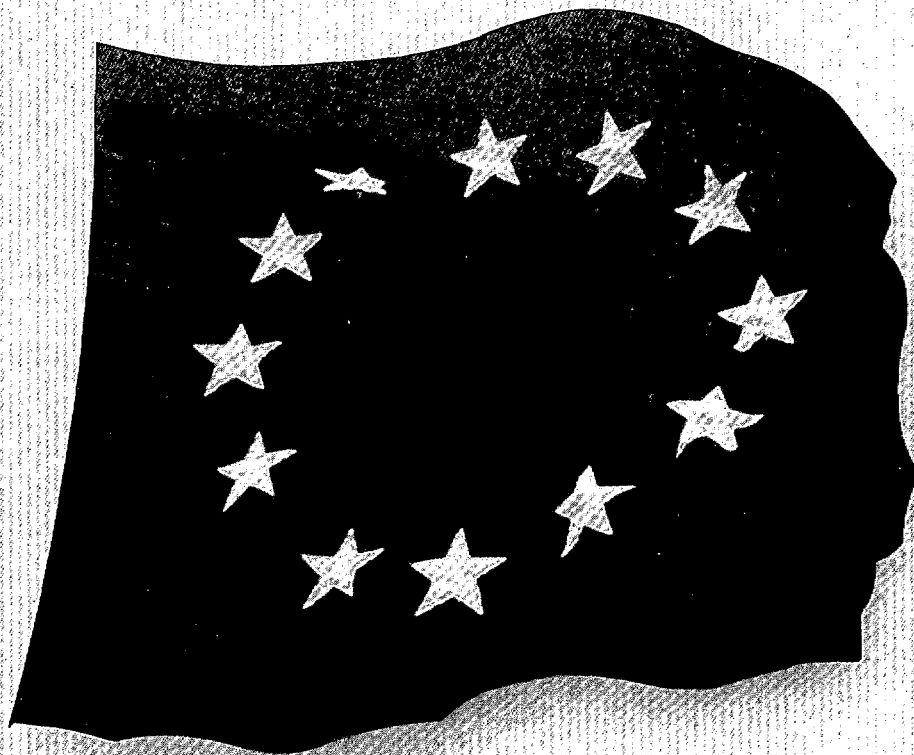


# Community merger control law



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**Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings**

(OJ L 395, 30.12.1989)

Corrigendum: OJ L 257, 21.9.1990)

**Commission Regulation (EEC) No 2367/90 of 25 July 1990 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89**

(OJ L 219, 14.8.1990)

**Commission Notice on the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89**

(OJ C 203, 14.8.1990)

**Commission Notice on restrictions ancillary to concentrations**

(OJ C 203, 14.8.1990)

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## Preface

The adoption of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings has provided the Community with a specific instrument which forms an essential complement to existing Community competition law.

The merger control system set up by the regulation, which entered into force on 21 September 1990, is

supplemented by the implementing and interpretative provisions adopted by the Commission on 25 July 1990. Together, they form the entire body of merger control legislation so far adopted by the Community.

It is clearly useful for companies subject to merger control and those having to deal with such matters to have a single reference source available.

This Supplement is intended to meet that need.

# Introduction

(Extract from the Nineteenth Report on Competition Policy, Brussels 1990)

On 21 December, the Council adopted the Commission's proposal on the control of concentrations between undertakings.<sup>1</sup> The regulation will form a cornerstone of competition policy and make a major contribution to ensuring success in the completion of the internal market.

Given the inadequacy of the existing competition rules in dealing with the entire concentration phenomenon at Community level, the need for such a regulation was recognized as early as 1973 in the wake of the *Continental Can* judgment.<sup>2</sup> However, at that time, the Council did not give serious consideration to the new draft regulation. The Commission tabled an updated proposal in the autumn of 1987. At its meeting on 30 November 1987, the Council adopted a generally positive attitude on the main lines of the Commission's approach.<sup>3</sup>

The progress made towards completing the internal market and the new political environment provided a key impetus towards approval of the merger control regulation. The logic of the single market prompted Member States to agree unanimously on a system of merger control at Community level for Community-scale mergers.

Merger control is necessary for both economic and political reasons. The process of restructuring European industry has given rise and will continue to give rise to a wave of mergers. Although many such mergers have not posed any problems from the competition point of view, it must be ensured that they do not in the long run jeopardize the competition process, which lies at the heart of the common market and is essential in securing all the benefits linked with the single market. In addition, it has become ever more clearly apparent that national rules are inadequate as a means of controlling Community-scale mergers, mainly because such rules are restricted to the respective territories of the Member States concerned. Clearly, Community law must be applied in controlling and examining large-scale mergers, where the reference market is increasingly the Community as a whole or a large part of it. The new regulation also introduces a system of control for Member States which do not have any specific rules in this area.

The fundamental principles of the regulation are as follows:

(a) The basic concept underlying the regulation is to establish a clear allocation between Community-scale mergers, for which the Commission is responsible, and those whose main impact is in the territory of a Member State, for which the national authorities are responsible.

(b) In its scope, the new regulation covers mergers having a Community dimension, which are defined on the basis of three criteria, namely:

(i) A threshold of at least ECU 5 000 million for the aggregate world-wide turnover of all the undertakings concerned. This figure reflects the aggregate economic and financial power of the undertakings involved in a merger. In the case of financial institutions and insurance companies, specific criteria are laid down;

(ii) A threshold of at least ECU 250 million for the aggregate Community-wide turnover of each of at least two of the undertakings concerned. Thus, only undertakings with a specified level of activity in the Community are covered by the regulation;

(iii) A transnationality criterion. Community control does not apply if each of the undertakings concerned achieves two-thirds of its turnover within one and the same Member State. This criterion allows mergers whose impact is mainly national to be excluded from the Community control system.

<sup>1</sup> OJ L 395, 30.12.1989.

<sup>2</sup> See *Third Competition Report*, pp. 15 and 16.

<sup>3</sup> See *Seventeenth Competition Report*, points 49 to 51.

(c) The current thresholds were set at a high level for an initial stage in implementing the regulation. However, this represents an important first step in establishing Community merger control and will probably result in some 50 cases being examined a year, on the basis of an extrapolation of the statistics for the last few years. The thresholds are to be reviewed by the Council, acting by a qualified majority on a proposal from the Commission, in the light of experience, no later than four years after the adoption of the regulation. The Commission's declared intention is that the thresholds will be revised downwards: the objective is to lower the overall threshold to ECU 2 000 million and to reduce the Community threshold similarly.

(d) All mergers falling within the scope of the regulation will be assessed on the basis of clearly defined criteria. The basic concept is that of 'dominant position'. The creation or strengthening of a dominant position will be declared incompatible with the common market if effective competition is impeded to a significant extent, whether within the common market as a whole, or in a substantial part thereof; conversely, a merger which does not impede effective competition will be declared compatible with the common market. The assessment process will take various aspects of competition into account. These will include the structure of the markets concerned, actual and potential competition (from inside and outside the Community), the market position of the undertakings concerned, the scope for choice on the part of third parties, barriers to entry, the interests of consumers and technical and economic progress. This overall list will be used in assessing the impact of a merger on competition.

(e) For the purposes of the regulation, a 'concentration' is defined as the acquisition of control and covers both mergers and acquisitions. The definition includes partial mergers and merger-type joint ventures, but it does not cover the coordination of the behaviour of undertakings which remain independent.

(f) So as to ensure that control is effective and that undertakings enjoy legal certainty, the merger control arrangements include the following:

(i) The principle of mandatory prior notification by the undertakings concerned. This has a suspensory effect on the concentration for a period of three weeks (suspension of the concentration may be extended or, in some cases, dispensed with). However, the validity of stock-exchange transactions will not be affected.

(ii) The setting of strict deadlines to be met by the Commission in its proceedings:

— The Commission has one month following notification within which to initiate proceedings.<sup>1</sup> In cases where the Commission does not raise any objections (this is likely to be the general rule), the parties will receive the go-ahead within one month;

— Four months after the initiation of proceedings, the Commission must take its final decision on the concentration. During that period, the parties are free to propose adjustments to the concentration so as to avoid a negative decision;

(iii) The Commission's powers of investigation and the fines provided for in the regulation are similar to those applicable to restrictive practices. Furthermore, the Commission may require undertakings or assets unlawfully merged to be separated.

(g) The regulation is based on the principle of exclusivity, but provision is made for a few limited exceptions to this rule. The principle of exclusivity applies as follows:

(i) All decisions relating to Community-scale mergers falling within the scope of the regulation will be taken by the Commission. The Member States have undertaken not to apply their national law to such cases. There will, therefore, be no need for concurrent proceedings.

(ii) There are two derogations from the principle of exclusivity:

— The regulation provides for referral to the national authorities of a Member State where a problem of a dominant position arises on a distinct market within its territory and where application of the regulation would not achieve a satisfactory solution to the particular problem. This mechanism would normally apply to local markets, for example in distribution or hotels; exceptionally, the provision could also apply to a national market which is to some extent isolated from the rest of the Community, for example, because of high transport costs.

<sup>1</sup> This period is increased to six weeks if the Commission receives a request from a Member State that a notified merger case be referred to it (see below).

— In cases where Member States may invoke legitimate interests other than those protected by the regulation. These include public security, plurality of the media and prudential rules. Exceptionally, other legitimate interests may be recognized by the Commission after an assessment of their compatibility with Community law; certain such legitimate interests may be protected by the provisions of national law. In such cases, a Member State may take appropriate measures to protect such interests, which means that they have the power to prohibit a concentration or to make its approval subject to additional conditions or requirements. However, a Member State may not, under this heading, authorize a concentration which has been prohibited by the Commission.

(h) Concentrations which are not covered by the Community regulation fall in principle within the jurisdiction of the Member States. However, the regulation gives the Commission the power to take action with regard to concentrations that do not have a Community dimension at the request of a Member State concerned, in cases where a problem involving a dominant position arises within the territory of that Member State.

\*  
\* \*

Four implementing measures have been adopted by the Commission.

Two notices provide explanatory guidelines on how the terms 'concentration' and 'ancillary restrictions' must be interpreted. These are technical questions of considerable importance, and the notices were drafted in close collaboration with the Member States, industry and the various other parties concerned.

A procedural regulation lays down the rights and obligations of the Commission and of the companies concerned in individual cases. This was based on existing procedures, with adjustments being made where necessary to take account of precedents set by the Court of Justice and the specific requirements of merger control.

A form has been drawn up for notifications. After wide-ranging consultations, a balance was struck between the Commission's need to obtain full information from the start of a case and the need to keep the burden imposed on industry as light as possible. The form confines itself to the information that is necessary for a full analysis of the market. If a company cannot provide some of the information requested or is able to show that some questions are not relevant to examination of the case, it may be relieved of its obligations.



COUNCIL REGULATION (EEC) No 4064/89

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 <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

- (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;
- (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 one 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 initial 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

<sup>(1)</sup> OJ No C 130, 19. 5. 1988, p. 4.  
<sup>(2)</sup> OJ No C 309, 5. 12. 1988, p. 55.  
<sup>(3)</sup> OJ No C 208, 8. 8. 1988, p. 11.

- 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 decision, 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 representatives 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 Articles 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 therefor ; 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, insolvency, cessation of payments, compositions or analogous proceedings ;

- (c) the operations referred to in paragraph 1 (b) are carried out by the financial holding companies referred to in Article 5 (3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies<sup>(1)</sup>, as last amended by Directive 84/569/EEC<sup>(2)</sup>, 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.

<sup>(1)</sup> OJ No L 222, 14. 8. 1978, p. 11.

<sup>(2)</sup> OJ No L 314, 4. 12. 1984, p. 28.

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.

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 custo-

mers 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 of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of 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:

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

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

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

— has the right to manage the 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 implementation 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 Judgement 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 Judgement.

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 investigation. To this end the Member States 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 enforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision.

#### *Article 16*

##### **Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 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 known their views on the objections against them.

2. By 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 decisions 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 its 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 (<sup>(1)</sup>), (EEC) No 1017/68 (<sup>(2)</sup>), (EEC) No 4056/86 (<sup>(3)</sup>) and (EEC) No 3975/87 (<sup>(4)</sup>) 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 restore 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.

(<sup>1</sup>) OJ No 13, 21. 2. 1962, p. 204/62.

(<sup>2</sup>) OJ No L 175, 23. 7. 1968, p. 1.

(<sup>3</sup>) OJ No L 378, 31. 12. 1986, p. 4.

(<sup>4</sup>) OJ No 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.

#### *Article 24*

##### **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 a 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.

## Annex

### Notes on Council Regulation (EEC) 4064/89

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 con-

centration 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 the context of a single appraisal procedure.

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 concentrations'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 entry 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 world-wide 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.



COMMISSION REGULATION (EEC) No 2367/90

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

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<sup>(1)</sup>, 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<sup>(2)</sup>, 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<sup>(3)</sup>, 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<sup>(4)</sup>, 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<sup>(5)</sup>, 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 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<sup>(6)</sup>, 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;

<sup>(1)</sup> OJ No L 395, 30. 12. 1989, p. 1.

<sup>(2)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(3)</sup> OJ No L 175, 23. 7. 1968, p. 1.

<sup>(4)</sup> OJ No L 378, 31. 12. 1986, p. 4.

<sup>(5)</sup> OJ No L 374, 31. 12. 1987, p. 1.

<sup>(6)</sup> OJ No L 124, 8. 6. 1971, p. 1.

9. Whereas 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 ;
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 in to 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 copies of each notification and fifteen 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.

#### *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 Commission 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 PROCEEDINGS 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 subparagraph 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 abovementioned 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 annul-

ling, 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 CO RELATING 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 and to Commission Regulation (EEC) No 2367/90. In particular you should note that:

- (a) all information requested by this form must be 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, under 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.

#### 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 a undertaking within the meaning of Article 3 (1) (b) of Regulation (EEC) No 4064/89, the notification shall be completed jointly by the parties to the 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 purposes of the concentration and from which information has been taken in order to provide the information requested in sections 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.

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 below must be provided in Ecus at the average conversion rates prevailing for the years or other period in question.

Twenty copies of each notification and fifteen copies of all supporting documents must be provided.

The notification should be sent to :

Commission of the European Communities,  
Directorate General for Competition (DG IV),  
Merger Task Force (Cort. 150),  
200, rue de la Loi,  
B-1049 Brussels ;

or be delivered by hand during normal Commission working hours at the following address :

Commission of the European Communities,  
Directorate General for Competition (DG IV),  
Merger Task Force,  
150, avenue de Cortenberg,  
B-1040 Brussels.

#### E. Secrecy

Article 214 of the Treaty and Article 17 (2) of Regulation (EEC) No 4064/89 require the Commission and the Member 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 interests 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 mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. 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 Council 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*<sup>(1)</sup><sup>(2)</sup>

For each party to the concentration (except the notifying party) give details of :

- 1.2.1. name 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 in 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 Commission Regulation (EEC) No 2367/90.

### 1.4. *Appointment of representatives*

Article 1 (2) of Commission Regulation (EEC) 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 below ;
  - if 'no', please give details of the representatives who have been authorized to act for each of the parties to the concentration indicating who 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.

## 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) ;
  - 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 of management 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.

<sup>(1)</sup> A concentration is defined in Article 3.

<sup>(2)</sup> This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

- 2.4. For each of the parties, the notifying party shall provide the following data for the last three financial years :
  - 2.4.1. worldwide turnover<sup>(1)</sup>,
  - 2.4.2. Community-wide turnover<sup>(1)</sup> <sup>(2)</sup>,
  - 2.4.3. turnover in each Member State<sup>(1)</sup> <sup>(2)</sup>,
  - 2.4.4. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved<sup>(1)</sup> <sup>(2)</sup>,
  - 2.4.5. profits before tax worldwide<sup>(3)</sup>,
  - 2.4.6. number of employees worldwide<sup>(4)</sup>.

## SECTION 3

### Ownership and control<sup>(5)</sup>

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 above, 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 below.

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.

## 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 boards 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.

<sup>(1)</sup> 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. 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.

<sup>(2)</sup> See guidance note IV for the calculation of turnover in one Member State with respect to Community-wide turnover.

<sup>(3)</sup> 'Profits before tax' shall comprise profit on ordinary activities before tax on profit.

<sup>(4)</sup> Employees shall comprise all persons employed in the enterprise who have a contract of employment and receive remuneration.

<sup>(5)</sup> See Article 3 (3) to (5).

## 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 used 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 consist of relevant product markets or individual product groups, in the Common Market or a Member 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 or 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 above.

#### *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 Community as a whole;
- (b) individually for each Member State where the parties (including undertakings belonging to the same group as defined in Section 3) do business;

(c) 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<sup>(1)</sup>. If available, include statistics prepared by other sources to illustrate your answers. 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 a similar comparison of such price levels between the Community and its major trading partners (eg the United States, Japan and EFTA) ;
- 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 relationships, 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 :
  - (a) for the Community as a whole ;
  - (b) individually for each Member State where the groups to which the parties belong do business ;
  - (c) and where different, for any relevant geographic 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 ? If the answer is 'yes', provide information on these entrants, estimating their current market shares.

<sup>(1)</sup> The value and volume of a market should reflect output less exports plus imports for the geographic market under consideration.

- 6.2. In the opinion of the notifying party are there undertakings (including those at present operating only in extra-Community markets) that could enter the Community'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<sup>(1)</sup> 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?

<sup>(1)</sup> 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 capacity for the last three years. Over the period what proportion of this capacity is accounted for by the parties and what have been their 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 engaged in by the parties in the affected markets, such as licensing 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.

## WORLDWIDE CONTEXT

- 6.14. Describe the worldwide context of the proposed concentration indicating the position of the 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 it 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 Article 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 the provisions of Article 14 (1) b of Regulation (EEC) No 4064/89.

Place and date :

Signatures :

GUIDANCE NOTE 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:		
— to credit institutions within one (and the same) Member State X:	(10 000)	(500)
	(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
<b>Total assets:</b>	<b>100 000</b>	<b>6 000</b>

**II. Calculation of turnover**

In place of turnover, the following figures shall be used:

	<i>Bank A</i>	<i>Bank B</i>
<b>1. Aggregate worldwide turnover</b>		
is replaced by one-tenth of total assets:	10 000	600
the total sum of which is more than ECU 5 000 million.		
<b>2. Community-wide turnover</b>		
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.		
	<i>Bank A</i>	<i>Bank B</i>
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 and customers	10 000	500
within the Community	30 000	2 000
	<hr style="width: 50%; margin: 0;"/>	<hr style="width: 50%; margin: 0;"/>
	40 000	2 500
and		
the total sum of loans and advances to credit institutions and customers	20 000	1 000
	60 000	4 000
	<hr style="width: 50%; margin: 0;"/>	<hr style="width: 50%; margin: 0;"/>
	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.		

(\*) In the following guidance notes, the terms 'institution' or 'undertaking' are used subject to the exact delimitation in each case.

3. Total turnover within one (and the same) Member State X

	<i>Bank A</i>	<i>Bank B</i>
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.		

	<i>Bank A</i>	<i>Bank B</i>
This is calculated as follows :		
loans and advances to credit institutions and customers	5 000	500
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
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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) (a))

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 its 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

<i>(in million ecu)</i>		
Turnover	Undertaking A	Undertaking B
Sales revenues worldwide	10 000	2 000
— Community	(8 000)	(1 500)
— Member State Y	(4 000)	(900)

<i>(in million ecu)</i>	
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.

**Commission notice regarding the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (\*)**

**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 (\*), (EEC) No 1017/68 (\*), No 4056/86 (\*) or No 3975/87 (\*). 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.

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 (\*).

**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 implies several characteristics:

(\*) OJ No L 395, 30. 12. 1989, p. 1.

(\*) OJ No 13, 21. 2. 1962, p. 204/62.

(\*) OJ No L 175, 23. 7. 1968, p. 1.

(\*) OJ No L 378, 31. 12. 1986, p. 4.

(\*) OJ No L 374, 31. 12. 1987, p. 1.

(\*) See footnotes 2 to 5 on this page.

### 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.

### 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 commercial 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 JV's 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 also 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 JVs 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<sup>(1)</sup>. 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.

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

<sup>(1)</sup> See the Thirteenth Report (1983) on Competition Policy, point 55.

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 JV's 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 Commission 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 (\*).

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 or 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.

(\*) 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.



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, characterised 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.

## I. Introduction

1. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ('the Regulation')<sup>(1)</sup> states in its 25th recital that its application is not excluded where the undertakings concerned accept restrictions which are directly related and necessary 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<sup>(2)</sup> as well as Regulations (EEC) No 1017/68<sup>(3)</sup>, (EEC) No 4056/86<sup>(4)</sup> and (EEC) No 3975/87<sup>(5)</sup>. 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 they 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 notice is without prejudice to the interpretation which may be given by the Court of Justice of the European Communities.

## 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.

<sup>(1)</sup> OJ No L 395, 30. 12. 1989, p. 1.

<sup>(2)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(3)</sup> OJ No L 175, 23. 7. 1968, p. 1.

<sup>(4)</sup> OJ No L 378, 31. 12. 1986, p. 4.

<sup>(5)</sup> OJ No L 374, 31. 12. 1987, p. 1.

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 transferor 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<sup>(1)</sup> or Regulation (EEC) No 559/89 on know-how licences<sup>(2)</sup>.

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 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.

<sup>(1)</sup> OJ No L 219, 16. 8. 1984, p. 15.

<sup>(2)</sup> OJ No L 61, 4. 3. 1989, p. 1.

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 prohibition 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 nonetheless 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.

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The adoption of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings has provided the Community with a specific instrument which forms an essential complement to existing Community competition law.

The merger control system set up by the regulation, which entered into force on 21 September 1990, is supplemented by the implementing and interpretative provisions adopted by the Commission on 25 July 1990. Together, they form the entire body of merger control legislation so far adopted by the Community.

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