COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL
concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws

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Proposal for a

DECISION OF THE COUNCIL AND THE COMMISSION
concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws

(presented by the Commission)

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL
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I. Introduction

Today, many companies are operating world wide or are concluding strategic alliances to have a greater presence in foreign markets through an international partner. The economic effects of mergers, restrictive practices or abuses of dominant positions are often felt in countries other than those in which the firms concerned are incorporated or based.

Extraterritorial Application of Competition Rules

One way for competition authorities to deal with restrictive practices with an international dimension is the use of extraterritorial jurisdiction. Many jurisdictions, including the European Community, seek to apply their competition rules under certain circumstances to behaviour taking place in a foreign country which may harm their markets.

The United States has expanded its extraterritorial jurisdiction more than any other country. In particular, the US claims jurisdiction to apply its competition laws to behaviour occurring outside its territory in order to address market access problems experienced by US exports, regardless of whether or not US consumers are harmed by the activity in question. This expansion of jurisdiction has caused political frictions in EC/US bilateral relations where it concerns behaviour occurring in the European Community.

Not only does the extraterritorial application of laws create political frictions but practical problems are also encountered due to a lack of personal jurisdiction and the difficulty of obtaining evidence located abroad.

International Cooperation

The extraterritorial application of laws is not the only means competition authorities have to ensure that anticompetitive behaviour occurring outside its territory is brought to an end. It is becoming increasingly obvious that, in order to regulate the anticompetitive behaviour of companies operating on the world wide market, efficiently and effectively, competition authorities need to cooperate with each other. Cooperation between competition enforcement agencies can also ensure that companies are not made the subject of conflicting decisions.

The Commission and the Government of the United States of America recognized this on 23 September 1991 when they entered into an agreement regarding the application of their competition laws (the "1991 Agreement")[1]. The 1991 Agreement facilitates cooperation between the Parties competition authorities and the coordination of their enforcement activities. As well as

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[1] Following a decision by the European Court of Justice, this Agreement and the exchange of interpretative letters dated May 31 and July 31, 1995 were subsequently approved on behalf of the European Community and the European Coal and Steel Community by a joint decision of the Council and the Commission of 10 April 1995 (OJ No L 95, 27.4.1995, pp. 45 - 50).

facilitating coordination, the 1991 Agreement requires a Party to take into account the important interests of the other Party at all stages of its enforcement activities ("traditional" or "negative" comity).

Positive Comity

The 1991 Agreement introduces the concept of positive comity in EC/US relations. Article V provides that a Party adversely affected by anticompetitive behaviour carried out in the territory of the other Party may request that other Party to take enforcement action.

It is clearly preferable, from the European Community's point of view, that the United States avail of the principle of positive comity when considering anticompetitive behaviour taking place within the European Community rather than seeking to apply US competition laws. Through positive comity the Commission can retain control, where it so wishes, of enforcement procedures addressing such behaviour. Positive comity also has advantages for companies as it helps to reduce the number of cases being examined by more than one competition authority, thus reducing compliance costs and the possibility of conflicting decisions being made by different competition authorities.

In addition, there are potential benefits for the European Community if it can request the US competition authorities to investigate and bring to an end anticompetitive activities occurring in the territory of the United States but adversely affecting interests of the Europe Community. Positive Comity can enable problems encountered in the extraterritorial application of jurisdiction, such as difficulties in obtaining evidence located abroad to be overcome.

II. The Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws

Before the European Community can enter into deeper cooperation with the US it is necessary to address the wide jurisdictional claims made by the US in the application of its antitrust laws. It was recognized that positive comity provides a method of addressing anticompetitive behaviour, occurring outside a country's territory, without giving rise to the need to exert extraterritorial jurisdiction

Accordingly, on 25 October 1996 the Commission was granted a mandate by the Council to enter into negotiations with the United States to seek to reach an agreement which would strengthen the positive comity provisions of the 1991 Agreement.

The Commission has negotiated a Draft Agreement[2] with the American authorities. The Draft Agreement applies where certain anticompetitive activities are occurring in whole or in a substantial part in the territory of one Party and yet at the same time also have adverse effects on the interests of the other Party. In such cases, the latter Party, may request the Party in whose territory the conduct is principally occurring to take enforcement action pursuant to its own competition rules.

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[2] Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws.

The Draft Agreement is an important step forward from Article V of the 1991 as it not only provides guidelines on how positive comity requests should be dealt with, it raises a presumption that in certain circumstances a Party will normally defer or suspend its own enforcement activities.

The presumption of deferral or suspension arises where the anticompetitive activities at issue do not have a direct, substantial and reasonably foreseeable impact on the Requesting Party's consumers, or where the anticompetitive activities occur principally in and are directed principally towards the other Party's territory. In other words the presumption arises where the Requesting Party is seeking to protect its export trade or where the centre of gravity of the anticompetitive activities is within the territory of the other Party.

There are a number of other conditions which also must be satisfied in order for the presumption of deferral or suspension to arise, including, a willingness on the part of the Requested Party to deal with the matter, to keep the Requesting Party informed of all developments and to take the latters concerns on board prior to the conclusion of the investigation. The Requested Party can only act on the basis of its own competition rules and to the extent that the relevant behaviour is caught by those rules.

While the Requested Party must agree to a number of conditions in order to give rise to the presumption of a suspension or deferral, it is not obliged to do so. There is therefore no risk that a Requested Party would be obliged to investigate a case where it was not within its interests to do so. However, very often it will be in the Requested Party's interest to bring an end to anticompetitive behaviour occurring on its territory and it may be extremely beneficial to have such behaviour brought to its attention.

The Draft Agreement recognizes that there may be circumstances where it is appropriate for both Parties to undertake parallel investigations, for example when the public interest requires that particularly serious anticompetitive activity is subject to sanction in both jurisdictions. This recognition of the possible appropriateness of parallel investigations only applies where both markets are harmed and would not apply where one Party was seeking to protect its export trade.

Mergers are not within the scope of the Draft Agreement due to US and EC merger legislation, which would not allow a deferral or suspension of action as envisaged by the Draft Agreement, due to the obligation to adopt a final decision within tight time limits.

The Explanatory Memorandum set out in Annex 1 gives a detailed description of the provisions of the Draft Agreement.

III. Legal Basis

In so far as the Draft Agreement relates to the competition rules of the EC Treaty, the legal basis for the Council to conclude the Agreement is Article 87 of the EC Treaty in conjunction with the first subparagraph of Article 228 paragraph 3 thereof. The European Parliament must be consulted before the Council can conclude the Agreement. To the extent that the Agreement applies to ECSC products, Articles 65 and 66 of the ECSC Treaty form the legal basis for the Commission to conclude the Draft Agreement.

In contrast to the 1991 Agreement, Article 235 of the EC Treaty does not apply as cases falling under the Merger Regulation are not within the scope of the Draft Agreement.

IV. Conclusion

The Commission believes that the Draft Agreement is an important development in relations with the US and represents a political commitment on the part of the US to cooperate with the Commission rather than seeking to apply its antitrust laws extraterritorially in the EU.

The Draft Agreement if entered into will formally institutionalize the political commitment that the US will normally refrain from addressing anticompetitive behaviour which does not affect US consumers, or is directed principally in and directed principally towards the European Community, where the Commission is prepared to deal with the matter.

Due to the advantages of positive comity described above, and the reinforcement thereof resulting from the important presumptions created by the Draft Agreement, the Commission proposes that the Council jointly with the Commission adopt a decision to conclude the attached Draft Agreement. To this end, a proposal for a joint Council and Commission Decision concluding the Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws is set out in Annex 2.

EXPLANATORY MEMORANDUM

The Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws

Description of the Agreement

Objective

The main objective of the Draft Agreement is to encourage the use of positive comity principles and to specify the circumstances in which positive comity should be invoked and how requests for positive comity should be dealt with.

Article I - Scope and Purpose

Article I.1 of the Draft Agreement sets out the circumstances in which the agreement will apply. Namely, where anticompetitive activities are occurring in whole or in substantial part in the territory of one Party but are adversely affecting the interests of the other Party. The activities in question must be impermissible under the competition laws of the Party in whose territory the activities are occurring.

Article I.2 sets out that the purpose of the Draft Agreement is to remove impediments to trade and investment flows and to establish through cooperation the most effective and efficient method for the enforcement of competition laws.

Article II - Definitions

The definitions used in Article II are the same as those used in the 1991 Agreement, with the important exception of the definition of competition laws. Here, on both the EC and US sides, mergers have been specifically excluded due to US and EC merger legislation, which would not allow a deferral or suspension of action as envisaged by the Draft Agreement, due to the obligation to adopt a final decision within tight time limits. Like the 1991 Agreement, it is necessary to provide for an extension of the definition of competition laws to take into account the possibility that further laws or implementing regulations may be adopted in the future. The need for both parties to consent in writing to any extension of the definition of competition laws ensures that there is no danger of the definition being extended beyond its intended scope.

Three new definitions also appear; "Adverse effects" and "Adversely affected", "Requesting Party" and "Requested Party".

Article III - Positive Comity

Article III sets out the principle of positive comity. Article III provides that where a Party believes that anticompetitive activities, occurring in the territory of the other Party, are adversely affecting its interests, it may request the other Party's competition authority to initiate appropriate enforcement activities. This possibility applies even if the first Party has commenced or contemplates taking enforcement action itself.

Article IV - Deferral or Suspension of Enforcement Activities

Article IV.1 provides that the parties may agree that the Requesting Party will defer or suspend enforcement activities while the Requested Party is investigating the activities.

Article IV.2 sets out in the detail the conditions which, if satisfied, will give rise to a presumption that the Requesting Party will defer or suspend its enforcement activities.

Article IV.2. (a) (i) is noteworthy as it contains a presumption of deferral or suspension of enforcement activities where the anticompetitive activities do not have an impact on the Requesting Party's consumers. This means that the presumption of deferral or suspension shall apply where the anticompetitive behaviour affects only exports.

There is also a presumption of deferral or suspension in Article IV.2 (a) (ii) if the centre of gravity of the anticompetitive activities is in the territory of the other Party. The centre of gravity of an activity is defined in the Draft Agreement as the territory in which the activities "occur principally in and are directed principally towards".

Article IV.2. (b) states that the presumption of deferral or suspension shall only apply if the adverse effects on the Requesting Party are likely to be fully and adequately investigated and remedied by the Requested Party. The Parties recognize that there may be circumstances where it is appropriate for both Parties to undertake parallel investigations. This may be the case where due to the particularly serious nature of the anticompetitive activity public interest requires that it is subject to sanction in both jurisdictions. This recognition of the possible appropriateness of parallel investigations only applies where the markets of both Parties are harmed.

Article IV.2 (c) sets out a number of requirements which the Requested Party must agree to in order for the presumption of deferral or suspension to arise. It is necessary to set out these commitments in order for the Requesting Party to have the confidence to defer or suspend action. The Requested Party must agree that it will use its best efforts and adequate resources to investigate the activity and that it will keep the Requesting Party informed of the status of their enforcement activities and of their intentions. The Requested Party must agree to complete their investigation within six months of the deferral or suspension or within such time as agreed to by the competition authorities. The Requested Party must also agree to take into account the views of the Requesting Party prior to any conclusion of the investigation and to comply with any reasonable request made by the Requesting Party.

Where it is appropriate to provide confidential information to the Requesting Party in order to keep that Party informed of any action being taken, the consent of the source of that information must be obtained. Community law provides a high level of protection to confidential information provided to the Commission, and it will be necessary that any consent obtained is sufficient to discharge the Commission from its obligation of confidentiality as

provided by general principles of Community Law, the case law of the European Court of Justice and Article 20(2) of Regulation No. 17. Like the rest of the Draft Agreement, this Article must be read in conjunction with Article VII, which states that existing laws remain unchanged.

If the Requesting Party chooses not to defer or suspend its enforcement activities, where the conditions of Article IV.2 are satisfied, it must inform the Requested Party of its reasons. This duty to give reasons will allow such situations to be closely monitored and explained.

Article IV.3 simply states that a Requesting Party may choose to defer or suspend their enforcement activities even if some of the conditions set out in Article IV.2 are not satisfied.

Article IV. 4 recognizes that a Party that has deferred or suspended action may later initiate or reinstitute enforcement activities. In such circumstances that Party must inform the other Party of its intentions and reasons. This duty to provide reasons will impose a control over such cases and a method for understanding why cooperation has failed to meet the expectations of the Requesting Party. Where both Parties take enforcement action they shall, where appropriate, cooperate under the 1991 Agreement.

Article V - Confidentiality and Use of Information

Article V of the Draft Agreement makes it clear that information provided under the Agreement may only be used for the implementation of the Agreement unless the competition authority that provided the information has consented to another use. A further safeguard is provided to those who have consented to certain confidential information being disclosed, in that such information may not be used for any other purpose unless the competition authority and the source of the information consent.

The confidentiality of all information provided under the Draft Agreement is protected by Article VIII of the 1991 Agreement and the exchange of letters dated May 31 and July 31, 1995[3].

Article VI - Relationship to the 1991 Agreement

Article VI firmly ties the 1991 Agreement to the Draft Agreement and makes it clear that the Draft Agreement supplements the 1991 Agreement by developing the concept of positive comity. The Draft Agreement must be interpreted consistently with the 1991 Agreement.

Article VII - Existing Law

Article VII states that the existing laws of the US and the EC remain unchanged by the Agreement and that the Agreement must be interpreted consistently with those existing laws. It is important to note that the Agreement cannot permit either of the Parties' competition authorities to do any act that they do not already have the power to do.

Article VIII - Entry into Force and Termination

Article VIII states that the Agreement will enter into force upon signature. The Agreement may be terminated by either Party upon giving 60 days notice of that intention.

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3 See footnote 1

Proposal for a

DECISION OF THE COUNCIL AND THE COMMISSION

concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws

THE COUNCIL OF THE EUROPEAN UNION,

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 87 in conjunction with the first subparagraph of Article 228(3) thereof,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 65 and 66 thereof,

Having regard to the proposal from the Commission[4],

Having regard to the opinion of the European Parliament[5],

Whereas the Agreement of 23 September 1991 between the European Communities and the Government of the United States of America regarding the application of their competition laws, and the exchange of interpretative letters dated 31 May and 31 July 1995 in relation to that Agreement (together hereinafter "the 1991 Agreement"), attached to Decision 95/145/EC, ECSC of the Council and the Commission has contributed to coordination, cooperation and avoidance of conflicts in competition law enforcement[6];

Whereas Article V of the 1991 Agreement, commonly referred to as the "Positive Comity" article, calls for cooperation regarding anticompetitive activities occurring in the territory of one Party that adversely affect the interests of the other Party;

Whereas further elaboration of the principles of positive comity and of the implementation of those principles would enhance the 1991 Agreement's effectiveness in relation to such conduct;

Whereas, to this end, the Commission has negotiated an Agreement with the Government of the United States of America on the application of positive comity principles in the enforcement of the competition rules of the European Communities and of the United States of America;

Whereas the Agreement should be approved,

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6 OJ No L 95, 27.4.1995, p. 45; corrigendum in OJ No L 131, 15.6.1995, p. 38.

HAVE ADOPTED THIS DECISION:

Article 1

The Agreement between and the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws is hereby approved on behalf of the European Community and the European Coal and Steel Community.

The text of the Agreement, drawn up in the Spanish, Danish, German, Greek, English, French, Italian, Dutch, Portuguese, Finnish and Swedish languages, is attached to this Decision.

Article 2

The President of the Council is hereby authorized to designate the person(s) empowered to sign the Agreement on behalf of the European Community.

The President of the Commission is hereby authorized to designate the person(s) empowered to sign the Agreement on behalf of the European Coal and Steel Community.

Done at Brussels,

For the Council
The President

For the Commission
The President

AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON THE APPLICATION OF POSITIVE COMITY PRINCIPLES IN THE ENFORCEMENT OF THEIR COMPETITION LAWS

The European Community and the European Coal and Steel Community of the one part (hereinafter "the European Communities"), and the Government of the United States of America of the other part:

Having regard to the September 23, 1991 Agreement between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws, and the exchange of interpretative letters dated May 31 and July 31, 1995 in relation to that Agreement (together hereinafter "the 1991 Agreement");

Recognizing that the 1991 Agreement has contributed to coordination, cooperation, and avoidance of conflicts in competition law enforcement;

Noting in particular Article V of the 1991 Agreement, commonly referred to as the "Positive Comity" article, which calls for cooperation regarding anticompetitive activities occurring in the territory of one Party that adversely affect the interests of the other Party;

Believing that further elaboration of the principles of positive comity and of the implementation of those principles would enhance the 1991 Agreement's effectiveness in relation to such conduct; and

Noting that nothing in this Agreement or its implementation shall be construed as prejudicing either Party's position on issues of competition law jurisdiction in the international context;

Have agreed as follows:

Article I
Scope and Purpose of this Agreement

1. This Agreement applies where a Party satisfies the other that there is reason to believe that the following circumstances are present:

   (a) Anticompetitive activities are occurring in whole or in substantial part in the territory of one of the Parties and are adversely affecting the interests of the other Party; and

   (b) The activities in question are impermissible under the competition laws of the Party in the territory of which the activities are occurring.

2. The purposes of this Agreement are to:

(a) Help ensure that trade and investment flows between the Parties and competition and consumer welfare within the territories of the Parties are not impeded by anticompetitive activities for which the competition laws of one or both Parties can provide a remedy, and

(b) Establish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory, where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities.

Article II
Definitions

As used in this Agreement:

1. "Adverse effects" and "adversely affected" mean harm caused by anticompetitive activities to:

(a) the ability of firms in the territory of a Party to export to, invest in, or otherwise compete in the territory of the other Party, or

(b) competition in a Party's domestic or import markets.

2. "Requesting Party" means a Party that is adversely affected by anticompetitive activities occurring in whole or in substantial part in the territory of the other Party.

3. "Requested Party" means a Party in the territory of which such anticompetitive activities appear to be occurring.

4. "Competition law(s)" means

(a) for the European Communities, Articles 85, 86, and 89 of the Treaty establishing the European Community (EC), Articles 65 and 66(7) of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing instruments, to the exclusion of Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, and

(b) for the United States of America, the Sherman Act (15 U.S.C. §§1-7), the Clayton Act (15 U.S.C. §§12-27, except as it relates to investigations pursuant to Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a), the Wilson Tariff Act (15 U.S.C. §§8-11), and the Federal Trade Commission Act (15 U.S.C. §§41-58, except as these sections relate to consumer protection functions),

as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for the purposes of this Agreement.

5. "Competition authorities" means:

(a) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and

(b) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission.

6. "Enforcement activities" means any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party.

7. "Anticompetitive activities" means any conduct or transaction that is impermissible under the competition laws of a Party.

Article III
Positive Comity

The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.

Article IV
Deferral or Suspension of Investigations in Reliance
On Enforcement Activity by the Requested Party

1. The competition authorities of the Parties may agree that the competition authorities of the Requesting Party will defer or suspend pending or contemplated enforcement activities during the pendency of enforcement activities of the Requested Party.

2. The competition authorities of a Requesting Party will normally defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party when the following conditions are satisfied:

(a) The anticompetitive activities at issue:

(i) do not have a direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party's territory, or

(ii) where the anticompetitive activities do have such an impact on the Requesting Party's consumers, they occur principally in and are directed principally towards the other Party's territory;

(b) The adverse effects on the interests of the Requesting Party can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied pursuant to the laws, procedures, and available remedies of the Requested Party. The Parties recognize that it may be appropriate to pursue separate enforcement activities where anticompetitive activities affecting both territories justify the imposition of penalties within both jurisdictions;

(c) The competition authorities of the Requested Party agree that in conducting their own enforcement activities, they will:

(i) devote adequate resources to investigate the anticompetitive activities and, where appropriate, promptly pursue adequate enforcement activities;

(ii) use their best efforts to pursue all reasonably available sources of information, including such sources of information as may be suggested by the competition authorities of the Requesting Party;

(iii) inform the competition authorities of the Requesting Party, on request or at reasonable intervals, of the status of their enforcement activities and intentions, and where appropriate provide to the competition authorities of the Requesting Party relevant confidential information if consent has been obtained from the source concerned. The use and disclosure of such information shall be governed by Article V;

(iv) promptly notify the competition authorities of the Requesting Party of any change in their intentions with respect to investigation or enforcement;

(v) use their best efforts to complete their investigation and to obtain a remedy or initiate proceedings within six months, or such other time as agreed to by the competition authorities of the Parties, of the deferral or suspension of enforcement activities by the competition authorities of the Requesting Party;

(vi) fully inform the competition authorities of the Requesting Party of the results of their investigation, and take into account the views of the competition authorities of the Requesting Party, prior to any settlement, initiation of proceedings, adoption of remedies, or termination of the investigation; and

(vii) comply with any reasonable request that may be made by the competition authorities of the Requesting Party.

When the above conditions are satisfied, a Requesting Party which chooses not to defer or suspend its enforcement activities shall inform the competition authorities of the Requested Party of its reasons.

3. The competition authorities of the Requesting Party may defer or suspend their own enforcement activities if fewer than all of the conditions set out in paragraph 2 are satisfied.

4. Nothing in this Agreement precludes the competition authorities of a Requesting Party that choose to defer or suspend independent enforcement activities from later initiating or reinstituting such activities. In such circumstances, the competition authorities of the Requesting Party will promptly inform the competition authorities of the Requested Party of their intentions and reasons. If the competition authorities of the Requested Party continue with their own investigation, the competition authorities of the two Parties shall, where appropriate, coordinate their respective investigations under the criteria and procedures of Article IV of the 1991 Agreement.

Article V
Confidentiality and Use of Information

Where pursuant to this Agreement the competition authorities of one Party provide information to the competition authorities of the other Party for the purpose of implementing this Agreement, that information shall be used by the latter competition authorities only for that purpose. However, the competition authorities that provided the information may consent to another use, on condition that where confidential information has been provided pursuant to Article IV.2 (c) (iii) on the basis of the consent of the source concerned, that source also agrees to the other use. Disclosure of such information shall be governed by the provisions of Article VIII of the 1991 Agreement and the exchange of interpretative letters dated May 31 and July 31, 1995.

Article VI
Relationship to the 1991 Agreement

This Agreement shall supplement and be interpreted consistently with the 1991 Agreement, which remains fully in force.

Article VII
Existing Law

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or Member States.

Article VIII
Entry Into Force and Termination

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Agreement.

DONE at , in duplicate, this day of , 1997, in the Spanish, Danish, German, Greek, English, French, Italian, Dutch, Portuguese, Finnish and Swedish languages, each one being equally authentic.

For the European Community and for the European Coal and Steel Community

For the Government of the United States of America

Statement by the Commission
(on confidentiality of information)

- The Statement made by the Commission in April 1995 on the confidentiality of information and the exchange of interpretative letters dated May 31 and July 31, 1995 in relation to the 1991 Agreement apply in their entirety to this Agreement.

- Article VII of this Agreement states that existing laws remain unchanged and that the Agreement must be interpreted consistently with those existing laws. This Agreement therefore cannot permit either of the Parties' competition authorities to do any act they do not already have the power to do. One consequence of this is that the Commission may only provide information to the US authorities where it is consistent with Community law to do so.

  While this Agreement envisages that it may be appropriate to provide information to the other party in order to keep it informed of enforcement activities, confidential information may only be provided with the consent of the source of that information. Community law provides a high level of protection to confidential information provided to the Commission, and it will be necessary that any consent obtained is sufficient to discharge the Commission from its obligation of confidentiality pursuant to general principles of Community law, the case-law of the Court of Justice of the European Communities and Article 20(2) of Council Regulation No 17.

Statement by the Commission
(on transparency)

- The principles on transparency which govern the relationship between the Commission and the Member States in the application of the competition rules as enshrined, for example, in Council Regulation No 17, and the arrangements contained in the exchange of interpretative letters dated May 31 and July 31, 1995 in relation to the 1991 Agreement shall apply.

- The Member States shall be informed of all proceedings opened by the Commission as a result of a request by the US authorities under Article III of this Agreement.

- Member States shall be informed when the Commission makes a request to the US authorities under Article III of this Agreement to investigate anticompetitive activities.

- When the Commission opens proceedings following a request by the US authorities under Article III of this Agreement, the undertakings concerned shall be informed of the existence of the request, at the latest when the statement of objections is issued, or when a publication pursuant to Article 19(3) of Council Regulation No 17 is made.

- The annual report presented by the Commission to the European Parliament and the Council on the application of the 1991 Agreement shall also cover the application of this Agreement.

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