Decision No 25/67

(Articles 1(2) and 3(1))

Permanent railway material
Sheet pilings
Wide-flanged beams
Other angles, shapes and sections, 80 mm or more and Omega sections
Tube rounds and squares
Wire rod in coils
Merchant steel
Universal plates
Hoop and strip and hot-rolled tube strip
Hot-rolled plates of 4.76 mm or more
Hot-rolled plates of 3 to 4.75 mm
Hot-rolled sheets under 3 mm
Coils (end products)
Cold-rolled sheets under 3 mm
Hoop and strip, cold-rolled, for making tinplate
Tinplate
Blackplate used as such
Galvanized, lead-coated and other clad sheets
Electrical sheet

COMMISSION DECISION No 715/78/ECSC[1] OF 6 APRIL 1978

concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 2 to 5 and 95(1) thereof,

Having regard to the opinion of the Consultative Committee,

Having regard to the unanimous assent of the Council,[2]

Whereas, under Articles 47, 54, 58, 59, 64, 65, 66 and 68 of the Treaty, the Commission has the power to impose fines and periodic penalty payments on undertakings or natural or legal persons who infringe obligations incumbent upon them with regard to information and investigations, investments, production, prices, cartels and concentrations or wages;

Whereas comparable powers are conferred upon the Commission by recommendations and decisions made under Article 95(1) and (2) for the purpose of regulating cases not provided for in the Treaty;

Whereas neither the abovementioned Articles of the Treaty nor the implementing measures taken pursuant to those Articles provide for any limitation period;

Whereas, in order to attain, pursuant to Article 5, the objectives of the Community set out in Articles 2, 3 and 4 of the Treaty and in the interests of legal certainty, it is necessary that the principle of limitation be introduced and that implementing rules be laid down; whereas, for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines but also as regards the power to enforce decisions which impose fines or periodic penalty payments; whereas such provisions should specify the length of the limitation periods, the date on which time start to run and the events which have the effect of interrupting or suspending the limitation period; whereas in this respect the interests of the parties, on the one hand, and administrative requirement, on the other, should be taken into account;

Whereas these rules must apply to all the provisions relating to fines and periodic penalty payments laid down in the Treaty and in implementing measures taken thereunder; whereas they must also apply to the relevant provisions of future implementing measures,

HAS ADOPTED THIS DECISION:

Article 1

Limitation periods in proceedings

1. The power of the Commission to impose fines for infringements of the provisions of the Treaty or of provisions made for its implementation shall be subject to a limitation period:

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[1] OJ L 94, 8.4.1978, p. 22.
[2] OJ C 316, 31.12.1977, p. 3.

(a) of three years in the case of infringements of provisions concerning applications or communications of the parties, requests for information, or the carrying out of investigations;

(b) of five years in the case of all other infringements.

2. Time shall begin to run upon the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

Article 2

Interruption of the limitation period in proceedings

1. Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one party which has participated in the infringement.

Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or Commission decisions requiring the requested information;

(b) written authorizations to carry out investigations issued to their officials by the Commission or a Commission decision ordering an investigation;

(c) the commencement of proceedings by the Commission;

(d) notification by the Commission of a letter giving the party concerned the opportunity to submit its comments, pursuant to Article 36 of the Treaty.

2. The interruption of the limitation period shall apply for all parties which have participated in the infringement.

3. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty; that period shall be extended by the time during which limitation is suspended pursuant to Article 3.

Article 3

Suspension of the limitation period in proceedings

The limitation period in proceedings shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

Article 4

Limitation period for the enforcement of sanctions

1. The power of the Commission to enforce decisions imposing fines or periodic payments for infringements of the provisions of the Treaty or of provisions made for its implementation shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

Article 5

Interruption of the limitation period for the enforcement of sanctions

1. The limitation period for the enforcement of sanctions shall be interrupted:

(a) by notification of a decision varying the original amount of the fines or periodic penalty payments or refusing an application for variation;

(b) by any action of the Commission or of a Member State at the request of the Commission, for the purpose of enforcing payments of a fine or periodic penalty payment.

2. Each interruption shall start time running afresh.

Article 6

Suspension of the limitation period for the enforcement of sanctions

The limitation period for the enforcement of sanctions shall be suspended for so long as:

(a) time to pay is allowed; or

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Communities.

Article 7

Application to transitional cases

This Decision shall also apply in respect of infringements committed before it enters into force.

Article 8

Entry into force

This Decision shall enter into force on the day of its publication in the *Official Journal of the European Communities.*

This Decision shall be binding in its entirety and directly applicable in all Member States.

COMMISSION DECISION No 379/84/ECSC[1] OF 15 FEBRUARY 1984

defining the power of officials and agents of the Commission instructed to carry out the checks provided for in the ECSC Treaty and decisions taken in application thereof

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 47 thereof,

Whereas it is necessary to define the scope of the powers to obtain information and carry out checks provided for in the first paragraph of Article 47 of the Treaty, without prejudice to the rights and powers referred to Article 86(4);

Whereas it is the task of the Commission to ensure that the objectives set out in the Treaty are attained, and in particular that undertakings fulfil the obligations imposed on them by the provisions of the Treaty and the decisions taken in application thereof;

Whereas in order to determine whether undertakings are acting in accordance with such obligations, it is necessary to carry out physical inspections and checks on their books;

Whereas such checks and inspections can be effective only if the facts and operations of which the Commission may need to have cognizance can be ascertained from undertakings' business records, including records held in automated systems of any kind; whereas the use of data-processing techniques is likely to facilitate the execution of the inspections for both parties;

Whereas undertakings must not be allowed to evade their obligations with regard to inspections by depositing their business records away from the undertaking; whereas they must therefore also permit access to such records in these cases;

Whereas it is not always possible to evaluate the material inspected whilst on the undertaking's premises and in such cases it is necessary to make copies or photocopies of or take extracts from the books or business records concerned;

Whereas in order for inspections to be rapid and effective, undertakings' managers or representatives should be required to give oral explanations on the spot to the officials or agents of the Commission;

Whereas, to ensure that all required information is collected, the Commission's officials or agents must be allowed to enter any premises, land or means of transport of the undertaking concerned, and of any third party with whom its books or business records have been deposited, and in so doing to have sight of the said books and business records so as to be able to select all those that are relevant and are to be produced for inspection;

Whereas, in order that inspections can be conducted efficiently, undertakings must actively assist the Commission's officials or agents in carrying out their duties;

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[1] OJ L 46, 16.2.1984, p. 23.

Whereas the information required may be determined only according to the purpose for which the check in question is intended;

Whereas checks should be allowed to proceed rapidly, smoothly and without interruption; whereas they should therefore be possible upon simple production of an authorization in writing from the Commission, without an individual decision being required for this purpose;

Whereas this Decision is without prejudice to the various other Decisions in force concerning inspections,

HAS ADOPTED THIS DECISION:

Article 1

1. Officials and agents of the Commission instructed to carry out the checks on undertakings provided for in the first paragraph of Article 47 of the Treaty are hereby empowered:

(a) to examine books and business records to the extent necessary for the purpose of the check, including records held in automated systems of any kind, wherever such books or business records are kept;

(b) to take copies or photocopies of or extracts from the books and business records, including data stored in automated systems of any kind;

(c) to require oral explanations on the spot;

(d) to enter any premises, land or means of transport of undertakings, and of any third party with whom books or business records have been deposited, and in so doing to have sight of the said books and business records so as to be able to select all those that are relevant and are to be produced for inspection.

2. Undertakings shall assist officials and agents of the Commission in carrying out their duties.

Article 2

Officials and agents of the Commission instructed to carry out checks shall exercise their powers upon production of an authorization in writing specifying the purpose of the check.

Article 3

Undertakings shall comply with the obligations imposed by Article 1 of this Decision without an individual decision being required for that purpose, failure to do so rendering them liable to the fines and penalties provided for in Article 47(3) of the Treaty.

Article 4

This Decision shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

This Decision shall be binding in its entirety and directly applicable in all Member States.

Commission Decision of 23 November 1990 on the implementation of hearings in connection with procedures for the application of Articles 85 and 86 of the EEC Treaty and Articles 65 and 66 of the ECSC Treaty

— see above under B-I 'General procedural rules' —

E — Public undertakings

Directives under Article 90(3) of the EC Treaty

COMMISSION DIRECTIVE[1] OF 16 MAY 1988
on competition in the markets in telecommunications terminal equipment

(88/301/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90(3) thereof,

Whereas:

1. In all the Member States, telecommunications are, either wholly or partly, a State monopoly generally granted in the form of special or exclusive rights to one or more bodies responsible for providing and operating the network infrastructure and related services. Those rights, however, often go beyond the provision of network utilization services and extend to supply of user terminal equipment for connection to the network. The last decades have seen considerable technical developments in networks, and the pace of development has been especially striking in the area of terminal equipment.

2. Several Member States have, in response to technical and economic developments, reviewed their grant of special or exclusive rights in the telecommunications sector. The proliferation of types of terminal equipment and the possibility of the multiple use of terminals means that users must be allowed a free choice between the various types of equipment available if they are to benefit fully from the technological advances made in the sector.

3. Article 30 of the Treaty prohibits quantitative restrictions on imports from other Member States and all measures having equivalent effect. The grant of special or exclusive rights to import and market goods to one organization can, and often does, lead to restrictions on imports from other Member States.

4. Article 37 of the Treaty states that 'Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to mono-

[1] OJ L 131, 27.5.1988, p. 73.

polies delegated by the State to others.' Paragraph 2 of Article 37 prohibits Member States from introducing any new measure contrary to the principles laid down in Article 37(1).

5. The special or exclusive rights relating to terminal equipment enjoyed by national telecommunications monopolies are exercised in such a way as, in practice, to disadvantage equipment from other Member States, notably by preventing users from freely choosing the equipment that best suits their needs in terms of price and quality, regardless of its origin. The exercise of these rights is therefore not compatible with Article 37 in all the Member States except Spain and Portugal, where the national monopolies are to be adjusted progressively before the end of the transitional period provided for by the Act of Accession.

6. The provision of installation and maintenance services is a key factor in the purchasing or rental of terminal equipment. The retention of exclusive rights in this field would be tantamount to retention of exclusive marketing rights. Such rights must therefore also be abolished if the abolition of exclusive importing and marketing rights is to have any practical effect.

7. Article 59 of the Treaty provides that 'restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'. Maintenance of terminals is a service within the meaning of Article 60 of the Treaty. As the transitional period has ended, the service in question, which cannot from a commercial point of view be dissociated from the marketing of the terminals, must be provided freely and in particular when provided by qualified operators.

8. Article 90(1) of the Treaty provides that 'in case of public undertakings and undertakings to which Member States grant special or exclusive rights, Members States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94'.

9. The market in terminal equipment is still as a rule governed by a system which allows competition in the common market to be distorted; this situation continues to produce infringements of the competition rules laid down by the Treaty and to affect adversely the development of trade to such an extent as would be contrary to the interests of the Community. Stronger competition in the terminal equipment market requires the introduction of transparent technical specifications and type-approval procedures which meet the essential requirements mentioned in Council Directive 86/361/EEC[1] and allow the free movement of terminal equipment. In turn, such transparency necessarily entails the publication of technical specifications and type-approval procedures. To ensure that the latter are applied transparently, objectively and without discrimination, the drawing-up and application of such rules should be entrusted to bodies independent of competitors in the market in question. It is essential that the specifications and type-approval procedures are published simultaneously and in an orderly fashion. Simultaneous publication will also ensure that behaviour contrary to the Treaty is avoided. Such simultaneous, orderly publication can be achieved only by means of a legal instrument that is binding on all the Member States. The most appropriate instrument to this end is a directive.

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[1] OJ L 217, 5.8.1986, p. 21.

10. The Treaty entrusts the Commission with very clear tasks and gives it specific powers with regard to the monitoring of relations between the Member States and their public undertakings and enterprises to which they have delegated special or exclusive rights, in particular as regards the elimination of quantitative restrictions and measures having equivalent effect, discrimination between nationals of Member States, and competition. The only instrument, therefore, by which the Commission can effectively carry out the tasks and powers assigned to it, is a Directive based on Article 90(3).

11. Telecommunications bodies or enterprises are undertakings within the meaning of Article 90(1) because they carry on an organized business activity involving the production of goods and services. They are either public undertakings or private enterprises to which the Member States have granted special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment. The grant and maintenance of special and exclusive rights for terminal equipment constitute measures within the meaning of that Article. The conditions for applying the exception of Article 90(2) are not fulfilled. Even if the provision of a telecommunications network for the use of the general public is a service of general economic interest entrusted by the State to the telecommunications bodies, the abolition of their special or exclusive rights to import and market terminal equipment would not obstruct, in law or in fact, the performance of that service. This is all the more true given that Member States are entitled to subject terminal equipment to type-approval procedures to ensure that they conform to the essential requirements.

12. Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves an abuse of a dominant position within the common market or a substantial part of it.

13. The telecommunications bodies hold individually or jointly a monopoly on their national telecommunications network. The national networks are markets. Therefore, the bodies each individually or jointly hold a dominant position in a substantial part of the market in question within the meaning of Article 86.

The effect of the special or exclusive rights granted to such bodies by the State to import and market terminal equipment is to:

— restrict users to renting such equipment, when it would often be cheaper for them, at least in the long term, to purchase this equipment. This effectively makes contracts for the use of networks subject to acceptance by the user of additional services which have no connection with the subject of the contracts,

— limit outlets and impede technical progress since the range of equipment offered by the telecommunications bodies is necessarily limited and will not be the best available to meet the requirements of a significant proportion of users.

Such conduct is expressly prohibited by Article 86(d) and (b), and is likely significantly to affect trade between Member States.

At all events, such special or exclusive rights in regard to the terminal equipment market give rise to a situation which is contrary to the objective of Article 3(f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is

not distorted, and requires *a fortiori* that competition must not be eliminated. Member States have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including Article 3(f).

The exclusive rights to import and market terminal equipment must therefore be regarded as incompatible with Article 86 in conjunction with Article 3, and the grant or maintenance of such rights by a Member State is prohibited under Article 90(1).

14. To enable users to have access to the terminal equipment of their choice, it is necessary to know and make transparent the characteristics of the termination points of the network to which the terminal equipment is to be connected. Member States must therefore ensure that the characteristics are published and that users have access to termination points.

15. To be able to market their products, manufacturers of terminal equipment must know what technical specifications they must satisfy. Member States should therefore formalize and publish the specifications and type-approval rules, which they must notify to the Commission in draft form, in accordance with Council Directive 83/189/EEC.[1] The specifications may be extended to products imported from other Member States only insofar as they are necessary to ensure conformity with the essential requirements specified in Article 2(17) of Directive 86/361/EEC that can legitimately be required under Community law. Member States must, in any event, comply with Articles 30 and 36 of the Treaty, under which an importing Member State must allow terminal equipment legally manufactured and marketed in another Member State to be imported on to its territory, and may only subject it to such type-approval and possibly refuse approval for reasons concerning conformity with the abovementioned essential requirements.

16. The immediate publication of these specifications and procedures cannot be considered in view of their complexity. On the other hand, effective competition is not possible without such publication, since potential competitors of the bodies or enterprises with special or exclusive rights are unaware of the precise specifications with which their terminal equipment must comply and of the terms of the type-approval procedures and hence their cost and duration. A deadline should therefore be set for the publication of specifications and the type-approval procedures. A period of two-and-a-half years will also enable the telecommunications bodies with special or exclusive rights to adjust to the new market conditions and will enable economic operators, especially small and medium-sized enterprises, to adapt to the new competitive environment.

17. Monitoring of type-approval specifications and rules cannot be entrusted to a competitor in the terminal equipment market in view of the obvious conflict of interest. Member States should therefore ensure that the responsibility for drawing up type-approval specifications and rules is assigned to a body independent of the operator of the network and of any other competitor in the market for terminals.

18. The holders of special or exclusive rights in the terminal equipment in question have been able to impose on their customers long-term contracts preventing the introduction of free competition from having a practical effect within a reasonable period. Users must therefore be given the right to obtain a revision of the duration of their contracts,

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[1] OJ L 109, 28.3.1983, p. 8.

HAS ADOPTED THIS DIRECTIVE:

Article 1

For the purpose of this Directive:

— 'terminal equipment' means equipment directly or indirectly connected to the termination of a public telecommunications network to send, process or receive information. A connection is indirect if equipment is placed between the terminal and the termination of the network. In eihter case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically,

  Terminal equipment also means receive-only satellite stations not reconnected to the public network of a Member State,

— 'undertaking' means a public or private body, to which a Member State grants special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment.

Article 2

Member States which have granted special or exclusive rights within the meaning of Article 1 to undertakings shall ensure that those rights are withdrawn.

They shall, not later than three months following the notification of this Directive, inform the Commission of the measures taken or draft legislation introduced to that end.

Article 3

Member States shall ensure that economic operators have the right to import, market, connect, bring into service and maintain terminal equipment. However, Member States may:

— in the absence of technical specifications, refuse to allow terminal equipment to be connected and brought into service where such equipment does not, according to a reasoned opinion of the body referred to in Article 6, satisfy the essential requirements laid down in Article 2(17) of Directive 86/361/EEC,

— require economic operators to possess the technical qualifications needed to connect, bring into service and maintain terminal equipment on the basis of objective, non-discriminatory and publicly available criteria.

Article 4

Member States shall ensure that users have access to new public network termination points and that the physical characteristics of these points are published not later than 31 December 1988.

Access to public network termination points existing at 31 December 1988 shall be given within a reasonable period to any user who so requests.

Article 5

1. Member States shall, not later than the date mentioned in Article 2, communicate to the Commission a list of all technical specifications and type-approval procedures which are used for terminal equipment, and shall provide the publication references.

Where they have not as yet been published in a Member State, the latter shall ensure that they are published not later than the dates referred to in Article 8.

2. Member States shall ensure that all other specifications and type-approval procedures for terminal equipment are formalized and published. Member States shall communicate the technical specifications and type-approval procedures in draft form to the Commission in accordance with Directive 83/189/EEC and according to the timetable set out in Article 8.

Article 6

Member States shall ensure that, from 1 July 1989, responsibility for drawing up the specifications referred to in Article 5, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.

Article 7

Member States shall take the necessary steps to ensure that undertakings within the meaning of Article 1 make it possible for their customers to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights at the time of the conclusion of the contracts.

For terminal equipment requiring type-approval, Member States shall ensure that this possibility of termination is afforded by the undertakings in question no later than the dates provided for in Article 8. For terminal equipment not requiring type-approval, Member States shall introduce this possibility no later than the date provided for in Article 2.

Article 8

Member States shall inform the Commission of the draft technical specifications and type-approval procedures referred to in Article 5(2):

— not later than 31 December 1988 in respect of equipment in category A of the list in Annex I,

— not later than 30 September 1989 in respect of equipment in category B of the list in Annex I,

— not later than 30 June 1990 in respect of other terminal equipment in category C of the list in Annex I.

Member States shall bring these specifications and type-approval procedures into force after expiry of the procedure provided for by Directive 83/189/EEC.

Article 9

Member States shall provide the Commission at the end of each year with a report allowing it to monitor compliance with the provisions of Articles 2, 3, 4, 6 and 7.

An outline of the report is attached as Annex II.

Article 10

The provisions of this Directive shall be without prejudice to the provisions of the instruments of accession of Spain and Portugal, and in particular Articles 48 and 208 of the Act of Accession.

Article 11

This Directive is addressed to the Member States.

ANNEX I

List of terminal equipment referred to in Article 8

	Category
Additional telephone set; private automatic branch exchanges (PABXs):	A
Modems:	A
Telex terminals:	B
Data-transmission terminals:	B
Mobile telephones:	B
Receive-only satellite stations not reconnected to the public network of a Member State:	B
First telephone set:	C
Other terminal equipment:	C

ANNEX II

Outline of the report provided for in Article 9

Implementation of Article 2

1. Terminal equipment for which legislation is being or has been modified.

By category of terminal equipment:

— date of adoption of the measure, or

— date of introduction of the bill, or

— date of entry into force of the measure.

2. Terminal equipment still subject to special or exclusive rights:

— type of terminal equipment and rights concerned.

Implementation of Article 3

— terminal equipment, the connection and/or commissioning of which has been restricted,

— technical qualifications required, giving reference of their publication.

Implementation of Article 4

— references of publications in which the physical characteristics are specified,

— number of existing network termination points,

— number of network termination points now accessible.

Implementation of Article 6

— independent body or bodies appointed.

Implementation of Article 7

— measures put into force, and

— number of terminated contracts.

COMMISSION DIRECTIVE[1] OF 28 JUNE 1990

on competition in the markets for telecommunications services

(90/388/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90(3) thereof,

Whereas:

(1) The improvement of telecommunications in the Community is an essential condition for the harmonious development of economic activities and a competitive market in the Community, from the point of view of both service providers and users. The Commission has, therefore, adopted a programme, set out in its Green Paper on the development of the common market for telecommunications services and equipment and in its communication on the implementation of the Green Paper by 1992, for progressively introducing competition into the telecommunications market. The programme does not concern mobile telephony and paging services, and mass communication services such as radio or television. The Council, in its resolution of 30 June 1988,[2] expressed broad support for the objectives of this programme, and in particular the progressive creation of an open Community market for telecommunications services. The last decades have seen considerable technological advances in the telecommunications sector. These allow an increasingly varied range of services to be provided, notably data transmission services, and also make it technically and economically possible for competition to take place between different service providers.

(2) In all the Member States the provision and operation of telecommunications networks and the provision of related services are generally vested in one or more telecommunications organizations holding exclusive or special rights. Such rights are characterized by the discretionary powers which the State exercises in various degrees with regard to access to the market for telecommunications services.

(3) The organizations entrusted with the provision and operation of the telecommunications network are undertakings within the meaning of Article 90(1) of the Treaty because they carry on an organized business activity, namely the provision of telecommunications services. They are either public undertakings or private enterprises to which the State has granted exclusive or special rights.

(4) Several Member States, while ensuring the performance of public service tasks, have already revised the system of exclusive or special rights that used to exist in the telecommunications sector in their country. In all cases, the system of exclusive or

[1] OJ L 192, 24.7.1990, p. 10.
[2] OJ C 257, 4.10.1988, p. 1.

special rights has been maintained in respect of the provision and operation of the network. In some Member States, it has been maintained for all telecommunications services, while in others such rights cover only certain services. All Member States have either themselves imposed or allowed their telecommunications administrations to impose restrictions on the free provision of telecommunications services.

(5) The granting of special or exclusive rights to one or more undertakings to operate the network derives from the discretionary power of the State. The granting by a Member State of such rights inevitably restricts the provision of such services by other undertakings to or from other Member States.

(6) In practice, restrictions on the provision of telecommunications services within the meaning of Article 59 to or from other Member States consist mainly in the prohibition on connecting leased lines by means of concentrators, multiplexers and other equipment to the switched telephone network, in imposing access charges for the connection that are out of proportion to the service provided, in prohibiting the routing of signals to or from third parties by means of leased lines or applying volume sensitive tariffs, without economic justification or refusing to give service providers access to the network. The effect of the usage restrictions and the excessive charges in relation to net cost is to hinder the provision to or from other Member States of such telecommunications services as:

— services designed to improve telecommunications functions, e.g. conversion of the protocol, code, format or speed,

— information services providing access to databases,

— remote data-processing services,

— message storing and forwarding services, e.g. electronic mail,

— transaction services, e.g. financial transactions, electronic commercial data transfer, teleshopping and telereservations,

— teleaction services, e.g. telemetry and remote monitoring.

(7) Articles 55, 56 and 66 of the Treaty allow exceptions on non-economic grounds to the freedom to provide services. The restrictions permitted are those connected, even occasionally, with the exercise of official authority, and those connected with public policy, public security or public health. Since these are exceptions, they must be interpreted restrictively. None of the telecommunications services is connected with the exercise of official authority involving the right to use undue powers compared with the ordinary law, privileges of public power or a power of coercion over the public. The supply of telecommunications services cannot in itself threaten public policy and cannot affect public health.

(8) The Court of Justice case-law also recognizes restrictions on the freedom to provide services if they fulfil essential requirements in the general interest and are applied without discrimination and in proportion to the objective. Consumer protection does not make it necessary to restrict freedom to provide telecommunications services since this objective can also be attained through free competition. Nor can the protection of intellectual property be invoked in this connection. The only essential requirements

derogating from Article 59 which could justify restrictions on the use of the public network are the maintenance of the integrity of the network, security of network operations and in justified cases, interoperability and data protection. The restrictions imposed, however, must be adapted to the objectives pursued by these legitimate requirements. Member States will have to make such restrictions known to the public and notify them to the Commission to enable it to assess their proportionality.

(9) In this context, the security of network operations means ensuring the availability of the public network in case of emergency. The technical integrity of the public network means ensuring its normal operation and the interconnection of public networks in the Community on the basis of common technical specifications. The concept of interoperability of services means complying with such technical specifications introduced to increase the provision of services and the choice available to users. Data protection means measures taken to warrant the confidentiality of communications and the protection of personal data.

(10) Apart from the essential requirements which can be included as conditions in the licensing or declaration procedures, Member States can include conditions regarding public-service requirements which constitute objective, non-discriminatory and transparent trade regulations regarding the conditions of permanence, availability and quality of the service.

(11) When a Member State has entrusted a telecommunications organization with the task of providing packet or circuit switched data services for the public in general and when this service may be obstructed because of competition by private providers, the Commission can allow the Member State to impose additional conditions for the provision of such a service, with respect also to geographical coverage. In assessing these measures, the Commission in the context of the achievement of the fundamental objectives of the Treaty referred to in Article 2 thereof, including that of strengthening the Community's economic and social cohesion as referred to in Article 130a, will also take into account the situation of those Member States in which the network for the provision of the packet or circuit switched services is not yet sufficiently developed and which could justify the deferment for these Member States until 1 January 1996 of the date for prohibition on the simple resale of leased line capacity.

(12) Article 59 of the Treaty requires the abolition of any other restriction on the freedom of nationals of Member States who are established in a Community country to provide services to persons in other Member States. The maintenance or introduction of any exclusive or special right which does not correspond to the abovementioned criteria is therefore a breach of Article 90 in conjunction with Article 59.

(13) Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves an abuse of a dominant position within the common market or a substantial part of it. Telecommunications organizations are also undertakings for the purposes of this Article because they carry out economic activities, in particular the service they provide by making telecommunications networks and services available to users. This provision of the network constitutes a separate services market as it is not interchangeable with other services. On each national market the competitive environment in which the network and the telecommunications services are provided is homogeneous enough for the Commission

to be able to evaluate the power held by the organizations providing the services on these territories. The territories of the Member States constitute distinct geographical markets. This is essentially due to the existing difference between the rules governing conditions of access and technical operation, relating to the provision of the network and of such services. Furthermore, each Member State market forms a substantial part of the common market.

(14) In each national market the telecommunications organizations hold individually or collectively a dominant position for the creation and the exploitation of the network because they are the only ones with networks in each Member State covering the whole territory of those States and because their governments granted them the exclusive right to provide this network either alone or in conjunction with other organizations.

(15) Where a State grants special or exclusive rights to provide telecommunications services to organizations which already have a dominant position in creating and operating the network, the effect of such rights is to strengthen the dominant position by extending it to services.

(16) Moreover, the special or exclusive rights granted to telecommunications organizations by the State to provide certain telecommunications services mean such organizations:

(a) prevent or restrict access to the market for these telecommunications services by their competitors, thus limiting consumer choice, which is liable to restrict technological progress to the detriment of consumers;

(b) compel network users to use the services subject to exclusive rights, and thus make the conclusion of network utilization contracts dependent on acceptance of supplementary services having no connection with the subject of such contracts.

Each of these types of conduct represents a specific abuse of a dominant position which is likely to have an appreciable effect on trade between Member States, as all the services in question could in principle be supplied by providers from other Member States. The structure of competition within the common market is substantially changed by them. At all events, the special or exclusive rights for these services give rise to a situation which is contrary to the objective in Article 3(f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is not distorted, and requires *a fortiori* that competition must not be eliminated. Member States have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including that of Article 3(f).

(17) The exclusive rights to telecommunications services granted to public undertakings or undertakings to which Member States have granted special or exclusive rights for the provision of the network are incompatible with Article 90(1) in conjunction with Article 86.

(18) Article 90(2) of the Treaty allows derogation from the application of Articles 59 and 86 of the Treaty where such application would obstruct the performance, in law or in fact, of the particular task assigned to the telecommunications organizations. This task consists in the provision and exploitation of a universal network, i.e. one having

general geographical coverage, and being provided to any service provider or user upon request within a reasonable period of time. The financial resources for the development of the network still derive mainly from the operation of the telephone service. Consequently, the opening-up of voice telephony to competition could threaten the financial stability of the telecommunications organizations. The voice telephony service, whether provided from the present telephone network or forming part of the ISDN service, is currently also the most important means of notifying and calling up emergency services in charge of public safety.

(19) The provision of leased lines forms an essential part of the telecommunications organizations' tasks. There is at present, in almost all Member States, a substantial difference between charges for use of the data transmission service on the switched network and for use of leased lines. Balancing those tariffs without delay could jeopardize this task. Equilibrium in such charges must be achieved gradually between now and 31 December 1992. In the mean time it must be possible to require private operators not to offer to the public a service consisting merely of the resale of leased line capacity, i.e. including only such processing, switching of data, storing, or protocol conversion as is necessary for transmission in real time. The Member States may therefore establish a declaration system through which private operators would undertake not to engage in simple resale.

However, no other requirement may be imposed on such operators to ensure compliance with this measure.

(20) These restrictions do not affect the development of trade in such an extent as would be contrary to the interests of the Community. Under these circumstances, these restrictions are compatible with Article 90(2) of the Treaty. This may also be the case as regards the measures adopted by Member States to ensure that the activities of private service providers do not obstruct the public switched-data service.

(21) The rules of the Treaty, including those on competition, apply to telex services; however, the use of this service is gradually declining throughout the Community owing to the emergence of competing means of telecommunication such as telefax. The abolition of current restrictions on the use of the switched telephone network and leased lines will allow telex messages to be retransmitted. In view of this particular trend, an individual approach is necessary. Consequently, this Directive should not apply to telex services.

(22) The Commission will in any event reconsider in the course of 1992 the remaining special or exclusive rights on the provision of services taking account of technological development and the evolution towards a digital infrastructure.

(23) Member States may draw up fair procedures for ensuring compliance with the essential requirements without prejudice to the harmonization of the latter at Community level within the framework of the Council Directives on open network provision (ONP). As regards data-switching, Member States must be able, as part of such procedures, to require compliance with trade regulations from the standpoint of conditions of permanence, availability and quality of the service, and to include measures to safeguard the task of general economic interest which they have entrusted to a tele-

communications organization. The procedures must be based on specific objective criteria and be applied without discrimination. The criteria should in particular be justified and proportional to the general interest objective, and be duly motivated and published. The Commisson must be able to examine them in depth in the light of the rules on free competition and freedom to provide services. In any event, Member States that have not notified the Commission of their planned licensing criteria and procedures within a given time may no longer impose any restrictions on the freedom to provide data transmission services to the public.

(24) Member States should be given more time to draw up general rules on the conditions governing the provision of packet- or circuit-switched data services for the public.

(25) Telecommunications services should not be subject to any restriction, either as regards free access by users to the services, or as regards the processing of data which may be carried out before messages are transmitted through the network or after messages have been received, except where this is warranted by an essential requirement in proportion to the objective pursued.

(26) The digitization of the network and the technological improvement of the terminal equipment connected to it have brought about an increase in the number of functions previously carried out within the network and which can now be carried out by users themselves with increasingly sophisticated terminal equipment. It is necessary to ensure that suppliers of telecommunications services, and notably suppliers of telephone and packet or circuit-switched data transmission services enable operators to use these functions.

(27) Pending the establishing of Community standards with a view to an open network provision (ONP), the technical interfaces currently in use in the Member States should be made publicly available so that firms wishing to enter the markets for the services in question can take the necessary steps to adapt their services to the technical characteristics of the networks. If the Member States have not yet established such technical interfaces, they should do so as quickly as possible. All such draft measures should be communicated to the Commission in accordance with Council Directive 83/189/EEC,[1] as last amended by Directive 88/182/EEC.[2]

(28) Under national legislation, telecommunications organizations are generally given the function of regulating telecommunications services, particularly as regards licensing, control of type-approval and mandatory interface specifications, frequency allocation and monitoring of conditions of use. In some cases, the legislation lays down only general principles governing the operation of the licensed services and leaves it to the telecommunications organizations to determine the specific operating conditions.

(29) This dual regulatory and commercial function of the telecommunications organizations has a direct impact on firms offering telecommunications services in competition with the organization in question. By this bundling of activities, the organizations determine or, at the very least, substantially influence the supply of services offered by their

[1] OJ L 109, 26.4.1983, p. 8.
[2] OJ L 81, 26.3.1988, p. 75.

competitors. The delegation to an undertaking which has a dominant position for the provision and exploitation of the network, of the power to regulate access to the market for telecommunications services constitutes a strengthening of that dominant position. Because of the conflict of interests, this is likely to restrict competitors' access to the markets in telecommunications services and to limit users' freedom of choice. Such arrangements may also limit the outlets for equipment for handling telecommunications messages and, consequently, technological progress in that field. This combination of activities therefore constitutes an abuse of the dominant position of telecommunications organizations within the meaning of Article 86. If it is the result of a State measure, the measure is also incompatible with Article 90(1) in conjunction with Article 86.

(30) To enable the Commission to carry out effectively the monitoring task assigned to it by Article 90(3), it must have available certain essential information. That information must in particular give the Commission a clear view of the measures of Member States, so that it can ensure that access to the network and the various related services are provided by each telecommunications organization to all its customers on non-discriminatory tariff and other terms. Such information should cover:

— measures taken to withdraw exclusive rights pursuant to this Directive,

— the conditions on which licences to provide telecommunications services are granted.

The Commission must have such information to enable it to check, in particular, that all the users of the network and services, including telecommunications organizations where they are providers of services, are treated equally and fairly.

(31) The holders of special or exclusive rights to provide telecommunications services that will in future be open to competition have been able in the past to impose long-term contracts on their customers. Such contracts would in practice limit the ability of any new competitors to offer their services to such customers and of such customers to benefit from such services. Users must therefore be given the right to terminate their contracts within a reasonable length of time.

(32) Each Member State at present regulates the supply of telecommunications services according to its own concepts. Even the definition of certain services differs from one Member State to another. Such differences cause distortions of competition likely to make the provision of cross-frontier telecommunications services more difficult for economic operators. This is why the Council, in its resolution of 30 June 1988, considered that one of the objectives of a telecommunications policy was the creation of an open Community market for telecommunications services, in particular through the rapid definition, in the form of Council Directives, of technical conditions, conditions of use and principles governing charges for an open network provision (ONP). The Commission has presented a proposal to this end to the Council. Harmonization of the conditions of access is not however the most appropriate means of removing the barriers to trade resulting from infringements of the Treaty. The Commission has a duty to ensure that the provisions of the Treaty are applied effectively and comprehensively.

(33) Article 90(3) assigns clearly-defined duties and powers to the Commission to monitor relations between Member States and their public undertakings and undertakings to

which they have granted special or exclusive rights, particularly as regards the removal of obstacles to freedom to provide services, discrimination between nationals of the Member States and competition. A comprehensive approach is necessary in order to end the infringements that persist in certain Member States and to give clear guidelines to those Member States that are reviewing their legislation so as to avoid further infringements. A Directive within the meaning of Article 90(3) of the Treaty is therefore the most appropriate means of achieving that end,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. For the purposes of this Directive:

— 'telecommunications organizations' means public or private bodies, and the subsidiaries they control, to which a Member State grants special or exclusive rights for the provision of a public telecommunications network and, when applicable, telecommunications services,

— 'special or exclusive rights' means the rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity,

— 'public telecommunications network' means the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means,

— 'telecommunications services' means services whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television,

— 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to and efficient communication through that public network,

— 'essential requirements' means the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services. These reasons are security of network operations, maintenance of network integrity, and, in justified cases, interoperability of services and data protection.

  Data protection may include protection of personal data, the confidentiality of information transmitted or stored as well as the protection of privacy,

— 'voice telephony' means the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— 'telex service' means the commercial provision for the public of direct transmission of telex messages in accordance with the relevant Comité consultatif international télé-

graphique et téléphonique (CCITT) recommendation between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— 'packet- and circuit-switched data services' means the commercial provision for the public of direct transport of data between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— 'simple resale of capacity' means the commercial provision on leased lines for the public of data transmission as a separate service, including only such switching, processing, data storage or protocol conversion as is necessary for transmission in real time to and from the public switched network.

2. This Directive shall not apply to telex, mobile radiotelephony, paging and satellite services.

Article 2

Without prejudice to Article 1(2), Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services.

Member States which make the supply of such services subject to a licensing or declaration procedure aimed at compliance with the essential requirements shall ensure that the conditions for the grant of licences are objective, non-discriminatory and transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any such refusal.

Without prejudice to Article 3, Member States shall inform the Commission no later than 31 December 1990 of the measures taken to comply with this Article and shall inform it of any existing regulations or of plans to introduce new licensing procedures or to change existing procedures.

Article 3

As regards packet- or circuit-switched data services, Member States may, until 31 December 1992, under the authorization procedures referred to in Article 2, prohibit economic operators from offering leased line capacity for simple resale to the public.

Member States shall, no later than 30 June 1992, notify to the Commission at the planning stage any licensing or declaration procedure for the provision of packet- or circuit-switched data services for the public which are aimed at compliance with:

— essential requirements, or

— trade regulations relating to conditions of permanence, availability and quality of the service, or

— measures to safeguard the task of general economic interest which they have entrusted to a telecommunications organization for the provision of switched data services, if the

performance of that task is likely to be obstructed by the activities of private service providers.

The whole of these conditions shall form a set of public-service specifications and shall be objective, non-discriminatory and transparent.

Member States shall ensure, no later than 31 December 1992, that such licensing or declaration procedures for the provision of such services are published.

Before they are implemented, the Commission shall verify the compatibility of these projects with the Treaty.

Article 4

Member States which maintain special or exclusive rights for the provision and operation of public telecommunications networks shall take the necessary measures to make the conditions governing access to the networks objective and non-discriminatory and publish them.

In particular, they shall ensure that operators who so request can obtain leased lines within a reasonable period, that there are no restrictions on their use other than those justified in accordance with Article 2.

Member States shall inform the Commission no later than 31 December 1990 of the steps they have taken to comply with this Article.

Each time the charges for leased lines are increased, Member States shall provide information to the Commission on the factors justifying such increases.

Article 5

Without prejudice to the relevant international agreements, Member States shall ensure that the characteristics of the technical interfaces necessary for the use of public networks are published by 31 December 1990 at the latest.

Member States shall communicate to the Commission, in accordance with Directive 83/189/EEC, any draft measure drawn up for this purpose.

Article 6

Member States shall ensure, as regards the provision of telecommunications services, and existing restrictions on the processing of signals before their transmission via the public network or after their reception, unless the necessity of these restrictions for compliance with public policy or essential requirements is demonstrated.

Without prejudice to harmonized Community rules adopted by the Council on the provision of an open network, Member States shall ensure as regards services providers including the telecommunications organizations that there is no discrimination either in the conditions of use or in the charges payable.

Member States shall inform the Commission of the measures taken or draft measures introduced in order to comply with this Article by 31 December 1990 at the latest.

Article 7

Member States shall ensure that from 1 July 1991 the grant of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and surveillance of usage conditions are carried out by a body independent of the telecommunications organizations.

They shall inform the Commission of the measures taken or draft measures introduced to that end no later than 31 December 1990.

Article 8

Member States shall ensure that as soon as the relevant special or exclusive rights have been withdrawn, telecommunications organizations make it possible for customers bound to them by a contract with more than one year to run for the supply of telecommunications services which was subject to such a right at the time it was concluded to terminate the contract at six months' notice.

Article 9

Member States shall communicate to the Commission the necessary information to allow it to draw up, for a period of three years, at the end of each year, an overall report on the application of this Directive. The Commission shall transmit this report to the Member States, the Council, the European Parliament and the Economic and Social Committee.

Article 10

In 1992, the Commission will carry out an overall assessment of the situation in the telecommunications sector in relation to the aims of this Directive.

In 1994, the Commission shall assess the effects of the measures referred to in Article 3 in order to see whether any amendments need to be made to the provisions of that Article, particularly in the light of technological evolution and the development of trade within the Community.

Article 11

This Directive is addressed to the Member States.

European Commission

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