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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 3384/94

of 21 December 1994

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 Community and the Agreements on the European Economic Area,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, 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 ⁽²⁾, 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 ⁽³⁾, as last amended by the Act of Accession of Greece, 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 ⁽⁴⁾, 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 ⁽⁵⁾, as last amended by Regulation (EEC) No 2410/92 ⁽⁶⁾, and in particular Article 19 thereof,

Having consulted the Advisory Committee on Concentrations,

(1) Whereas experience in the application of Commission Regulation (EEC) No 2367/90 ⁽⁷⁾, as amended by Regulation (EC) No 3666/93 ⁽⁸⁾ which implements Regulation (EEC) No 4064/89, has shown the need to improve certain procedural aspects thereof; whereas it should therefore be replaced by a new regulation;

(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 to the concentration plan, 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 notifying parties 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;

⁽¹⁾ OJ No L 395, 30. 12. 1989, p. 1.

⁽²⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽³⁾ OJ No L 175, 23. 7. 1968, p. 1.

⁽⁴⁾ OJ No L 378, 31. 12. 1986, p. 4.

⁽⁵⁾ OJ No L 374, 31. 12. 1987, p. 1.

⁽⁶⁾ OJ No L 240, 24. 8. 1992, p. 18.

⁽⁷⁾ OJ No L 219, 14. 8. 1990, p. 5.

⁽⁸⁾ OJ No L 336, 31. 12. 1993, p. 7.

- (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, and whereas in particular, the beginning and end of the period and the circumstances suspending the running of the period must be determined, with due regard to the requirements resulting from the exceptionally short legal time limits referred to above; whereas in the absence of specific provisions the determination of rules applicable to periods, dates and time limits should be based on the principles of Council Regulation (EEC, Euratom) No 1182/71 ⁽¹⁾;
- (7) Whereas the provisions relating to the Commission's procedure must be framed in such a way as to safeguard fully the right to be heard and the rights of defence; whereas for these purposes the Commission should distinguish between the parties who notify the concentration, other parties involved in the concentration plan, third parties and parties regarding whom the Commission intends to take a decision imposing a fine or periodic penalty payments;
- (8) Whereas the Commission will give the notifying parties and other parties involved, 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 those parties to the extent necessary to discuss with them any practical or legal problems which it discovers on a first examination of the case and if possible to remove such problems by mutual agreement;
- (9) Whereas in accordance with the principle of the rights of defence, the notifying parties must be given the opportunity to submit their comments on all the objections which the Commission proposes to take into account in its decisions; whereas other parties involved should also be informed of the Commission's objections and granted the opportunity to express their views;
- (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 a formal oral hearing where appropriate to supplement the written procedure; whereas in urgent cases, however, the Commission must be able to proceed immediately to formal oral hearings of the notifying parties, other parties involved or third parties;
- (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 the Commission must respect the legitimate interest of undertakings in the protection of their business secrets;
- (14) Whereas, in order to enable the Commission to carry out a proper assessment of modifications to the original concentration plan, and to ensure due consultation with other parties involved, third parties and the authorities of the Member States as provided for in Regulation (EEC) No 4064/89, in particular Article 18 (1) and (4) thereof, a time limit for submitting modifications to the concentration plan as provided for in Article 10 (2) of Regulation (EEC) No 4064/89 must be laid down;
- (15) Whereas it is also necessary to define the rules for fixing and calculating the time limits for reply fixed by the Commission;
- (16) Whereas the Advisory Committee on Concentrations must 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 reopening an inquiry if need be,

⁽¹⁾ OJ No L 124, 8. 6. 1971, p. 1.

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-four copies of each notification and 19 copies of the supporting documents shall be submitted to the Commission at the address indicated in Form CO.
3. The supporting documents shall be either originals or copies of the originals; in the latter case the notifying parties shall confirm that they are true and complete.
4. Notifications shall be in one of the official languages of the Community. This language shall also be the language of the proceeding for the notifying parties. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation into the language of the proceeding shall be attached.
5. Where notifications are made pursuant to Article 57 of the EEA Agreement, they may also be in one of the official languages of the EFTA States or the working language of the EFTA Surveillance Authority. If the language chosen for the notifications is not an official language of the Community, the notifying parties shall simultaneously supplement all documentation with a

translation into an official language of the Community. The language which is chosen for the translation shall determine the language used by the Commission as the language of the proceedings for the notifying parties.

Article 3

Information and documents to be provided

1. Notifications shall contain the information, including documents, requested by Form CO. The information must be correct and complete.
2. The Commission may dispense with the obligation to provide any particular information, including documents, requested by Form CO where the Commission considers that such information is not necessary for the examination of the case.
3. The Commission shall without delay acknowledge in writing to the notifying parties or their representatives receipt of the notification and of any reply to a letter sent by the Commission pursuant to Article 4 (2) and 4 (4).

Article 4

Effective date of notification

1. Subject to paragraphs 2, 3 and 4, notifications shall become effective on the date on which they are received by the Commission.
2. Where the information, including documents, contained in the notification is incomplete in a material respect, the Commission shall without delay inform the notifying parties or their representatives in writing and shall set 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. Material changes in the facts contained in the notification which the notifying parties know or ought to have known must be communicated to the Commission voluntarily and without delay. In such cases, when these material changes could have a significant effect on the appraisal of the concentration, the notification may be considered by the Commission as becoming effective on the date on which the information on the material changes is received by the Commission; the Commission shall inform the notifying parties or their representatives of this in writing and without delay.
4. Incorrect or misleading information shall be considered to be incomplete information.

5. When the Commission publishes the fact of the notification pursuant to Article 4 (3) of Regulation (EEC) No 4064/89, it shall specify the date upon which the notification has been received. Where, further to the application of paragraphs 2, 3 and 4, the effective date of notification is later than the date specified in this publication, the Commission shall issue a further publication in which it will state the later date.

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 their representatives in writing. In such a case, the Commission shall, if requested by the notifying parties, as appropriate and subject to paragraph 2, 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 period

1. The periods referred to in Article 10 (1) of Regulation (EEC) No 4064/89 shall start at the beginning of the working day (as defined under Article 22) following the effective date of the notification, within the meaning of Article 4 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 working day (as defined under Article 22) following the day on which proceedings were initiated.

Article 7

End of the time period

1. The time period referred to in Article 10 (1) first subparagraph of Regulation (EEC) No 4064/89 shall end with the expiry of the day which in the month following that in which the time 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 time period referred to in Article 10 (1) second subparagraph 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 time 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 22, the period shall end with the expiry of the following working day.

Article 8

Recovery of holidays

Once the end of the time period has been determined in accordance with Article 7, if public holidays or other holidays of the Commission as defined in Article 22 fall within the periods referred to in Article 10 (1) and in Article 10 (3) of Regulation (EEC) No 4064/89, a corresponding number of working days shall be added to those periods.

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) and 13 (3) of the same Regulation, has to take a decision because:

(a) information which the Commission has requested pursuant to Article 11 (1) of Regulation (EEC) No 4064/89 from one of the notifying parties or another involved party (as defined in Article 11 of this Regulation) is not provided or not provided in full within the time limit fixed by the Commission;

- (b) one of the notifying parties or another involved party (as defined in Article 11 of this Regulation) 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 contained 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), 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), 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), 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 a day is not a working day within the meaning of Article 22, 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 notifying parties must follow without delay.

SECTION III

HEARING OF THE PARTIES AND OF THIRD PARTIES

Article 11

Parties to be heard

For the purposes of the rights to be heard pursuant to Article 18 of Regulation (EEC) No 4064/89, the following parties are distinguished:

- (a) notifying parties, that is, persons or undertakings submitting a notification pursuant to Article 4 (2) of Regulation (EEC) No 4064/89;
- (b) other involved parties, that is, parties to the concentration plan other than the notifying parties, such as the seller and the undertaking which is the target of the concentration;
- (c) third parties, that is, natural or legal persons showing a sufficient interest, including customers, suppliers and competitors, and especially members of the administration or management organs of the undertakings concerned or recognised workers' representatives of those undertakings;
- (d) parties regarding whom the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EEC) No 4064/89.

Article 12

Decisions on the suspension of concentrations

1. Where the Commission intends to take a decision pursuant to Article 7 (2) of Regulation (EEC) No 4064/89 or a decision pursuant to Article 7 (4) of that Regulation which adversely affects the parties, it shall, pursuant to Article 18 (1) of that Regulation, inform the notifying parties and other involved parties in writing of its objections and shall 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 notifying parties and other involved parties 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 notifying parties and other involved parties have made known their views, the Commission shall take a final decision annulling, amending or confirming the provisional decision. Where they have not made known their views within the time limit fixed, the Commission's provisional decision shall become final with the expiry of that period.

3. The notifying parties and other involved parties shall make known their views in writing or orally within the time limit fixed. They may confirm their oral statements in writing.

*Article 13***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) or (5) of Regulation (EEC) No 4064/89 it shall, before consulting the Advisory Committee on Concentrations, hear the parties pursuant to Article 18 (1) and (3) of that Regulation.

2. (a) The Commission shall address its objections in writing to the notifying parties.

The Commission shall, when giving notice of objections, set a time limit within which the notifying parties may inform the Commission of their views in writing.

(b) The Commission shall inform other involved parties in writing of these objections.

The Commission shall also set a time limit within which these other involved parties may inform the Commission of their views in writing.

3. (a) After having addressed its objections to the notifying parties, the Commission shall, upon request, give them access to the file for the purpose of enabling them to exercise their rights of defence.

(b) The Commission shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their observations.

4. The parties to whom the Commission's objections have been addressed or who have been informed of these objections shall, within the time limit fixed, make known in writing their views on the objections. In their written comments, they may 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.

5. Where the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EEC) No 4064/89 it shall, before consulting the Advisory Committee on Concentrations, hear (pursuant to Article 18 (1) and (3) of that Regulation) the parties regarding whom the Commission intends to take such a decision.

The procedure provided pursuant to subparagraphs 2 (a), 3 (a), and paragraph 4 is applicable, *mutatis mutandis*.

*Article 14***Oral hearings**

1. The Commission shall afford the notifying parties who have so requested in the written comments the opportunity to put forward their arguments orally in a formal hearing if such parties show a sufficient interest. It may also in other cases afford such parties the opportunity of expressing their views orally.

2. The Commission shall afford other involved parties who have so requested in their written comments the opportunity to express their views orally in a formal hearing if they show a sufficient interest. It may also in other cases afford such parties the opportunity of expressing their views orally.

3. The Commission shall afford parties in relation to whom it proposes to impose a fine or periodic penalty payment who have so requested in their written comments the opportunity to put forward their arguments orally in a formal hearing. It may also in other cases afford such parties the opportunity of expressing their views orally.

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

5. The Commission shall immediately 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 15***Conduct of formal oral 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 by 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 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 16

Hearing of third parties

1. If third parties apply in writing to be heard pursuant to 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 shall make known their views in writing within the time limit fixed. The Commission may, where appropriate, afford the parties who have so requested in their written comments, the opportunity to participate in a formal hearing. It may also in other cases afford such parties the opportunity of expressing their views orally.

3. The Commission may likewise afford to any other third parties the opportunity of expressing their views.

Article 17

Confidential information

Information, including documents, shall not be communicated or made accessible in so far as it contains business secrets of any person or undertaking, including the notifying parties, other involved parties or of third parties, or other confidential information the disclosure of which is not considered necessary by the Commission for the purpose of the procedure, or where internal documents of the authorities are concerned.

SECTION IV

MODIFICATIONS OF THE CONCENTRATION PLAN

Article 18

Time limit for modifications to the concentration plan

1. The modifications to the original concentration plan made by the undertakings concerned as provided for pursuant to Article 10 (2) of Regulation (EEC) No 4064/89 which are intended by the parties to form the basis for a decision pursuant to Article 8 (2) shall be submitted to the Commission within not more than three months of the date on which proceedings were initiated. The Commission may in exceptional circumstances extend this period.

2. The time period referred to in paragraph 1 shall be determined according to the same rules as those contained in Articles 6 to 9 of this Regulation.

SECTION V

MISCELLANEOUS PROVISIONS

Article 19

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 acknowledgment of receipt;
- (c) telefax with a request for acknowledgment of receipt;
- (d) telex;
- (e) electronic mail with a request for acknowledgment of receipt.

2. Subject to Article 21 (1), paragraph 1 also applies to the transmission of documents from the notifying parties, from other involved parties or from third parties to the Commission.

3. Where a document is sent by telex, by telefax or by electronic mail, it shall be presumed that it has been received by the addressee on the day on which it was sent.

Article 20

Setting of time limits

1. In fixing the time limits provided for pursuant to Article 4 (2), 5 (2), 12 (1) and (2), 13 (2) and 16 (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 working days as defined under Article 22 as well as public holidays in the country of receipt of the Commission's communication.

2. These time limits shall be set in terms of a precise calendar date.

Article 21

Receipt of documents by the Commission

1. Subject to the provisions of Article 4 (1) of this Regulation, notifications must be delivered to the Commission at the address indicated in Form CO or have been dispatched by registered letter to the address indicated in Form CO before the 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) and (4) or to supplement notifications pursuant to Article 5 (2) of this Regulation must reach the Commission at the aforesaid address 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 12 (1) and (2), 13 (2) and 16 (1) must be delivered to the Commission or must have reached the Commission at the aforesaid address before the expiry of the time limit fixed in each case.

2. Time limits referred to in subparagraphs two and three of paragraph 1 shall be determined in accordance with Article 20.

3. Should the last day of a time limit fall on a day which is not a working day (as defined under Article 22), or which is a public holiday in the country of dispatch, the time limit expires on the following working day.

Article 22

Definition of working days

The expression 'working days' in this Regulation means all days other than Saturdays, Sundays, public holidays 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 23

Repeal

Regulation (EEC) No 2367/90 is repealed.

Article 24

Entry into force

This Regulation shall enter into force on 1 March 1995.

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

Done at Brussels, 21 December 1994

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

FORM CO RELATING TO THE NOTIFICATION OF A CONCENTRATION PURSUANT TO
REGULATION (EEC) No 4064/89

INTRODUCTION

A. The purpose of this Form

This Form specifies the information that must 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 drawn to Regulation (EEC) No 4064/89 and to Regulation (EC) No 0000/94, (hereinafter referred to as the 'Implementing Regulation') and to the corresponding provisions of the Agreement of the European Economic Area ⁽¹⁾.

Experience has shown that prenotification meetings are extremely valuable to both the notifying party(ies) and the Commission in determining the precise amount of information required in a notification and, in the large majority of cases, will result in a significant reduction of the information required. Accordingly, notifying parties are encouraged to consult the Commission regarding the possibility of dispensing with the obligation to provide certain information (see Section B (b) discussing the possibility of waivers).

B. The need for a correct and complete notification

All information required by this Form must be correct and complete (Article 4 of the Implementing Regulation). In particular you should note that:

- (a) if the information required by this Form is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid), the Commission will accept that the notification is complete and thus valid notwithstanding the failure to provide such information, providing that you give reasons for the unavailability of said information, and provide your best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission should also be provided; unless all material information required by this Form is supplied in full or good reasons are given explaining why this has not been possible the notification will be incomplete and will only become effective on the date on which all such information required is received;
- (b) the Commission only requires the submission of information relevant and necessary to its inquiry into the notified operation. If you consider that any particular information requested by this Form, in the full- or short-form version, may not be necessary for the Commission's examination of the case, you may explain this in your notification and ask the Commission to dispense with the obligation to provide that information, pursuant to Article 3 (2) of the Implementing Regulation;
- (c) incorrect or misleading information in the notification will be considered to be incomplete information. In such cases, the Commission will inform the notifying parties or their representatives of this in writing and without delay. The notification will only become effective on the date on which the complete and accurate information is received by the Commission (Article 4 (2) and (4) of the Implementing Regulation). Article 14 (1) (b) of Regulation (EEC) No 4064/89 provides that incorrect or misleading information where supplied intentionally or negligently can make the notifying party or parties liable to fines of up to ECU 50 000. In addition, pursuant to point (a) of

⁽¹⁾ Hereinafter referred to as 'the EEA Agreement', in particular Article 57 of the EEA Agreement (point 1 of Annex XIV to the EEA Agreement and Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice), as well as Protocols 21 and 24 to the EEA Agreement and Article 1, and the Agreed Minutes of the Protocol adjusting the EEA Agreement. In particular, any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement.

Article 8 (5) of Regulation (EEC) No 4064/89 the Commission may also revoke its decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

C. Notification in short-form

- (a) In cases where a joint venture has no, or *de minimis*, actual or foreseen activities within the EEA territory, the Commission intends to allow notification of the operation by means of short-form. Such cases occur where joint control is acquired by two or more undertakings, and where:
- (i) the turnover ⁽¹⁾ of the joint venture and/or the turnover of the contributed activities ⁽²⁾, is less than ECU 100 million in the EEA territory; and
 - (ii) the total value of assets ⁽³⁾ transferred to the joint venture is less than ECU 100 million in the EEA territory ⁽⁴⁾.
- (b) If you consider that the operation to be notified meets these qualifications, you may explain this in your notification and ask the Commission to dispense with the obligation to provide the full-form notification, pursuant to Article 3 (2) of the Implementing Regulation, and to allow you to notify by means of short-form.
- (c) Short-form notification allows the notifying parties to limit the information provided in the notification to the following sections and questions:
- Section 1,
 - Section 2, except questions 2.1 (a, b and d), 2.3.4, and 2.3.5,
 - Section 3, only question 3.1 and 3.2 (a),
 - Section 5, only questions 5.1 and 5.3,
 - Section 6,
 - Section 10, and
 - Section 9, only questions 9.5 and 9.6 (optional for the convenience of the parties).
- (d) In addition, with respect to the affected markets of the joint venture as defined below in Section 6, indicate the following for the EEA territory, for the Community as a whole, for each Member State and EFTA State, and where different, in the opinion of the notifying parties, for the relevant geographic market:
- the sales in value and volume, as well as the market shares, for the year preceding the operation, and
 - the five largest customers and the five largest competitors in the affected markets in which the joint venture will be active. Provide the name, address, telephone number, fax number and appropriate contact person of each such customer and competitor.
- (e) The Commission may require full, or where appropriate partial, notification under the Form CO where:

⁽¹⁾ The turnover of the joint venture should be determined according to the most recent audited accounts of the parent companies, or the joint venture itself, depending upon the availability of separate accounts for the resources combined in the joint venture.

⁽²⁾ The expression 'and/or' refers to the variety of situations covered by the short-form; for example:

- in the case of the joint acquisition of a target company, the turnover to be taken into account is the turnover of this target (the joint venture),
- in the case of the creation of a joint venture to which the parent companies contribute their activities, the turnover to be taken into account is that of the contributed activities,
- in the case of entry of a new controlling party into an existing joint venture, the turnover of the joint venture and the turnover of the activities contributed by the new parent company (if any) must be taken into account.

⁽³⁾ The total value of assets of the joint venture should be determined according to the last regularly prepared and approved balance sheet of each parent company. The term 'assets' includes (1) all tangible and intangible assets that will be transferred to the joint venture (examples of tangible assets include production plants, wholesale or retail outlets, and inventory of goods) and (2) any amount of credit or any obligations of the joint venture which any parent company of the JV has agreed to extend or guarantee.

⁽⁴⁾ Where the assets transferred generate turnover, then neither the value of the assets nor that of the turnover may exceed ECU 100 million.

- the notified operation does not meet the short-form thresholds, or
- this appears to be necessary for an adequate investigation with respect to possible competition problems on affected markets.

In such cases, the notification may be considered incomplete in a material respect pursuant to Article 4 (2) of the Implementing Regulation. The Commission will inform the notifying parties or their representatives of this in writing and without delay and will fix a deadline for the submission of a full or, where appropriate partial, notification. The notification will only become effective on the date on which all information required is received.

D. Who must notify

In the case of a merger within the meaning of Article 3 (1) (a) or the acquisition of joint control in an undertaking within the meaning of Article 3 (1) (b), the notification shall be completed jointly by the parties to the merger or by those acquiring joint control as the case may be.

In case of the acquisition of a controlling interest in 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.

E. 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 proceedings for all notifying parties. Where notifications are made in accordance with Article 12 of Protocol 24 to the EEA Agreement in an official language of an EFTA State which is not an official language of the Community, the notification shall simultaneously be supplemented with a translation into an official language of the Community.

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing a declaration as provided in Section 10, and annexing supporting documentation.

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 the Implementing Regulation).

Requested documents may be originals or copies of the originals. In the latter case the notifying party shall confirm that they are true and complete.

Twenty-four copies of each notification and 19 copies of all supporting documentation must be provided.

The notification should be delivered by registered mail or by hand (or courier service) 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/Kortenberglaan 150,
B-1049 Brussels.

F. Confidentiality

Article 214 of the Treaty and Article 17 (2) of Regulation (EEC) No 4064/89 as well as the corresponding provisions of the EEA Agreement ⁽¹⁾ require the Commission, the Member States, the

⁽¹⁾ See, in particular, Article 122 of the EEA Agreement, Article 9 of Protocol 24 to the EEA Agreement and Article 17 (2) of Chapter XIII of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (ESA Agreement).

EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

If you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked 'Business Secrets'. You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

G. Definitions and instructions for purposes of this Form

Notifying party or parties: in cases where a notification is submitted by only one of the undertakings party to an operation, 'notifying parties' is used to refer only to the undertaking actually submitting the notification.

Party(ies) to the concentration or, parties: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms 'notifying party(ies)' and 'party(ies) to the concentration' include all the undertakings which belong to the same groups as those 'parties'.

Affected markets: Section 6 of this Form requires the notifying parties to define the relevant product and/or service markets, and further to identify which of those relevant markets are likely to be affected by the notified operation. This definition of affected market is used as the basis for requiring information for a number of other questions contained in this Form. The definitions thus submitted by the notifying parties are referred to in this Form as the affected market(s). This term can refer to a relevant market made up either of products or of services.

Year: all references to the word 'year' in this Form shall be read as meaning calendar year, unless otherwise stated. All information requested in this Form shall, unless otherwise specified, relate to the year preceding that of the notification.

The financial data requested in Section 2.4 must be provided in ecus at the average conversion rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant Articles and paragraphs of Council Regulation (EEC) No 4064/89, unless otherwise stated.

SECTION 1

Background information

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 number, fax number and/or telex of, and position held by, the appropriate contact person.

1.2. *Information on other parties ⁽¹⁾ to the concentration*

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

⁽¹⁾ This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

- 1.2.1. name and address of undertaking;
- 1.2.2. nature of undertaking's business;
- 1.2.3. name, address, telephone number, fax number and/or telex of, and position held by the appropriate contact person.
- 1.3. *Address for service*

Give an address (in Brussels if available) to which all communications may be made and documents delivered.
- 1.4. *Appointment of representatives*

Where notifications are signed by representatives of undertakings, such representatives shall produce written proof that they are authorized to act.

If a joint notification is being submitted, has a joint representative been appointed?

If yes, please give the details requested in Sections 1.4.1 to 1.4.4.

If no, please give details of information of any representatives who have been authorized to act for each of the parties to the concentration, indicating whom they represent:

 - 1.4.1. name of representative;
 - 1.4.2. address of representative,
 - 1.4.3. name of person to be contacted (and address, if different from 1.4.2);
 - 1.4.4. telephone number, fax number and/or telex.

SECTION 2

Details of the concentration

- 2.1. *Briefly describe the nature of the concentration being notified. In doing so state:*
 - (a) whether the proposed concentration is a full legal merger, an acquisition of sole or joint control, a concentrative joint venture or a contract or other means of conferring direct or indirect control within the meaning of Article 3 (3);
 - (b) whether the whole or parts of parties are subject to the concentration;
 - (c) a brief explanation of the economic and financial structure of the concentration;
 - (d) whether any public offer for the securities of one party by another party has the support of the former's supervisory boards of management or other bodies legally representing that party;
 - (e) the proposed or expected date of any major events designed to bring about the completion of the concentration;
 - (f) the proposed structure of ownership and control after the completion of the concentration;
 - (g) any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support.

- 2.2. *List the economic sectors involved in the concentration.*
- 2.3. *For each of the undertakings concerned by the concentration ⁽¹⁾ provide the following data ⁽²⁾ for the last financial year:*
- 2.3.1. world-wide turnover;
- 2.3.2. Community-wide turnover;
- 2.3.3. EFTA-wide turnover;
- 2.3.4. turnover in each Member State;
- 2.3.5. turnover in each EFTA State;
- 2.3.6. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved ⁽³⁾;
- 2.3.7. the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved ⁽³⁾.
- 2.4. *Provide the following information with respect to the last financial year:*
- 2.4.1. does the combined turnover of the undertakings concerned in the territory of the EFTA States equal 25 % or more of their total turnover in the EEA territory?
- 2.4.2. does each of at least two undertakings concerned have a turnover exceeding ECU 250 million in the territory of the EFTA States?

SECTION 3

Ownership and control ⁽⁴⁾

For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

This list must include:

- 3.1. all undertakings or persons controlling these parties, directly or indirectly;
- 3.2. all undertakings active on any affected market ⁽⁵⁾ that are controlled, directly or indirectly:
- (a) by these parties;
- (b) by any other undertaking identified in 3.1.

For each entry listed above, the nature and means of control shall be specified.

⁽¹⁾ See Commission notice on the notion of undertakings concerned.

⁽²⁾ See, generally, the Commission notice on 'Calculation of turnover'. Turnover of the acquiring party or parties to the concentration shall include the aggregated turnover of all undertakings within the sense of Article 5 (4). Turnover of the acquired party or parties shall include the turnover relating to the parts subject to the transaction in the sense of Article 5 (2). Special provisions are contained in Articles 5 (3), (4) and 5 (5) for credit, insurance, other financial institutions and joint undertakings.

⁽³⁾ See guidance note IV for the calculation of turnover in one Member State with respect to Community-wide turnover.

⁽⁴⁾ See Articles 3 (3) to 3 (5) and 5 (4).

⁽⁵⁾ See Section 6 for the definition of affected markets.

The information sought in this section may be illustrated by the use of organization charts or diagrams to show the structure of ownership and control of the undertakings.

SECTION 4

Personal and financial links and previous acquisitions

With respect to the parties to the concentration and each undertaking or person identified 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 6) in which the undertakings, or persons, of the group hold individually or collectively 10 % or more of the voting rights, issued share capital or other securities;

in each case identify the holder and state the percentage held;
- 4.2. 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 or any other undertaking which is active on affected markets;

in each case identify the name of the other undertaking and the positions held;
- 4.3. details of acquisitions made during the last three years by the groups identified above (Section 3) of undertakings active in affected markets as defined in Section 6.

Information provided here may be illustrated by the use of organization charts or diagrams to give a better understanding.

SECTION 5

Supporting documentation

Notifying parties shall provide the following:

- 5.1. copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties to the concentration, acquisition of a controlling interest or a public bid;
- 5.2. in a public bid, a copy of the offer document; if unavailable on notification, should be submitted as soon as possible and not later than when it is posted to shareholders);
- 5.3. copies of the most recent annual reports and accounts of all the parties to the concentration;
- 5.4. where at least one affected market is identified:

copies of analyses, reports, studies and surveys submitted to or prepared for any member(s) of the board of directors, the supervisory board, or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to competitive conditions, competitors (actual and potential), and market conditions.

SECTION 6

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed.

The notifying party or parties shall provide the data requested having regard to the following definitions:

I. Relevant product markets

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, e.g. substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets.

II. Relevant geographic markets

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

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

III. Affected markets

For purposes of information required in this Form, affected markets consist of relevant product markets where in the EEA territory, in the Community, in the territory of the EFTA States, in any Member State or in any EFTA State:

- (a) two or more of the parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 % or more. These are horizontal relationships;
- (b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market share is 25 % or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration. These are vertical relationships.

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

- 6.1. Identify each affected market within the meaning of Section III, within the EEA territory, the Community, the territory of the EFTA States, in any Member State or in any EFTA State
- 6.2. Briefly describe the relevant product and geographic markets concerned by the notified operation, including those which are closely related to the relevant product market(s) concerned (in upstream, downstream and horizontal neighbouring markets), where two or more of the parties to the concentration are active and which are not affected markets within the meaning of Section III.

SECTION 7

Information on affected markets

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

- (a) for the EEA territory;
- (b) for the Community as a whole;
- (c) for the territory of the EFTA States as a whole;
- (d) individually for each Member State and EFTA State where the parties to the concentration do business;
- (e) and, where in the opinion of the notifying parties, the relevant geographic market is different;

provide the following:

- 7.1. an estimate of the total size of the market in terms of sales value (in ecus) and volume (units) ⁽¹⁾. Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;
- 7.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;
- 7.3. an estimate of the market share in value (and where appropriate volume) of all competitors (including importers) having at least 10 % of the geographic market under consideration. Provide documents where available to confirm the calculation of these market shares and provide the name, address, telephone number, fax number and appropriate contact person, of these competitors;
- 7.4. an estimate of the total value and volume and source of imports from outside the EEA territory and identify:
 - (a) the proportion of such imports that are derived from the groups to which the parties to the concentration belong;
 - (b) an estimate of the extent to which any quotas, tariffs or non-tariff barriers to trade, affect these imports, and
 - (c) an estimate of the extent to which transportation and other costs affect these imports;
- 7.5. the extent to which trade among States within the EEA territory is affected by:
 - (a) transportation and other costs; and
 - (b) other non-tariff barriers to trade;
- 7.6. the manner in which the parties to the concentration produce and sell the products and/or services; for example, whether they manufacture locally, or sell through local distribution facilities;
- 7.7. a comparison of price levels in each Member State and EFTA State by each party to the concentration and a similar comparison of price levels between the Community, the EFTA States and other areas where these products are produced (e. g. eastern Europe, the United States of America, Japan, or other relevant areas);
- 7.8. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors.

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

SECTION 8

General conditions in affected markets

- 8.1. Identify the five largest suppliers to the notifying parties and their individual shares of purchases from each of these suppliers (or raw materials or goods used for purposes of producing the relevant products). Provide the name, address, telephone number, fax number and appropriate contact person, of these suppliers.

Structure of supply in affected markets

- 8.2. Explain the distribution channels and service networks that exist on the affected markets. In so doing, take account of the following where appropriate:
- (a) 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 identified in Section 3?
 - (b) the service networks (for example, maintenance and repair) prevailing and their importance in these markets. To what extent are such services performed by third parties and/or undertakings belonging to the same group as the parties identified in Section 3?
- 8.3. Where appropriate, provide an estimate of the total Community-wide and EFTA-wide capacity for the last three years. Over this period what proportion of this capacity is accounted for by each of the parties to the concentration, and what have been their respective rates of capacity utilization.

Structure of demand in affected markets

- 8.4. Identify the five largest customers of the notifying parties in each affected market and their individual share of total sales for such products accounted for by each of those customers. Provide the name, address, telephone number, fax number and appropriate contact person, of each of these customers.
- 8.5. Explain the structure of demand in terms of:
- (a) the phases of the markets in terms of, for example, take-off, expansion, maturity and decline, and a forecast of the growth rate of demand;
 - (b) the importance of customer preferences, in terms of brand loyalty, products differentiation and the provision of a full range of products;
 - (c) the degree of concentration or dispersion of customers;
 - (d) segmentation of customers into different groups and describe the 'typical customer' of each group;
 - (e) the importance of exclusive distribution contracts and other types of long-term contracts;
 - (f) the extent to which public authorities, government agencies, state enterprises or similar bodies are important participants as a source of demand.

Market entry

- 8.6. Over the last five years, has there been any significant entry into any affected markets? If the answer is 'yes', where possible provide their name, address, telephone number, fax number and appropriate contact person, and an estimate of their current market shares.
- 8.7. In the opinion of the notifying parties are there undertakings (including those at present operating only in extra-Community or extra-EEA markets) that are likely to enter the market? If the answer is 'yes', please explain why and identify such entrants by name, address, telephone number, fax number and appropriate contact person, and an estimate of the time within which such entry is likely to occur.

- 8.8. 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:
- (a) the total costs of entry (R&D, establishing distribution systems, promotion, advertising, servicing, etc.) on a scale equivalent to a significant viable competitor, indicating the market share of such a competitor;
 - (b) any legal or regulatory barriers to entry, such as government authorization or standard setting in any form;
 - (c) any restrictions created by the existence of patents, know-how and other intellectual property rights in these markets and any restrictions created by licensing such rights;
 - (d) the extent to which each of the parties to the concentration are licensees or licensors of patents, know-how and other rights in the relevant markets;
 - (e) the importance of economies of scale for the production of products in the affected markets;
 - (f) access to sources of supply, such as availability of raw materials.

Research and development

- 8.9. Give an account of the importance of research and development in the ability of a firm operating on the relevant market(s) to compete in the long-term. Explain the nature of the research and development in affected markets carried out by the undertakings to the concentration.

In so doing, take account of the following, where appropriate:

- (a) the research and development intensities ⁽¹⁾ for these markets and the relevant research and development intensities for the parties to the concentration;
- (b) the course of technological development for these markets over an appropriate time period (including developments in products and/or services, production processes, distribution systems, etc.);
- (c) the major innovations that have been made in these markets and the undertakings responsible for these innovations;
- (d) the cycle of innovation in these markets and where the parties are in this cycle of innovation.

Cooperative Agreements

- 8.10. To what extent do cooperative agreements (horizontal or vertical) exist in the affected markets?
- 8.11. Give details of the most important cooperative agreements engaged in by the parties to the concentration in the affected markets, such as research and development, licensing, joint production, specialization, distribution, long-term supply and exchange of information agreements.

Trade associations

- 8.12. With respect to the trade associations in the affected markets:
- (a) identify those in which the parties to the concentration are members;
 - (b) identify the most important trade associations to which the customers and suppliers of the parties to the concentration belong.

Provide the name, address, telephone number, fax number and appropriate contact person of all trade associations listed above.

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

SECTION 9

General matters*Market data on conglomerate aspects*

Where any of the parties to the concentration hold individually a market share of 25 % or more for any product market in which there is no horizontal or vertical relationship as described above, provide the following information:

- 9.1. a description of each product market and explain why the products and/or services in these markets are included (and why others are excluded) by reasons of their characteristics, prices and their intended use;
- 9.2. an estimate of the value of the market and the market shares of each of the groups to which the parties belong for each product market identified in 9.1. for the last financial year:
 - (a) for the EEA territory as a whole;
 - (b) for the Community as a whole;
 - (c) for the territory of the EFTA States as a whole;
 - (d) individually for each Member State and EFTA State where the groups to which the parties belong do business;
 - (e) and where different, for the relevant geographic market.

Overview of the markets

- 9.3. Describe the world-wide context of the proposed concentration, indicating the position of each of the parties to the concentration outside of the EEA territory in terms of size and competitive strength.
- 9.4. Describe how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.

Ancillary restraints

- 9.5. Operations which have as their object or effect the coordination of the competitive behaviour of undertakings which remain independent fall, in principle, within Articles 85 and 86 of the Treaty of Rome. However, if the parties to the concentration, and/or other involved parties (including the seller and minority shareholders), enter into ancillary restrictions directly related and necessary to the implementation of the concentration, these restrictions may be assessed in conjunction with the concentration itself (see in particular the 25th recital to Regulation (EEC) No 4064/89 and Commission notice on restrictions ancillary to concentrations ⁽¹⁾).
 - (a) Identify each ancillary restriction in the agreements provided with the notification for which you request an assessment in conjunction with the concentration; and
 - (b) explain why these are directly related and necessary to the implementation of the concentration.

Transfer of notification

- 9.6. 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 for negative clearance from, or a notification to obtain an exemption from Article 85 of the Treaty of Rome?

⁽¹⁾ OJ No C 203, 14. 8. 1990, p. 5.

GUIDANCE NOTE I ⁽¹⁾

Calculation of turnover for credit and other financial institutions

(Article 5 (3) (a))

For the calculation of turnover for credit institutions and other financial institutions, we give the following example (proposed merger between bank A and bank B)

I. Consolidated balance sheets

(ECU million)

Assets	Bank A	Bank B
Loans and advances to credit institutions	20 000	1 000
— to credit institutions within the Community	(10 000)	(500)
— to credit institutions within one (and the same) Member State X	(5 000)	(500)
Loans and advances to customers	60 000	4 000
— to Community residents	(30 000)	(2 000)
— to residents of one (and the same) Member State X	(15 000)	(500)
Other assets:	20 000	1 000
Total assets:	100 000	5 000

II. Calculation of turnover

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

1. Aggregate world-wide turnover is replaced by one-tenth of total assets the total sum of which is more than ECU 5 000 million.

Bank A	Bank B
10 000	600

2. Community-wide turnover is replaced by, for each bank, one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers within the Community; to the total sum of loans and advances to credit institutions and customers.

This is calculated as follows:

one-tenth of total assets:
which is multiplied for each bank by the ratio between
loans and advances to credit institutions and customers
within the Community

Bank A	Bank B
10 000	600
10 000	500
30 000	2 000
40 000	2 500
20 000	1 000
60 000	4 000
80 000	5 000

and

the total sum of loans and advances to credit institutions
and customers

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.

⁽¹⁾ 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

is replaced by one-tenth of total assets:

Bank A	Bank B
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.

This is calculated as follows:

loans and advances to credit institutions
and customers

Bank A	Bank B
5 000	500
15 000	500
20 000	1 000
80 000	5 000

within one (and the same) Member State X

and
the total sum of loans and advances to credit institutions and
customers

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 world-wide 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 insurance A and B):

I. Consolidated profit and loss account

(ECU million)

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 world-wide turnover is replaced by the value of gross premiums written world-wide, 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 world-wide turnover of insurances A and B, as replaced by the value of gross premiums written world-wide, 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

(ECU million)

Turnover	Undertaking A	Undertaking B
Sales revenues world-wide	10 000	2 000
— Community	(8 000)	(1 500)
— Member State Y	(4 000)	(900)

(ECU million)

Turnover	Joint undertaking C
Sales revenues world-wide	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 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.

III. Calculation of turnover

- (a) Undertaking A's aggregate world-wide turnover shall be calculated as follows: ECU 10 000 million and 50 % of C's world-wide turnover with third undertakings (i.e. ECU 35 million), the sum of which is ECU 10 035 million.

Undertaking B's aggregate world-wide turnover shall be calculated as follows: ECU 2 000 million and 50 % of C's world-wide turnover with third undertakings (i.e. ECU 35 million), the sum of which is ECU 2 035 million.

- (b) The aggregate world-wide 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).
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 world-wide 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-third 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

(ECU million)

Turnover	Undertaking A	Undertaking B
Sales revenues world-wide	10 000	500
— within the Community	(8 000)	(400)
— in Member State X	(6 000)	(200)

Example 2 (a)

(ECU million)

Turnover	Undertaking A	Undertaking B
Sale revenues world-wide	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 REGULATION (EC) No 3385/94

of 21 December 1994

on the form, content and other details of applications and notifications provided for in
Council Regulation No 17

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European
Community,Having regard to the Agreement on the European
Economic Area,Having regard to Council Regulation No 17 of 6
February 1962, First Regulation implementing Articles 85
and 86 of the Treaty ⁽¹⁾, as last amended by the Act of
Accession of Spain and Portugal, and in particular Article
24 thereof,Whereas Commission Regulation No 27 of 3 May 1962,
First Regulation implementing Council Regulation No
17 ⁽²⁾, as last amended by Regulation (EC) No
3666/93 ⁽³⁾, no longer meets the requirements of efficient
administrative procedure; whereas it should therefore be
replaced by a new regulation;Whereas, on the one hand, applications for negative
clearance under Article 2 and notifications under Articles
4, 5 and 25 of Regulation No 17 have important legal
consequences, which are favourable to the parties to an
agreement, a decision or a practice, while, on the other
hand, incorrect or misleading information in such
applications or notifications may lead to the imposition
of fines and may also entail civil law disadvantages for
the parties; whereas it is therefore necessary in the
interests of legal certainty to define precisely the persons
entitled to submit applications and notifications, the
subject matter and content of the information which such
applications and notifications must contain, and the time
when they become effective;Whereas each of the parties should have the right to
submit the application or the notification to the
Commission; whereas, furthermore, a party exercising the
right should inform the other parties in order to enable
them to protect their interests; whereas applications andnotifications relating to agreements, decisions or practices
of associations of undertakings should be submitted only
by such association;Whereas it is for the applicants and the notifying parties
to make full and honest disclosure to the Commission of
the facts and circumstances which are relevant for
coming to a decision on the agreements, decisions or
practices concerned;Whereas, in order to simplify and expedite their
examination, it is desirable to prescribe that a form be
used for applications for negative clearance relating to
Article 85 (1) and for notifications relating to Article 85
(3); whereas the use of this form should also be possible
in the case of applications for negative clearance relating
to Article 86;Whereas the Commission, in appropriate cases, will give
the parties, if they so request, an opportunity before the
application or the notification to discuss the intended
agreement, decision or practice informally and in strict
confidence; whereas, in addition, it will, after the
application or notification, maintain close contact with
the parties 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;Whereas the provisions of this Regulation must also
cover cases in which applications for negative clearance
relating to Article 53 (1) or Article 54 of the EEA
Agreement, or notifications, relating to Article 53 (3) of
the EEA Agreement are submitted to the Commission,

HAS ADOPTED THIS REGULATION:

*Article 1***Persons entitled to submit applications and notifications**1. The following may submit an application under
Article 2 of Regulation No 17 relating to Article 85 (1)⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.⁽²⁾ OJ No 35, 10. 5. 1962, p. 1118/62.⁽³⁾ OJ No L 336, 31. 12. 1993, p. 1.

of the Treaty or a notification under Articles 4, 5 and 25 of Regulation No 17:

- (a) any undertaking and any association of undertakings being a party to agreements or to concerted practices; and
- (b) any association of undertakings adopting decisions or engaging in practices;

which may fall within the scope of Article 85 (1).

Where the application or notification is submitted by some, but not all, of the parties, referred to in point (a) of the first subparagraph, they shall give notice to the other parties.

2. Any undertaking which may hold, alone or with other undertakings, a dominant position within the common market or in a substantial part of it, may submit an application under Article 2 of Regulation No 17 relating to Article 86 of the Treaty.

3. Where the application or notification is signed by representatives of persons, undertakings or associations of undertakings, such representatives shall produce written proof that they are authorized to act.

4. Where a joint application or notification is made, a joint representative should be appointed who is authorized to transmit and receive documents on behalf of all the applicants or notifying parties.

Article 2

Submission of applications and notifications

1. Applications under Article 2 of Regulation No 17 relating to Article 85 (1) of the Treaty and notifications under Articles 4, 5 and 25 of Regulation No 17 shall be submitted in the manner prescribed by Form A/B as shown in the Annex to this Regulation. Form A/B may also be used for applications under Article 2 of Regulation No 17 relating to Article 86 of the Treaty. Joint applications and joint notifications shall be submitted on a single form.

2. Seventeen copies of each application and notification and three copies of the Annexes thereto shall be submitted to the Commission at the address indicated in Form A/B.

3. The documents annexed to the application or notification shall be either originals or copies of the originals; in the latter case the applicant or notifying party shall confirm that they are true copies of the originals and complete.

4. Applications and notifications shall be in one of the official languages of the Community. This language shall also be the language of the proceeding for the applicant or notifying party. Documents shall be submitted in their original language. Where the original language is not one of the official languages, a translation into the language of the proceeding shall be attached.

5. Where applications for negative clearance relating to Article 53 (1) or Article 54 of the EEA Agreement or notifications relating to Article 53 (3) of the EEA Agreement are submitted, they may also be in one of the official languages of the EFTA States or the working language of the EFTA Surveillance Authority. If the language chosen for the application or notification is not an official language of the Community, the applicant or notifying party shall supplement all documentation with a translation into an official language of the Community. The language which is chosen for the translation shall be the language of the proceeding for the applicant or notifying party.

Article 3

Content of applications and notifications

1. Applications and notifications shall contain the information, including documents, required by Form A/B. The information must be correct and complete.

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

3. The Commission may dispense with the obligation to provide any particular information, including documents, required by Form A/B 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 applicant or notifying party receipt of the application or notification, and of any reply to a letter sent by the Commission pursuant to Article 4 (2).

*Article 4***Effective date of submission of applications and notifications**

1. Without prejudice to paragraphs 2 to 5, applications and notifications shall become effective on the date on which they are received by the Commission. Where, however, the application or notification is sent by registered post, it shall become effective on the date shown on the postmark of the place of posting.

2. Where the Commission finds that the information, including documents, contained in the application or notification is incomplete in a material respect, it shall, without delay, inform the applicant or notifying party in writing of this fact and shall fix an appropriate time limit for the completion of the information. In such cases, the application or notification shall become effective on the date on which the complete information is received by the Commission.

3. Material changes in the facts contained in the application or notification which the applicant or notifying party knows or ought to know must be communicated to the Commission voluntarily and without delay.

4. Incorrect or misleading information shall be considered to be incomplete information.

5. Where, at the expiry of a period of one month following the date on which the application or notification has been received, the Commission has not provided the applicant or notifying party with the information referred to in paragraph 2, the application or notification shall be deemed to have become effective on the date of its receipt by the Commission.

*Article 5***Repeal**

Regulation No 27 is repealed.

*Article 6***Entry into force**

This Regulation shall enter into force on 1 March 1995.

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

Done at Brussels, 21 December 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

FORM A/B

INTRODUCTION

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

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

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

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

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

1. Purpose of the EC Competition Rules

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

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

2. Purpose of the EEA competition rules

The competition rules of the Agreement on the European Economic Area (concluded between the Community, the Member States and the EFTA States ⁽¹⁾) are based on the same principles as those contained in the Community competition rules and have the same purpose, i.e. to prevent the distortion of competition in the EEA territory by cartels or the abuse of dominant position. They apply to any enterprise trading directly or indirectly in the EEA territory, wherever established.

Article 53 (1) of the EEA Agreement (the text of Articles 53, 54 and 56 of the EEA Agreement is reproduced in Annex I) prohibits restrictive agreements, decisions or concerted practices (arrangements) which may affect trade between the Community and one or more EFTA States (or between EFTA States), and Article 53 (2) declares agreements or decisions containing such restrictions void; Article 53 (3), however, provides for exemption of arrangements with beneficial effects, if its conditions are met. Article 54 prohibits the abuse of a dominant position which may affect trade between the Community and one or more EFTA States (or between EFTA States). The procedures for implementing these Articles, which provide for 'negative clearance' and exemption pursuant to Article 53 (3), are laid down in Regulation No 17, supplemented for EEA purposes, by Protocols 21, 22 and 23 to the EEA Agreement ⁽²⁾.

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

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

1. Negative clearance

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

There is, however, no point in making an application when the arrangements or the behaviour are manifestly not prohibited by the abovementioned provisions. Nor is the Commission obliged to give negative clearance. Article 2 of Regulation No 17 states that '... the Commission may certify...'. The Commission issues negative clearance decisions only where an important problem of interpretation has to be solved. In the other cases it reacts to the application by sending a comfort letter.

The Commission has published several notices relating the interpretation of Article 85 (1) of the EC Treaty. They define certain categories of agreements which, by their nature or because of their minor importance, are not caught by the prohibition ⁽³⁾.

2. Exemption

The procedure for exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement allows companies to enter into arrangements which, in fact, offer economic advantages but which, without exemption, would be prohibited by Article 85 (1) of the EC Treaty or by Article 53 (1) of the EEA Agreement. This procedure is governed by Articles 4, 6 and 8 and, for the new Member States, also by Articles 5, 7 and 25 of Regulation No 17. The exemption takes

⁽¹⁾ See list of Member States and EFTA States in Annex III.

⁽²⁾ Reproduced in Annex I.

⁽³⁾ See Annex II.

the form of a decision by the Commission declaring Article 85 (1) of the EC Treaty or Article 53 (1) of the EEA Agreement to be inapplicable to the arrangements described in the decision. Article 8 requires the Commission to specify the period of validity of any such decision, allows the Commission to attach conditions and obligations and provides for decisions to be amended or revoked or specified acts by the parties to be prohibited in certain circumstances, notably if the decisions were based on incorrect information or if there is any material change in the facts.

The Commission has adopted a number of regulations granting exemptions to categories of agreements ⁽¹⁾. Some of these regulations provide that some agreements may benefit from exemption only if they are notified to the Commission pursuant to Article 4 or 5 of Regulation No 17 with a view to obtaining exemption, and the benefit of the opposition procedure is claimed in the notification.

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

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

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

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

The competence of the Commission and of the EFTA Surveillance Authority to apply the EEA competition rules follows from Article 56 of the EEA Agreement. Applications and notifications relating to agreements, decisions or concerted practices liable to affect trade between Member States should be addressed to the Commission unless their effects on trade between Member States or on competition within the Community are not appreciable within the meaning of the Commission notice of 1986 on agreements of minor importance ⁽²⁾. Furthermore, all restrictive agreements, decisions or concerted practices affecting trade between one Member State and one or more EFTA States fall within the competence of the Commission, provided that the undertakings concerned achieve more than 67 % of their combined EEA-wide turnover within the Community ⁽³⁾. However, if the effects of such agreements, decisions or concerted practices on trade between Member States or on competition within the Community are not appreciable, the notification should, where necessary, be addressed to the EFTA Surveillance Authority. All other agreements, decisions and concerted practices falling under Article 53 of the EEA Agreement should be notified to the EFTA Surveillance Authority (the address of which is given in Annex III).

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

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

⁽¹⁾ See Annex II.

⁽²⁾ OJ No C 231, 12. 9. 1986, p. 2.

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

C. The Purpose of this Form

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

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

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

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

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

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

D. Which chapters of the form should be completed?

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

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

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

- in cases not posing any problems, the Commission will send a comfort letter confirming the compatibility of the agreement with Article 85 (1) or (3),
- if a comfort letter cannot be sent because of the need to settle the case by formal decision, the Commission will inform the undertakings concerned of its intention to adopt a decision either granting or rejecting exemption,

- if the Commission has serious doubts as to the compatibility of the agreement with the competition rules, it will send a letter to the parties giving notice of an in-depth examination which may, depending on the case, result in a decision either prohibiting, exempting subject to conditions and obligations, or simply exempting the agreement in question.

This new accelerated procedure, applicable since 1 January 1993, is based entirely on the principle of self-discipline. The deadline of two months from the complete notification — intended for the initial examination of the case — does not constitute a statutory term and is therefore in no way legally binding. However, the Commission will do its best to abide by it. The Commission reserves the right, moreover, to extend this accelerated procedure to other forms of cooperation between undertakings.

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

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

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

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

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

E. The need for complete information

The receipt of a valid notification by the Commission has two main consequences. First, it affords immunity from fines from the date that the valid notification is received by the Commission with respect to applications made in order to obtain exemption (see Article 15 (5) of Regulation No 17). Second, until a valid notification is received, the Commission cannot grant an exemption pursuant to Article 85 (3) of the EC Treaty and/or Article 53 (3) of the EEA Agreement, and any exemption that is granted can be effective only from the date of receipt of a valid notification⁽¹⁾. Thus, whilst there is no legal obligation to notify as such, unless and until an arrangement that falls within the scope of Article 85 (1) and/or Article 53 (1) has not been notified and is, therefore, not capable of being exempted, it may be declared void by a national court pursuant to Article 85 (2) and/or Article 53 (2)⁽²⁾.

⁽¹⁾ Subject to the qualification provided for in Article 4 (2) of Regulation No 17.

⁽²⁾ For further details of the consequences of non-notification see the Commission notice on cooperation between national Courts and the Commission (OJ No C 39, 13. 2. 1993, p. 6).

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

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

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

It is also important that undertakings inform the Commission of important changes in the factual situation including those of which they become aware after the application or notification has been submitted. The Commission must, therefore, be informed immediately of any changes to an agreement, decision or practice which is the subject of an application or notification (see Article 4 (3) of the Regulation). Failure to inform the Commission of such relevant changes could result in any negative clearance decision being without effect or in the withdrawal of any exemption decision⁽¹⁾ adopted by the Commission on the basis of the notification.

F. The need for accurate information

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

G. Who can lodge an application or a notification?

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

⁽¹⁾ See point (a) of Article 8 (3) of Regulation No 17.

of undertakings may submit an application or a notification in relation to decisions taken or practices pursued into in the operation of the association.

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

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

H. How to submit an application or notification

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

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

Supporting documents shall be submitted in their original language; where this is not an official language of the Community they must be translated into the language of the proceeding. The supporting documents may be originals or copies of the originals (see Article 2 (4) of the Regulation).

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

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

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

The application or notification is to be sent to:

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

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

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

I. Confidentiality

Article 214 of the EC Treaty, Article 20 of Regulation No 17, Article 9 of Protocol 23 to the EEA Agreement, Article 122 of the EEA Agreement and Articles 20 and 21 of Chapter II of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and of a Court of Justice require the Commission, the Member States, the EEA Surveillance Authority and EFTA States not to disclose information of the kind covered by the obligation of professional secrecy. On the other hand, Regulation No 17 requires the Commission to publish a summary of the application or notification, should it intend to take a favourable decision. In this publication, the Commission '... shall have regard to the legitimate interest of undertakings in the protection of their business secrets' (Article 19 (3) of Regulation No 17; see also Article 21 (2) in relation to the publication of decisions). In this connection, if an undertaking believes that its interests would be harmed if any of the information it is asked to supply were to be published or otherwise divulged to other undertakings, it should put all such information in a separate annex with each page clearly marked 'Business Secrets'. It should also give reasons why any information identified as confidential or secret should not be divulged or published. (See below, Section 5 of the operational part that requests a non-confidential summary of the notification).

J. Subsequent Procedure

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

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

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

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

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

Files are often closed without any formal decision being taken, for example, because it is found that the arrangements are already covered by a block exemption, or because they do not call for any action by the Commission, at least in circumstances at that time. In such cases comfort letters are sent. Although not a Commission decision, a comfort letter indicates how the Commission's departments view the case on the facts currently in their possession which means that the Commission could where necessary — for example, if it were to be asserted that a contract was void under Article 85 (2) of the EC Treaty and/or Article 53 (2) of the EEA Agreement — take an appropriate decision to clarify the legal situation.

K. Definitions used in the operational part of this form

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

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

Group: A group relationship exists for the purpose of this form where one undertaking:

- owns more than half the capital or business assets of another undertaking, or
- has the power to exercise more than half the voting rights in another undertaking, or
- has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or
- has the right to manage the affairs of another undertaking.

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

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

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

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

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

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

OPERATIONAL PART

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

CHAPTER I

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

Section 1

Identity of the undertakings or persons submitting the notification

- 1.1. Please list the undertakings on behalf of which the notification is being submitted and indicate their legal denomination or commercial name, shortened or commonly used as appropriate (if it differs from the legal denomination).
- 1.2. If the notification is being submitted on behalf of only one or some of the undertakings party to the agreement being notified, please confirm that the remaining undertakings have been informed of that fact and indicate whether they have received a copy of the notification, with relevant confidential information and business secrets deleted ⁽¹⁾. (In such circumstances a copy of the edited copy of the notification which has been provided to such other undertakings should be annexed to this notification.)
- 1.3. If a joint notification is being submitted, has a joint representative ⁽²⁾ been appointed ⁽³⁾?
If yes, please give the details requested in 1.3.1 to 1.3.3 below.
If no, please give details of any representatives who have been authorized to act for each or either of the parties to the agreement indicating who they represent.
 - 1.3.1. Name of representative.
 - 1.3.2. Address of representative.
 - 1.3.3. Telephone and fax number of representative.
- 1.4. In cases where one or more representatives have been appointed, an authority to act on behalf of the undertaking(s) submitting the notification must accompany the notification.

Section 2

Information on the parties to the agreement and the groups to which they belong

- 2.1. State the name and address of the parties to the agreement being notified, and the country of their incorporation.
- 2.2. State the nature of the business of each of the parties to the agreement being notified.
- 2.3. For each of the parties to the agreement, give the name of a person that can be contacted, together with his or her name, address, telephone number, fax number and position held in the undertaking.

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

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

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

- 2.4. Identify the corporate groups to which the parties to the agreement being notified belong. State the sectors in which these groups are active, and the world-wide turnover of each group ⁽¹⁾).

Section 3

Procedural matters

- 3.1. Please state whether you have made any formal submission to any other competition authorities in relation to the agreement in question. If yes, state which authorities, the individual or department in question, and the nature of the contact. In addition to this, mention any earlier proceedings or informal contacts, of which you are aware, with the Commission and/or the EFTA Surveillance Authority and any earlier proceedings with any national authorities or courts in the Community or in EFTA concerning these or any related agreements.
- 3.2. Please summarize any reasons for any claim that the case involves an issue of exceptional urgency.
- 3.3. The Commission has stated that where notifications do not have particular political, economic or legal significance for the Community they will normally be dealt with by means of comfort letter ⁽²⁾. Would you be satisfied with a comfort letter? If you consider that it would be inappropriate to deal with the notified agreement in this manner, please explain the reasons for this view.
- 3.4. State whether you intend to produce further supporting facts or arguments not yet available and, if so, on which points ⁽³⁾.

Section 4

Full details of the arrangements

- 4.1. Please summarize the nature, content and objectives pursued by the agreement being notified.
- 4.2. Detail any provisions contained in the agreements which may restrict the parties in their freedom to take independent commercial decisions, for example regarding:
- buying or selling prices, discounts or other trading conditions,
 - the quantities of goods to be manufactured or distributed or services to be offered,
 - technical development or investment,
 - the choice of markets or sources of supply,
 - purchases from or sales to third parties,
 - whether to apply similar terms for the supply of equivalent goods or services,
 - whether to offer different services separately or together.

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

⁽¹⁾ For the calculation of turnover in the banking and insurance sectors see Article 3 of Protocol 22 to the EEA Agreement.

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

⁽³⁾ Note: In so far as the notifying parties provide the information required by this form that was reasonably available to them at the time of notification, the fact that the parties intend to provide further supporting facts or documentation in due course does not prevent the notification being valid at the time of notification and, in the case of structural joint ventures where the accelerated procedure is being claimed, the two month deadline commencing.

- 4.3. State between which Member States of the Community and/or EFTA States ⁽¹⁾ trade may be affected by the arrangements. Please give reasons for your reply to this question, giving data on trade flows where relevant. Furthermore please state whether trade between the Community or the EEA territory and any third countries is affected, again giving reasons for your reply.

Section 5

Non-confidential Summary

Shortly following receipt of a notification, the Commission may publish a short notice inviting third party comments on the agreement in question ⁽²⁾. As the objective pursued by the Commission in publishing an informal preliminary notice is to receive third party comments as soon as possible after the notification has been received, such a notice is usually published without first providing it to the notifying parties for their comments. This section requests the information to be used in an informal preliminary notice in the event that the Commission decides to issue one. It is important, therefore, that your replies to these questions do not contain any business secrets or other confidential information.

1. State the names of the parties to the agreement notified and the groups of undertakings to which they belong.
2. Give a short summary of the nature and objectives of the agreement. As a guideline this summary should not exceed 100 words.
3. Identify the product sectors affected by the agreement in question.

CHAPTER II

Section concerning the relevant market

(to be completed for all notifications except those relating to structural joint ventures for which accelerated treatment is claimed)

Section 6

The relevant market

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

The following factors are normally considered to be relevant to the determination of the relevant product market and should be taken into account in this analysis ⁽³⁾:

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

⁽¹⁾ See list in Annex II.

⁽²⁾ An example of such a notice figures in annex 1 to this Form. Such a notice should be distinguished from a formal notice published pursuant to Article 19 (3) of Regulation No 17. An Article 19 (3) notice is relatively detailed, and gives an indication of the Commission's current approach in the case in question. Section 5 only seeks information that will be used in a short preliminary notice, and not a notice published pursuant to Article 19 (3).

⁽³⁾ This list is not, however, exhaustive, and notifying parties may refer to other factors.

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 ⁽¹⁾ the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preferences, appreciable differences of the undertakings' market share or substantial price differences between neighbouring areas, and transport costs.

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

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

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

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

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

Section 7

Group members operating on the same markets as the parties *

- 7.1. For each of the parties to the agreement being notified, provide a list of all undertakings belonging to the same group which are:
- 7.1.1. active in the relevant product market(s);
- 7.1.2. active in markets neighbouring the *relevant product market(s)* (i. e. active in products and/or services that represent imperfect and partial substitutes for those included in your definition of the relevant product market(s)).

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

Section 8

The position of the parties on the affected relevant product markets

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

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

⁽¹⁾ This list is not, however, exhaustive, and notifying parties may refer to other factors.

- 8.1.1. the market shares of the parties on the *relevant geographic market* during the previous three years;
- 8.1.2. where different, the market shares of the parties in (a) the EEA territory as a whole, (b) the Community, (c) the territory of the EFTA States and (d) each EC Member State and EFTA State during the previous three years ⁽¹⁾. For this section, where market shares are less than 20 %, please state simply which of the following bands are relevant: 0 to 5 %, 5 to 10 %, 10 to 15 %, 15 to 20 %.

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

Section 9

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

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

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

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

Section 10

Market entry and potential competition in product and geographic terms

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

- 10.1. Describe the various factors influencing entry in product terms into the *relevant product market(s)* that exist in the present case (i.e. what barriers exist to prevent undertakings that do not presently manufacture goods within the relevant product market(s) entering this market(s)). In so doing take account of the following where appropriate:
- to what extent is entry to the markets influenced by the requirement of government authorization or standard setting in any form? Are there any legal or regulatory controls on entry to these markets?
 - to what extent is entry to the markets influenced by the availability of raw materials?
 - to what extent is entry to the markets influenced by the length of contracts between an undertaking and its suppliers and/or customers?
 - describe the importance of research and development and in particular the importance of licensing patents, know-how and other rights in these markets.
- 10.2. Describe the various factors influencing entry in geographic terms into the relevant geographic market(s) that exist in the present case (i.e. what barriers exist to prevent undertakings already

⁽¹⁾ i.e. Where the relevant geographic market has been defined as world wide, these figures must be given regarding the EEA, the Community, the territory of the EFTA States, and each EC Member State. Where the relevant geographic market has been defined as the Community, these figures must be given for the EEA, the territory of the EFTA States, and each EC Member State. Where the market has been defined as national, these figures must be given for the EEA, the Community and the territory of the EFTA States.

producing and/or marketing products within the relevant product market(s) but in areas outside the relevant geographic market(s) extending the scope of their sales into the relevant geographic market(s)?). Please give reasons for your answer, explaining, where relevant, the importance of the following factors:

- trade barriers imposed by law, such as tariffs, quotas etc.,
- local specification or technical requirements,
- procurement policies,
- the existence of adequate and available local distribution and retailing facilities,
- transport costs,
- entrenched consumer preferences for local brands or products,
- language.

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

CHAPTER III

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

Section 11

The relevant market

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

The following factors are normally considered to be relevant ⁽¹⁾ to the determination of the relevant product market and should be taken into account in this analysis:

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

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include ⁽²⁾ the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preferences, appreciable differences of the undertakings' market share or substantial price differences between neighbouring areas, and transport costs.

⁽¹⁾ This list is not, however, exhaustive, and notifying parties may refer to other factors.

⁽²⁾ This list is not, however, exhaustive, and notifying parties may refer to other factors.

Part 11.1

The notifying parties' analysis of the relevant market

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

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

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

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

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

Part 11.2

Questions on the relevant product and geographic market(s)

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

Product market definition

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

The products identified in this list should be ordered in their degree of substitutability, first listing the most perfect substitute for the products of the parties, finishing with the least perfect substitute ⁽¹⁾.

⁽¹⁾ Close economic substitute; most perfect substitute; least perfect substitute these definitions are only relevant to those filling out Chapter III of the form, i.e. those notifying structural joint ventures requesting the accelerated procedure).

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

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

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

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

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

Geographic market definition

- 11.2.3. List all the countries in which the parties are active in the relevant product market(s). Where they are active in all countries within any given groups of countries or trading area (e. g. the whole Community or EFTA, the EEA countries, world-wide) it is sufficient to indicate the area in question.
- 11.2.4. Explain the manner in which the parties produce and sell the goods and/or services in each of these various countries or areas. For example, do they manufacture locally, do they sell through local distribution facilities, or do they distribute through exclusive, or non-exclusive, importers and distributors?
- 11.2.5. Are there significant trade flows in the goods/services that make up the relevant product market(s) (i) between the EC Member States (please specify which and estimate the percentage of total sales made up by imports in each Member State in which the parties are active), (ii) between all or part of the EC Member States and all or part of the EFTA States (again, please specify and estimate the percentage of total sales made up by imports), (iii) between the EFTA States (please specify which and estimate the percentage of total sales made up by imports in each such State in which the parties are active), and (iv) between all or part of the EEA territory and other countries? (again, please specify and estimate the percentage of total sales made up by imports.)
- 11.2.6. Which producer undertakings based outside the Community or the EEA territory sell within the EEA territory in countries in which the parties are active in the affected products? How do these undertakings market their products? Does this differ between different EC Member States and/or EFTA States?

Section 12

Group members operating on the same markets as the parties to the notified agreement

- 12.1. For each of the parties to the agreement being notified, provide a list of all undertakings belonging to the same group which are:
 - 12.1.1. active in the relevant product market(s);
 - 12.1.2. active in markets neighbouring the relevant product market(s) (i. e. active in products/services that represent imperfect and partial substitutes ⁽¹⁾ for those included in your definition of the relevant product market(s);
 - 12.1.3. active in markets upstream and/or downstream from those included in the relevant product market(s).

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

Section 13

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

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

⁽¹⁾ The following are considered to be partial substitutes: products and services which may replace each other solely in certain geographic areas, solely during part of the year or solely for certain uses.

- 13.1. In relation to each relevant product market(s), as defined in your reply to question 11.1.2, please provide the following information:
- 13.1.1. the market shares of the parties on the relevant geographic market during the previous three years;
- 13.1.2. where different, the market shares of the parties in (a) the EEA territory as a whole, (b) the Community, (c) the territory of the EFTA States and (d) each EC Member State and EFTA State during the previous three years ⁽¹⁾. For this section, where market shares are less than 20 %, please state simply which of the following bands are relevant: 0 to 5 %, 5 to 10 %, 10 to 15 %, 15 to 20 % in terms of value or volume.
- For the purpose of answering these questions, market share may be calculated either on the basis of value or volume. Justification for the figures provided must be given. Thus, for each answer, total market value/volume must be stated, together with the sales/turnover of each the parties in question. The source or sources of the information should also be given, and where possible, copies should be provided of documents from which information has been taken.
- 13.2. If the market shares in question 13.1 were to be calculated on a basis other than that used by the parties, would the resultant market shares differ by more than 5 % in any market (i. e. if the parties have calculated market shares on the basis of volume, what would be the relevant figure if it was calculated on the basis of value?) If the figure were to differ by more than 5 % please provide the information requested in question 13.1 on the basis of both value and volume.
- 13.3. Give your best estimate of the current rate of capacity utilization of the parties and in the industry in general in the relevant product and geographic market(s).

Section 14

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

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

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

- 14.1. Please identify the competitors of the parties on the relevant product market(s) that have a market share exceeding 10 % in any EC Member State, EFTA State, in the territory of the EFTA States, in the EEA, or world-wide. Please identify the company and give your best estimate as to their market share in these geographic areas. Please also provide the address, telephone and fax numbers, and, where possible, the name of a contact person at each company identified.
- 14.2. Please describe the nature of demand on the relevant product market(s). For example, are there few or many purchasers, are there different categories of purchasers, are government agencies or departments important purchasers?
- 14.3. Please identify the five largest customers of each of the parties for each *relevant product market(s)*. State company name, address, telephone and fax numbers, together with the name of a contact person.

Section 15

Market entry and potential competition

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

⁽¹⁾ i.e. Where the relevant geographic market has been defined as world wide, these figures must be given regarding the EEA, the Community, the territory of the EFTA States, and each EC Member State and EFTA State. Where the relevant geographic market has been defined as the Community, these figures must be given for the EEA, the territory of the EFTA States, and each EC Member State and EFTA State. Where the market has been defined as national, these figures must be given for the EEA, the Community and the territory of the EFTA States.

- 15.1. Describe the various factors influencing entry into the relevant product market(s) that exist in the present case. In so doing take account of the following where appropriate:
- to what extent is entry to the markets influenced by the requirement of government authorization or standard setting in any form? Are there any legal or regulatory controls on entry to these markets?
 - to what extent is entry to the markets influenced by the availability of raw materials?
 - to what extent is entry to the markets influenced by the length of contracts between an undertaking and its suppliers and/or customers?
 - what is the importance of research and development and in particular the importance of licensing patents, know-how and other rights in these markets.
- 15.2. Have any new undertakings entered the relevant product market(s) in geographic areas where the parties sell during the last three years? If so, please identify the undertaking(s) concerned (name, address, telephone and fax numbers, and, where possible, contact person), and provide your best estimate of their market share in each EC Member State and EFTA State that they are active and in the Community, the territory of the EFTA States and the EEA territory as a whole.
- 15.3. Give your best estimate of the minimum viable scale for the entry into the relevant product market(s) in terms of appropriate market share necessary to operate profitably.
- 15.4. Are there significant barriers to entry preventing companies active on the relevant product market(s):
- 15.4.1. in one EC Member State or EFTA State selling in other areas of the EEA territory;
- 15.4.2. outside the EEA territory selling into all or parts of the EEA territory.

Please give reasons for your answers, explaining, where relevant, the importance of the following factors:

- trade barriers imposed by law, such as tariffs, quotas etc.,
- local specification or technical requirements,
- procurement policies,
- the existence of adequate and available local distribution and retailing facilities,
- transport costs,
- entrenched consumer preferences for local brands or products,
- language.

CHAPTER IV

Final sections

To be completed for all notifications

Section 16

Reasons for the application for negative clearance

If you are applying for negative clearance state:

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

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

- 16.2. why the agreements or behaviour do not have the object or effect of preventing, restricting or distorting competition within the common market or within the territory of the EFTA States to any appreciable extent, or why your undertaking does not have or its behaviour does not abuse a dominant position; and/or
- 16.3. why the agreements or behaviour do not have the object or effect of preventing, restricting or distorting competition within the EEA territory to any appreciable extent, or why your undertaking does not have or its behaviour does not abuse a dominant position; and/or
- 16.4. why the agreements or behaviour are not such as may affect trade between Member States or between the Community and one or more EFTA States, or between EFTA States to any appreciable extent.

Section 17

Reasons for the application for exemption

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

- 17.1. the agreement contributes to improving production or distribution, and/or promoting technical or economic progress. In particular, please explain the reasons why these benefits are expected to result from the collaboration; for example, do the parties to the agreement possess complementary technologies or distribution systems that will produce important synergies? (if, so, please state which). Also please state whether any documents or studies were drawn up by the notifying parties when assessing the feasibility of the operation and the benefits likely to result therefrom, and whether any such documents or studies provided estimates of the savings or efficiencies likely to result. Please provide copies of any such documents or studies;
- 17.2. a proper share of the benefits arising from such improvement or progress accrues to consumers;
- 17.3. all restrictive provisions of the agreement are indispensable to the attainment of the aims set out under 17.1 (if you are claiming the benefit of the opposition procedure, it is particularly important that you should identify and justify restrictions that exceed those automatically exempted by the relevant Regulations). In this respect please explain how the benefits resulting from the agreement identified in your reply to question 17.1 could not be achieved, or could not be achieved so quickly or efficiently or only at higher cost or with less certainty of success (i) without the conclusion of the agreement as a whole and (ii) without those particular clauses and provisions of the agreement identified in your reply to question 4.2;
- 17.4. the agreement does not eliminate competition in respect of a substantial part of the goods or services concerned.

Section 18

Supporting documentation

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

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

- (c) three copies of the most recent in-house or external long-term market studies or planning documents for the purpose of assessing or analysing the affected markets) with respect to competitive conditions, competitors (actual and potential), and market conditions. Each document should indicate the name and position of the author;
- (d) three copies of reports and analyses which have been prepared by or for any officer(s) or director(s) for the purposes of evaluating or analysing the notified agreement.

Section 19

Declaration

The notification must conclude with the following declaration which is to be signed by or on behalf of all the applicants or notifying parties ⁽¹⁾.

'The undersigned declare that the information given in this notification is correct to the best of their knowledge and belief, that complete copies of all documents requested by form A/B have been supplied to the extent that they are in the possession of the group of undertakings to which the applicant(s) or notifying party(ies) belong(s) and are accessible to the latter, that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

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

Place and date:

Signatures:'

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

⁽¹⁾ Applications and notifications which have not been signed are invalid.

ANNEX I

TEXT OF ARTICLES 85 AND 86 OF THE EC TREATY, ARTICLES 53, 54 AND 56 OF THE EEA AGREEMENT, AND OF ARTICLES 2, 3 AND 4 OF PROTOCOL 22 TO THAT AGREEMENT

ARTICLE 85 OF THE EC TREATY

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

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

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

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

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

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

ARTICLE 86 OF THE EC TREATY

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

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

ARTICLE 53 OF THE EEA AGREEMENT

1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

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

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

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

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

ARTICLE 54 OF THE EEA AGREEMENT

Any abuse by one or more undertakings of a dominant position within the territory covered by this agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

ARTICLE 56 OF THE EEA AGREEMENT

1. Individual cases falling under Article 53 shall be decided upon by the surveillance authorities in accordance with the following provisions:

- (a) individual cases where only trade between EFTA States is affected shall be decided upon by the EFTA Surveillance Authority;

- (b) without prejudice to subparagraph (c), the EFTA Surveillance Authority decides, as provided for in the provisions set out in Article 58, Protocol 21 and the rules adopted for its implementation, Protocol 23 and Annex XIV, on cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 % or more of their turnover in the territory covered by this Agreement;
 - (c) the EC Commission decides on the other cases as well as on cases under (b) where trade between EC Member States is affected, taking into account the provisions set out in Article 58, Protocol 21, Protocol 23 and Annex XIV.
2. Individual cases falling under Article 54 shall be decided upon by the surveillance authority in the territory of which a dominant position is found to exist. The rules set out in paragraph 1 (b) and (c) shall apply only if dominance exists within the territories of both surveillance authorities.
3. Individual cases falling under paragraph 1(c), whose effects on trade between EC Member States or on competition within the Community are not appreciable, shall be decided upon by the EFTA Surveillance Authority.
4. The terms 'undertaking' and 'turnover' are, for the purpose of this Article, defined in Protocol 22.

ARTICLES 2, 3 AND 4 OF PROTOCOL 22 TO THE EEA AGREEMENT

Article 2

'Turnover' within the meaning of Article 56 of the Agreement shall comprise the amounts derived by the undertaking concerned, in the territory covered by this Agreement, in the preceding financial year from the sale of products and the provision of services falling within the undertaking's ordinary scope of activities after deduction of sales rebates and of value-added tax and other taxes directly related to turnover.

Article 3

In place of turnover the following shall be used:

- (a) for credit institutions and other financial institutions, their total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with residents in the territory covered by this Agreement and the total sum of those loans and advances;
- (b) for insurance undertakings, the value of gross premiums received from residents in the territory covered by this Agreement, 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 value of premiums.

Article 4

1. In derogation of the definition of the turnover relevant for the application of Article 56 of the Agreement, as contained in Article 2 of this Protocol, the relevant turnover shall be constituted:

- (a) as regards agreements, decisions of associations of undertakings and concerted practices related to distribution and supply arrangements between non-competing undertakings, of the amounts derived from the sale of goods or the provision of services which are the subject matter of the agreements, decisions or concerted practices, and from the other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use;
- (b) as regards agreements, decisions of associations of undertakings and concerted practices related to arrangements on transfer of technology between non-competing undertakings, of the amounts derived from the sale of goods or the provision of services which result from the technology which is the subject matter of the agreements, decisions or concerted practices, and of the amounts derived from the sale of those goods or the provision of those services which that technology is designed to improve or replace.

2. However, where at the time of the coming to existence of arrangements as described in paragraph 1 (a) and (b) turnover as regards the sale of products or the provision of services is not in evidence, the general provision as contained in Article 2 shall apply.

ANNEX II

LIST OF RELEVANT ACTS

(as of 1 March 1995)

(If you think it possible that your arrangements do not need to be notified by virtue of any of these regulations or notices it may be worth your while to obtain a copy.)

IMPLEMENTING REGULATIONS ⁽¹⁾

Council Regulation No of 6 February 1992: First Regulation implementing Articles 85 and 86 of the Treaty (OJ No L 13, 21. 2. 1962, p. 204/62, English Special Edition 1959-1962, November 1972, p. 87) as amended (OJ No L 58, 10. 7. 1962, p. 1655/62; OJ No L 162, 7. 11. 1963, p. 2696/63; OJ No L 285, 29. 12. 1971, p. 49; OJ No L 73, 27. 3. 1972, p. 92; OJ No L 291, 19. 11. 1979, p. 94 and OJ No L 302, 15. 11. 1985, p. 165).

Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17.

REGULATIONS GRANTING BLOCK EXEMPTION IN RESPECT OF A WIDE RANGE OF AGREEMENTS

Commission Regulation (EC) No 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements (OJ No L 173, 30. 6. 1983, p. 1, as corrected in OJ No L 281, 13. 10. 1983, p. 24), as well as this Regulation as adapted for EEA purposes (see point 2 of Annex XIV to the EEA Agreement).

Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements (OJ No L 173, 30. 6. 1983, p. 5, as corrected in OJ No L 281, 13. 10. 1983, p. 24), as well as this Regulation as adapted for EEA purposes (see point 3 of Annex XIV to the EEA Agreement).

See also the Commission notices concerning Regulations (EEC) No 1983/93 and (EEC) No 1984/83 (OJ No C 101, 13. 4. 1984, p. 2 and OJ No C 121, 13. 5. 1992, p. 2).

Commission Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements (OJ No L 219, 16. 8. 1984, p. 15, as corrected in OJ No L 113, 26. 4. 1985, p. 34), as amended (OJ No L 12, 18. 1. 1995, p. 13), as well as this Regulation as adapted for EEA purposes (see point 5 of Annex XIV to the EEA Agreement). Article 4 of this Regulation provides for an opposition procedure.

Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distributing and servicing agreements (OJ No L 15, 18. 1. 1985, p. 16); as well as this Regulation as adapted for EEA purposes (see point 4 of Annex XIV to the EEA Agreement). See also the Commission notices concerning this Regulation (OJ No C 17, 18. 1. 1985, p. 4 and OJ No C 329, 18. 12. 1991, p. 20).

Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of specialization agreements (OJ No L 53, 22. 2. 1985, p. 1), as amended (OJ No L 21, 29. 1. 1993, p. 8), as well as this Regulation as adapted for EEA purposes (see point 6 of Annex XIV to the EEA Agreement). Article 4 of this Regulation provides for an opposition procedure.

Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of research and development cooperation agreements (OJ No L 53, 22. 2. 1985, p. 5), as amended (OJ No L 21, 29. 1. 1993, p. 8), as well as this Regulation as adapted for EEA purposes (see point 7 of Annex XIV to the EEA Agreement). Article 7 of this Regulation provides for an opposition procedure.

⁽¹⁾ As regards procedural rules applied by the EFTA Surveillance Authority, see Article 3 of Protocol 21 to the EEA Agreement and the relevant provisions in Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements (OJ No L 359, 28. 12. 1988, p. 46), as well as this Regulation as adapted for EEA purposes (see point 8 of Annex XIV to the EEA Agreement). Article 6 of this Regulation provides for an opposition procedure.

Commission Regulation (EEC) No 556/89 of 30 November 1988 on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements (OJ No L 61, 4. 3. 1989, p. 1), as amended (OJ No L 21, 29. 1. 1993, p. 8), as well as this Regulation as adapted for EEA purposes (see point 9 of Annex XIV to the EEA Agreement). Article 4 of this Regulation provides for an opposition procedure.

Commission Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ No L 398, 31. 12. 1992, p. 7). This Regulation will be adapted for EEA purposes.

NOTICES OF A GENERAL NATURE ⁽¹⁾

Commission notice on exclusive dealing contracts with commercial agents (OJ No 139, 24. 12. 1962, p. 2921/62). This states that the Commission does not consider most such agreements to fall under the prohibition of Article 85 (1).

Commission notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises (OJ No C 75, 29. 7. 1968, p. 3, as corrected in OJ No C 84, 28. 8. 1968, p. 14). This defines the sorts of cooperation on market studies, accounting, R & D, joint use of production, storage or transport, ad hoc consortia, selling or after-sales service, advertising or quality labelling that the Commission considers not to fall under the prohibition of Article 85 (1).

Commission notice concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the Treaty (OJ No C 1, 3. 1. 1979, p. 2).

Commission notice on agreements, decisions and concerted practices of minor importance which do not fall under Article 85 (1) of the Treaty (OJ No C 231, 12. 9. 1986, p. 2) as amended by Commission notice (OJ No C 368, 23. 12. 1994, p. 20) — in the main, those where the parties have less than 5 % of the market between them, and a combined annual turnover of less than ECU 300 million.

Commission guidelines on the application of EEC competition rules in the telecommunications sector (OJ No C 233, 6. 9. 1991, p. 2). These guidelines aim at clarifying the application of Community competition rules to the market participants in the telecommunications sector.

Commission notice on cooperation between national courts and the Commission in applying Articles 85 and 86 (OJ No C 39, 13. 2. 1993, p. 6). This notice sets out the principles on the basis of which such cooperation takes place.

Commission notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EC Treaty (OJ No C 43, 16. 2. 1993, p. 2). This notice sets out the principles on the assessment of joint ventures.

A collection of these texts (as at 31 December 1989) was published by the Office for Official Publications of the European Communities (references Vol I: ISBN 92-826-1307-0, catalogue No: CV-42-90-001-EN-C). An updated collection is in preparation.

Pursuant to the Agreement, these texts will also cover the European Economic Area.

⁽¹⁾ See also the corresponding notices published by the EFTA Surveillance Authority.

ANNEX III

LIST OF MEMBER STATES AND EFTA STATES, ADDRESS OF THE COMMISSION AND OF THE EFTA SURVEILLANCE AUTHORITY, LIST OF COMMISSION INFORMATION OFFICES WITHIN THE COMMUNITY AND IN EFTA STATES AND ADDRESSES OF COMPETENT AUTHORITIES IN EFTA STATES

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

The EFTA States which will be Contracting Parties of the EEA Agreement, as at the date of this Annex, are: Iceland, Liechtenstein and Norway.

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

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

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

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

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

BELGIUM
73 rue Archimède
B-1040 Bruxelles
Tel. (322) 299 11 11

Av. Diagonal, 407 bis
18 Planta
E-08008 Barcelona
Tel. (343) 415 81 77

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Højbrohus
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DK-1004 København K
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Tel. (331) 40 63 38 00

FEDERAL REPUBLIC OF GERMANY
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D-10711 Berlin 31
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Corso Magenta 61
I-20123 Milano
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The addresses of the Commission's Information Offices in the EFTA States are:

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Postboks 1643 Vika 0119 Oslo 1
Haakon's VII Gate No 6
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Forms for notifications and applications, as well as more detailed information on the EEA competition rules, can also be obtained from the following offices:

AUSTRIA

Federal Ministry for Economic Affairs
Tel. (431) 71 100

FINLAND

Office of Free Competition
Tel. (3580) 73 141

ICELAND

Directorate of Competition and Fair Trade
Tel. (3541) 27 422

LIECHTENSTEIN

Office of National Economy
Division of Economy and Statistics
Tel. (4175) 61 11

NORWAY

Price Directorate
Tel. (4722) 40 09 00

SWEDEN

Competition Authority
Tel. (468) 700 16 00
