



EUR-Charts - The *EU Law in Charts* Project

## **EU Competition Law - 20 Essential Legal Texts**

A selection of important legal texts  
referenced in the book  
*Essential EU Competition Law in Charts*

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Companion website to

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## **Webcompanion: Selection of important legal texts referenced in the book**

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## **A. PRIMARY LAW: ARTS. 101 - 109 TFEU**

### **1. Arts. 101-109 TFEU (Treaty on the Functioning of the European Union)**

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2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

## TITLE VII

### COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

#### CHAPTER 1

#### RULES ON COMPETITION

##### SECTION 1

##### RULES APPLYING TO UNDERTAKINGS

#### *Article 101*

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal 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 internal 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 102*

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal 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 103*

(ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.
2. The regulations or directives referred to in paragraph 1 shall be designed in particular:
  - (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

- (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;
- (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
- (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

*Article 104*

(ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

*Article 105*

(ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.
3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

*Article 106*

(ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

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

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

#### SECTION 2

#### AIDS GRANTED BY STATES

#### Article 107

(ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

*Article 108*

(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

*Article 109*

(ex Article 89 TEC)

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

CHAPTER 2

TAX PROVISIONS

*Article 110*

(ex Article 90 TEC)

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

*Article 111*

(ex Article 91 TEC)

Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

*Article 112*

(ex Article 92 TEC)

In the case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted and countervailing charges in respect of imports from Member States may not be imposed unless the measures contemplated have been previously approved for a limited period by the Council on a proposal from the Commission.





## **B. SECONDARY LAW**

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## **I. Specifically regarding Arts. 101 and 102 TFEU**

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**a. Regarding Art 101(1) TFEU, de minimis**

2. Commission Notice on agreements of minor importance which do not appreciably restrict competition; under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ 2001 C 368/13

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**Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*)<sup>(1)</sup>**

(2001/C 368/07)

(Text with EEA relevance)

**I**

1. Article 81(1) prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable.
2. In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 of the EC Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1) <sup>(2)</sup>.
3. Agreements may in addition not fall under Article 81(1) because they are not capable of appreciably affecting trade between Member States. This notice does not deal with this issue. It does not quantify what does not constitute an appreciable effect on trade. It is however acknowledged that agreements between small and medium-sized undertakings, as defined in the Annex to Commission Recommendation 96/280/EC <sup>(3)</sup>, are rarely capable of appreciably affecting trade between Member States. Small and medium-sized undertakings are currently defined in that recommendation as undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million.
4. In cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an

agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

5. This notice also applies to decisions by associations of undertakings and to concerted practices.
6. This notice is without prejudice to any interpretation of Article 81 which may be given by the Court of Justice or the Court of First Instance of the European Communities.

**II**

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1):
  - (a) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors) <sup>(4)</sup>; or
  - (b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors).

In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 % threshold is applicable.

<sup>(1)</sup> This notice replaces the notice on agreements of minor importance published in OJ C 372, 9.12.1997.

<sup>(2)</sup> See, for instance, the judgment of the Court of Justice in Joined Cases C-215/96 and C-216/96 *Bagnasco (Carlos) v Banca Popolare di Novara and Casa di Risparmio di Genova e Imperia* (1999) ECR I-135, points 34-35. This notice is also without prejudice to the principles for assessment under Article 81(1) as expressed in the Commission notice 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements', OJ C 3, 6.1.2001, in particular points 17-31 inclusive, and in the Commission notice 'Guidelines on vertical restraints', OJ C 291, 13.10.2000, in particular points 5-20 inclusive.

<sup>(3)</sup> OJ L 107, 30.4.1996, p. 4. This recommendation will be revised. It is envisaged to increase the annual turnover threshold from EUR 40 million to EUR 50 million and the annual balance-sheet total threshold from EUR 27 million to EUR 43 million.

<sup>(4)</sup> On what are actual or potential competitors, see the Commission notice 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements', OJ C 3, 6.1.2001, paragraph 9. A firm is treated as an actual competitor if it is either active on the same relevant market or if, in the absence of the agreement, it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability). A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices.

8. Where in a relevant market competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds under point 7 are reduced to 5 %, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5 % are in general not considered to contribute significantly to a cumulative foreclosure effect<sup>(1)</sup>. A cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects.
9. The Commission also holds the view that agreements are not restrictive of competition if the market shares do not exceed the thresholds of respectively 10 %, 15 % and 5 % set out in point 7 and 8 during two successive calendar years by more than 2 percentage points.
10. In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the notice on the definition of the relevant market for the purposes of Community competition law<sup>(2)</sup>. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.
11. Points 7, 8 and 9 do not apply to agreements containing any of the following hardcore restrictions:
- (1) as regards agreements between competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object<sup>(3)</sup>:
- (a) the fixing of prices when selling the products to third parties;
- (b) the limitation of output or sales;
- (c) the allocation of markets or customers;
- (2) as regards agreements between non-competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except the following restrictions which are not hardcore:
- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
  - the restriction of sales to end users by a buyer operating at the wholesale level of trade,
  - the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
  - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
- (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;
- <sup>(1)</sup> See also the Commission notice 'Guidelines on vertical restraints', OJ C 291, 13.10.2000, in particular paragraphs 73, 142, 143 and 189. While in the guidelines on vertical restraints in relation to certain restrictions reference is made not only to the total but also to the tied market share of a particular supplier or buyer, in this notice all market share thresholds refer to total market shares.
- <sup>(2)</sup> OJ C 372, 9.12.1997, p. 5.
- <sup>(3)</sup> Without prejudice to situations of joint production with or without joint distribution as defined in Article 5, paragraph 2, of Commission Regulation (EC) No 2658/2000 and Article 5, paragraph 2, of Commission Regulation (EC) No 2659/2000, OJ L 304, 5.12.2000, pp. 3 and 7 respectively.

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- (e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods;
- (3) as regards agreements between competitors as defined in point 7, where the competitors operate, for the purposes of the agreement, at a different level of the production or distribution chain, any of the hardcore restrictions listed in paragraph (1) and (2) above.
12. (1) For the purposes of this notice, the terms 'undertaking', 'party to the agreement', 'distributor', 'supplier' and 'buyer' shall include their respective connected undertakings.
- (2) 'Connected undertakings' are:
- (a) undertakings in which a party to the agreement, directly or indirectly:
- has the power to exercise more than half the voting rights, or
  - has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
  - has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
- (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
- (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
- parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
  - one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.
- (3) For the purposes of paragraph 2(e), the market share held by these jointly held undertakings shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 2(a).



**b. Regarding Art 101(1) and (3) TFEU, block exemptions**

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## **i. Vertical agreements**

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3. Commission Regulation 330/2010/EU of 20 April 2010 on the; application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1

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## II

(Non-legislative acts)

# REGULATIONS

### COMMISSION REGULATION (EU) No 330/2010

of 20 April 2010

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices<sup>(1)</sup>, and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

of the Treaty to categories of vertical agreements and concerted practices<sup>(2)</sup> defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 May 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

- (3) The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term 'vertical agreements' should include the corresponding concerted practices.

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union<sup>(\*)</sup> by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty.

- (2) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3)

- (4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the supply and purchase side.

- (5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

<sup>(1)</sup> OJ 36, 6.3.1965, p. 533.

<sup>(\*)</sup> With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

<sup>(2)</sup> OJ L 336, 29.12.1999, p. 21.

- (6) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.
- (7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use.
- (8) It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30 %, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (9) Above the market share threshold of 30 %, there can be no presumption that vertical agreements falling within the scope of Article 101(1) of the Treaty will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition. At the same time, there is no presumption that those vertical agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty.
- (10) This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.
- (11) In order to ensure access to or to prevent collusion on the relevant market, certain conditions should be attached to the block exemption. To this end, the exemption of non-compete obligations should be limited to obligations which do not exceed a defined duration. For the same reasons, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers should be excluded from the benefit of this Regulation.
- (12) The market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.
- (13) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>(1)</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
- (14) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (15) In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects which significantly restrict access to a relevant market or competition therein are of particular importance. Such cumulative effects may for example arise in the case of selective distribution or non compete obligations.
- (16) In order to strengthen supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50 % of a given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements,
- <sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

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HAS ADOPTED THIS REGULATION:

#### Article 1

##### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(a) 'vertical agreement' means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

(b) 'vertical restraint' means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;

(c) 'competing undertaking' means an actual or potential competitor; 'actual competitor' means an undertaking that is active on the same relevant market; 'potential competitor' means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market;

(d) 'non-compete obligation' means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year;

(e) 'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;

(f) 'intellectual property rights' includes industrial property rights, know how, copyright and neighbouring rights;

(g) 'know-how' means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, 'secret' means that the know-how is not generally known or easily accessible; 'substantial' means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; 'identified' means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(h) 'buyer' includes an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking;

(i) 'customer of the buyer' means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement.

2. For the purposes of this Regulation, the terms 'undertaking', 'supplier' and 'buyer' shall include their respective connected undertakings.

'Connected undertakings' means:

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

(i) has the power to exercise more than half the voting rights, or

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

(iii) has the right to manage the undertaking's affairs;

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



- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);

- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:

- (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d), or
- (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

#### Article 2

##### Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.

2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million. Vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 101 of the Treaty to horizontal agreements concluded between the members of the association or decisions adopted by the association.

3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual

property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted under this Regulation.

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

- (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
- (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

5. This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation.

#### Article 3

##### Market share threshold

1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.

2. For the purposes of paragraph 1, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply.

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*Article 4*

**Restrictions that remove the benefit of the block exemption — hardcore restrictions**

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:
  - (i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
  - (ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,
  - (iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and
  - (iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility

of prohibiting a member of the system from operating out of an unauthorised place of establishment;

- (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
- (e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

*Article 5*

**Excluded restrictions**

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:

- (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
- (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
- (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

For the purposes of point (a) of the first subparagraph, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

3. By way of derogation from paragraph 1(b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:

- (a) the obligation relates to goods or services which compete with the contract goods or services;
- (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
- (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;
- (d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

#### Article 6

##### Non-application of this Regulation

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50 % of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

#### Article 7

##### Application of the market share threshold

For the purposes of applying the market share thresholds provided for in Article 3 the following rules shall apply:

- (a) the market share of the supplier shall be calculated on the basis of market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;

- (b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;

- (c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;

- (d) if a market share is initially not more than 30 % but subsequently rises above that level without exceeding 35 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % market share threshold was first exceeded;

- (e) if a market share is initially not more than 30 % but subsequently rises above 35 %, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 35 % was first exceeded;

- (f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years;

- (g) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

#### Article 8

##### Application of the turnover threshold

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10 %.

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*Article 9*

**Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 June 2010 to 31 May 2011 in respect of agreements already in force on 31 May 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2010, satisfied the conditions for exemption provided for in Regulation (EC) No 2790/1999.

*Article 10*

**Period of validity**

This Regulation shall enter into force on 1 June 2010.

It shall expire on 31 May 2022.

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

Done at Brussels, 20 April 2010.

*For the Commission*

*The President*

José Manuel BARROSO

4. Commission notice - Guidelines on Vertical Restraints, OJ 2010 C 130/1

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



## II

(Information)

### INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

## EUROPEAN COMMISSION

### Guidelines on Vertical Restraints

(Text with EEA relevance)

(2010/C 130/01)

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## I. INTRODUCTION

### 1. Purpose of the Guidelines

- (1) These Guidelines set out the principles for the assessment of vertical agreements under Article 101 of the Treaty on the Functioning of the European Union (\*) (hereinafter 'Article 101')<sup>(1)</sup>. Article 1(1)(a) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices<sup>(2)</sup> (hereinafter referred to as the 'Block Exemption Regulation') (see paragraphs (24) to (46)) defines the term 'vertical agreement'. These Guidelines are without prejudice to the possible parallel application of Article 102 of the Treaty on the Functioning of the European Union (hereinafter 'Article 102') to vertical agreements. These Guidelines are structured in the following way:

— Section II (paragraphs (8) to (22)) describes vertical agreements which generally fall outside Article 101(1);

— Section III (paragraphs (23) to (73)) clarifies the conditions for the application of the Block Exemption Regulation;

— Section IV (paragraphs (74) to (85)) describes the principles concerning the withdrawal of the block exemption and the disapplication of the Block Exemption Regulation;

— Section V (paragraphs (86) to (95)) provides guidance on how to define the relevant market and calculate market shares;

— Section VI (paragraphs (96) to (229)) describes the general framework of analysis and the enforcement policy of the Commission in individual cases concerning vertical agreements.

- (2) Throughout these Guidelines, the analysis applies to both goods and services, although certain vertical restraints are mainly used in the distribution of goods. Similarly,

(\*) With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of these Guidelines, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout these Guidelines.

(1) These Guidelines replace the Commission Notice – Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, p. 1.

(2) OJ L 102, 23.4.2010, p. 1.

vertical agreements can be concluded for intermediate and final goods and services. Unless otherwise stated, the analysis and arguments in these Guidelines apply to all types of goods and services and to all levels of trade. Thus, the term 'products' includes both goods and services. The terms 'supplier' and 'buyer' are used for all levels of trade. The Block Exemption Regulation and these Guidelines do not apply to agreements with final consumers where the latter are not undertakings, since Article 101 only applies to agreements between undertakings.

- (3) By issuing these Guidelines, the Commission aims to help companies conduct their own assessment of vertical agreements under EU competition rules. The standards set forth in these Guidelines cannot be applied mechanically, but must be applied with due consideration for the specific circumstances of each case. Each case must be evaluated in the light of its own facts.

- (4) These Guidelines are without prejudice to the case-law of the General Court and the Court of Justice of the European Union concerning the application of Article 101 to vertical agreements. The Commission will continue to monitor the operation of the Block Exemption Regulation and Guidelines based on market information from stakeholders and national competition authorities and may revise this notice in the light of future developments and of evolving insight.

### 2. Applicability of Article 101 to vertical agreements

- (5) Article 101 applies to vertical agreements that may affect trade between Member States and that prevent, restrict or distort competition ('vertical restraints')<sup>(3)</sup>. Article 101 provides a legal framework for the assessment of vertical restraints, which takes into consideration the distinction between anti-competitive and pro-competitive effects. Article 101(1) prohibits those agreements which appreciably restrict or distort competition, while Article 101(3) exempts those agreements which confer sufficient benefits to outweigh the anti-competitive effects<sup>(4)</sup>.

(3) See *inter alia* judgments of the Court of Justice in Joined Cases 56/64 and 58/64 *Grundig-Consten v Commission* [1966] ECR 299; Case 56/65 *Technique Minière v Maschinenbau Ulm* [1966] ECR 235; and judgment of the Court of First Instance in Case T-77/92 *Parker Pen v Commission* [1994] ECR II-549.

(4) See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97 for the Commission's general methodology and interpretation of the conditions for applying Article 101(1) and in particular Article 101(3).



- (6) For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.

- (7) The objective of Article 101 is to ensure that undertakings do not use agreements – in this context, vertical agreements – to restrict competition on the market to the detriment of consumers. Assessing vertical restraints is also important in the context of the wider objective of achieving an integrated internal market. Market integration enhances competition in the European Union. Companies should not be allowed to re-establish private barriers between Member States where State barriers have been successfully abolished.

## II. VERTICAL AGREEMENTS WHICH GENERALLY FALL OUTSIDE THE SCOPE OF ARTICLE 101(1)

### 1. Agreements of minor importance and SMEs

- (8) Agreements that are not capable of appreciably affecting trade between Member States or of appreciably restricting competition by object or effect do not fall within the scope of Article 101(1). The Block Exemption Regulation applies only to agreements falling within the scope of application of Article 101(1). These Guidelines are without prejudice to the application of Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*)<sup>(1)</sup> or any future *de minimis* notice.
- (9) Subject to the conditions set out in the *de minimis* notice concerning hardcore restrictions and cumulative effect issues, vertical agreements entered into by non-competing undertakings whose individual market share on the relevant market does not exceed 15 % are generally considered to fall outside the scope of Article 101(1)<sup>(2)</sup>. There is no presumption that vertical agreements concluded by undertakings having more than 15 % market share automatically infringe Article 101(1). Agreements between undertakings whose market share exceeds the 15 % threshold may still not have an appreciable effect on trade between Member States or

may not constitute an appreciable restriction of competition<sup>(3)</sup>. Such agreements need to be assessed in their legal and economic context. The criteria for the assessment of individual agreements are set out in paragraphs (96) to (229).

- (10) As regards hardcore restrictions referred to in the *de minimis* notice, Article 101(1) may apply below the 15 % threshold, provided that there is an appreciable effect on trade between Member States and on competition. The applicable case-law of the Court of Justice and the General Court is relevant in this respect<sup>(4)</sup>. Reference is also made to the possible need to assess positive and negative effects of hardcore restrictions as described in particular in paragraph (47) of these Guidelines.

- (11) In addition, the Commission considers that, subject to cumulative effect and hardcore restrictions, vertical agreements between small and medium-sized undertakings as defined in the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises<sup>(5)</sup> are rarely capable of appreciably affecting trade between Member States or of appreciably restricting competition within the meaning of Article 101(1), and therefore generally fall outside the scope of Article 101(1). In cases where such agreements nonetheless meet the conditions for the application of Article 101(1), the Commission will normally refrain from opening proceedings for lack of sufficient interest for the European Union unless those undertakings collectively or individually hold a dominant position in a substantial part of the internal market.

### 2. Agency agreements

#### 2.1 Definition of agency agreements

- (12) An agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal, for the:

- purchase of goods or services by the principal, or
- sale of goods or services supplied by the principal.

<sup>(1)</sup> OJ C 368, 22.12.2001, p. 13.

<sup>(2)</sup> For agreements between competing undertakings the *de minimis* market share threshold is 10 % for their collective market share on each affected relevant market.

<sup>(3)</sup> See judgment of the Court of First Instance in Case T-7/93 *Langnese-Iglo v Commission* [1995] ECR II-1533, paragraph 98.

<sup>(4)</sup> See judgments of the Court of Justice in Case 5/69 *Völk v Vervaecke* [1969] ECR 295; Case 1/71 *Cadillon v Höss* [1971] ECR 351 and Case C-306/96 *Javico v Yves Saint Laurent* [1998] ECR I-1983, paragraphs 16 and 17.

<sup>(5)</sup> OJ L 124, 20.5.2003, p. 36.

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- (13) The determining factor in defining an agency agreement for the application of Article 101(1) is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal.<sup>(1)</sup> In this respect it is not material for the assessment whether the agent acts for one or several principals. Neither is material for this assessment the qualification given to their agreement by the parties or national legislation.
- (14) There are three types of financial or commercial risk that are material to the definition of an agency agreement for the application of Article 101(1). First, there are the contract-specific risks which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as financing of stocks. Secondly, there are the risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal, that is, which are required to enable the agent to conclude and/or negotiate this type of contract. Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss. Thirdly, there are the risks related to other activities undertaken on the same product market, to the extent that the principal requires the agent to undertake such activities, but not as an agent on behalf of the principal but for its own risk.
- (15) For the purposes of applying Article 101(1), the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market. However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel, are not material to this assessment.
- (16) For the purpose of applying Article 101(1), an agreement will thus generally be considered an agency agreement where property in the contract goods bought or sold does not vest in the agent, or the agent does not himself supply the contract services and where the agent:
- (a) does not contribute to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods. This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal;
  - (b) does not maintain at its own cost or risk stocks of the contract goods, including the costs of financing the stocks and the costs of loss of stocks and can return unsold goods to the principal without charge, unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss of stocks);
  - (c) does not undertake responsibility towards third parties for damage caused by the product sold (product liability), unless, as agent, it is liable for fault in this respect;
  - (d) does not take responsibility for customers' non-performance of the contract, with the exception of the loss of the agent's commission, unless the agent is liable for fault (for example, by failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or police or to communicate to the principal all necessary information available to him on the customer's financial reliability);
  - (e) is not, directly or indirectly, obliged to invest in sales promotion, such as contributions to the advertising budgets of the principal;
  - (f) does not make market-specific investments in equipment, premises or training of personnel, such as for example the petrol storage tank in the case of petrol retailing or specific software to sell insurance policies in case of insurance agents, unless these costs are fully reimbursed by the principal;
  - (g) does not undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal.
- <sup>(1)</sup> See judgment of the Court of First Instance in Case T-325/01 *Daimler Chrysler v Commission* [2005] ECR II-3319; judgments of the Court of Justice in Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA* [2006] ECR I-11987; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* [2008] ECR I-6681.

- (17) This list is not exhaustive. However, where the agent incurs one or more of the risks or costs mentioned in paragraphs (14), (15) and (16), the agreement between agent and principal will not be qualified as an agency agreement. The question of risk must be assessed on a case-by-case basis, and with regard to the economic reality of the situation rather than the legal form. For practical reasons, the risk analysis may start with the assessment of the contract-specific risks. If contract-specific risks are incurred by the agent, it will be enough to conclude that the agent is an independent distributor. On the contrary, if the agent does not incur contract-specific risks, then it will be necessary to continue further the analysis by assessing the risks related to market-specific investments. Finally, if the agent does not incur any contract-specific risks and risks related to market-specific investments, the risks related to other required activities within the same product market may have to be considered.

#### 2.2 The application of Article 101(1) to agency agreements

- (18) In the case of agency agreements as defined in section 2.1, the selling or purchasing function of the agent forms part of the principal's activities. Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1). The following obligations on the agent's part will be considered to form an inherent part of an agency agreement, as each of them relates to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods or services, which is essential if the principal is to take the risks and therefore to be in a position to determine the commercial strategy:
- (a) limitations on the territory in which the agent may sell these goods or services;
  - (b) limitations on the customers to whom the agent may sell these goods or services;
  - (c) the prices and conditions at which the agent must sell or purchase these goods or services.
- (19) In addition to governing the conditions of sale or purchase of the contract goods or services by the agent on behalf of the principal, agency agreements often contain provisions which concern the relationship between the agent and the principal. In particular, they may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) and/or a provision preventing the agent from acting as an agent or distributor of undertakings which compete with the principal (single branding

provisions). Since the agent is a separate undertaking from the principal, the provisions which concern the relationship between the agent and the principal may infringe Article 101(1). Exclusive agency provisions will in general not lead to anti-competitive effects. However, single branding provisions and post-term non-compete provisions, which concern inter-brand competition, may infringe Article 101(1) if they lead to or contribute to a (cumulative) foreclosure effect on the relevant market where the contract goods or services are sold or purchased (see in particular Section VI.2.1). Such provisions may benefit from the Block Exemption Regulation, in particular when the conditions provided in Article 5 of that Regulation are fulfilled. They can also be individually justified by efficiencies under Article 101(3) as for instance described in paragraphs (144) to (148).

- (20) An agency agreement may also fall within the scope of Article 101(1), even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion. That could, for instance, be the case when a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.
- (21) Where the agent bears one or more of the relevant risks as described in paragraph (16), the agreement between agent and principal does not constitute an agency agreement for the purpose of applying Article 101(1). In that situation, the agent will be treated as an independent undertaking and the agreement between agent and principal will be subject to Article 101(1) as any other vertical agreement.

#### 3. Subcontracting agreements

- (22) Subcontracting concerns a contractor providing technology or equipment to a subcontractor that undertakes to produce certain products on the basis thereof (exclusively) for the contractor. Subcontracting is covered by Commission notice of 18 December 1978 concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty <sup>(1)</sup> (hereinafter 'subcontracting notice'). According to that notice, which remains applicable, subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside the scope of Article 101(1) provided that the technology or equipment is necessary to enable the subcontractor to produce the products. However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit its own research and development or not to produce for third parties in general may fall within the scope of Article 101 <sup>(2)</sup>.

<sup>(1)</sup> OJ C 1, 3.1.1979, p. 2.

<sup>(2)</sup> See paragraph 3 of the subcontracting notice.

### III. APPLICATION OF THE BLOCK EXEMPTION REGULATION

#### 1. Safe harbour created by the Block Exemption Regulation

- (23) For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Provided that they do not contain hardcore restrictions of competition, which are restrictions of competition by object, the Block Exemption Regulation creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer. Pursuant to Article 3 of the Block Exemption Regulation, it is the supplier's market share on the market where it sells the contract goods or services and the buyer's market share on the market where it purchases the contract goods or services which determine the applicability of the block exemption. In order for the block exemption to apply, the supplier's and the buyer's market share must each be 30 % or less. Section V of these Guidelines provides guidance on how to define the relevant market and calculate the market shares. Above the market share threshold of 30 %, there is no presumption that vertical agreements fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3) but there is also no presumption that vertical agreements falling within the scope of Article 101(1) will usually satisfy the conditions of Article 101(3).

#### 2. Scope of the Block Exemption Regulation

##### 2.1 Definition of vertical agreements

- (24) Article 1(1)(a) of the Block Exemption Regulation defines a 'vertical agreement' as 'an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'.

- (25) The definition of 'vertical agreement' referred to in paragraph (24) has four main elements:

- (a) The Block Exemption Regulation applies to agreements and concerted practices. The Block Exemption Regulation does not apply to unilateral conduct of the undertakings concerned. Such unilateral conduct can fall within the scope of Article 102 which prohibits abuses of a dominant position. For there to be an agreement within the meaning of Article 101 it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific

way. The form in which that intention is expressed is irrelevant as long as it constitutes a faithful expression of the parties' intention. In case there is no explicit agreement expressing the concurrence of wills, the Commission will have to prove that the unilateral policy of one party receives the acquiescence of the other party. For vertical agreements, there are two ways in which acquiescence with a particular unilateral policy can be established. First, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof<sup>(1)</sup>. Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice<sup>(2)</sup>. For instance, if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier's unilateral policy. This can however not be concluded if the distributors continue to engage in parallel trade or try to find new ways to engage in parallel trade. Similarly, for vertical agreements, tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy. The two ways of establishing acquiescence described in this paragraph can be used jointly;

- (b) The agreement or concerted practice is between two or more undertakings. Vertical agreements with final consumers not operating as an undertaking are not covered by the Block Exemption Regulation. More generally, agreements with final consumers do not fall under Article 101(1), as that article applies only to agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings. This is without prejudice to the possible application of Article 102;

<sup>(1)</sup> Judgment of the Court of Justice in Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585.

<sup>(2)</sup> Judgment of the Court of First Instance in Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383.

- (c) The agreement or concerted practice is between undertakings each operating, for the purposes of the agreement, at a different level of the production or distribution chain. This means for instance that one undertaking produces a raw material which the other undertaking uses as an input, or that the first is a manufacturer, the second a wholesaler and the third a retailer. This does not preclude an undertaking from being active at more than one level of the production or distribution chain;
- (d) The agreements or concerted practices relate to the conditions under which the parties to the agreement, the supplier and the buyer, 'may purchase, sell or resell certain goods or services'. This reflects the purpose of the Block Exemption Regulation to cover purchase and distribution agreements. These are agreements which concern the conditions for the purchase, sale or resale of the goods or services supplied by the supplier and/or which concern the conditions for the sale by the buyer of the goods or services which incorporate these goods or services. Both the goods or services supplied by the supplier and the resulting goods or services are considered to be contract goods or services under the Block Exemption Regulation. Vertical agreements relating to all final and intermediate goods and services are covered. The only exception is the automobile sector, as long as this sector remains covered by a specific block exemption such as that granted by Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector<sup>(1)</sup> or its successor. The goods or services provided by the supplier may be resold by the buyer or may be used as an input by the buyer to produce its own goods or services.
- (26) The Block Exemption Regulation also applies to goods sold and purchased for renting to third parties. However, rent and lease agreements as such are not covered, as no good or service is sold by the supplier to the buyer. More generally, the Block Exemption Regulation does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale, such as an obligation preventing parties from carrying out independent research and development which the parties may have included in an otherwise vertical agreement. In addition, Article 2(2) to (5) of the Block Exemption Regulation directly or indirectly excludes certain vertical agreements from the application of that Regulation.
- 2.2 *Vertical agreements between competitors*
- (27) Article 2(4) of the Block Exemption Regulation explicitly excludes 'vertical agreements entered into between competing undertakings' from its application. Vertical agreements between competitors are dealt with, as regards possible collusion effects, in the Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements<sup>(2)</sup>. However, the vertical aspects of such agreements need to be assessed under these Guidelines. Article 1(1)(c) of the Block Exemption Regulation defines a competing undertaking as 'an actual or potential competitor'. Two companies are treated as actual competitors if they are active on the same relevant market. A company is treated as a potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative prices it is likely that this first company, within a short period of time normally not longer than one year, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the other company is active. That assessment must be based on realistic grounds; the mere theoretical possibility of entering a market is not sufficient.<sup>(3)</sup> A distributor that provides specifications to a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods.
- (28) Article 2(4) of the Block Exemption Regulation contains two exceptions to the general exclusion of vertical agreements between competitors. These exceptions concern non-reciprocal agreements. Non-reciprocal agreements between competitors are covered by the Block Exemption Regulation where (a) the supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not also a competing undertaking at the manufacturing level, or (b) the supplier is a provider of services operating at several levels of trade, while the buyer operates at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services. The first exception covers situations of dual distribution, that is, the manufacturer of particular goods also acts as a distributor of the goods in competition with independent distributors of its goods. In case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level. The second exception covers similar situations of dual distribution, but in this case for services, when the supplier is also a provider of products at the retail level where the buyer operates.

<sup>(1)</sup> OJ L 203, 1.8.2002, p. 30.

<sup>(2)</sup> OJ C 3, 6.1.2001, p. 2. A revision of those Guidelines is forthcoming.

<sup>(3)</sup> See Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, paragraphs 20 to 24, the Commission's Thirteenth Report on Competition Policy, point 55, and Commission Decision 90/410/EEC in Case No IV/32.009 — *Elopak/Metal Box-Odin*, OJ L 209, 8.8.1990, p. 15.



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### 2.3 Associations of retailers

(29) Article 2(2) of the Block Exemption Regulation includes in its application vertical agreements entered into by an association of undertakings which fulfils certain conditions and thereby excludes from the Block Exemption Regulation vertical agreements entered into by all other associations. Vertical agreements entered into between an association and its members, or between an association and its suppliers, are covered by the Block Exemption Regulation only if all the members are retailers of goods (not services) and if each individual member of the association has a turnover not exceeding EUR 50 million. Retailers are distributors reselling goods to final consumers. Where only a limited number of the members of the association have a turnover exceeding the EUR 50 million threshold and where these members together represent less than 15 % of the collective turnover of all the members combined, the assessment under Article 101 will normally not be affected.

(30) An association of undertakings may involve both horizontal and vertical agreements. The horizontal agreements must be assessed according to the principles set out in the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements<sup>(1)</sup>. If that assessment leads to the conclusion that a cooperation between undertakings in the area of purchasing or selling is acceptable, a further assessment will be necessary to examine the vertical agreements concluded by the association with its suppliers or its individual members. The latter assessment will follow the rules of the Block Exemption Regulation and these Guidelines. For instance, horizontal agreements concluded between the members of the association or decisions adopted by the association, such as the decision to require the members to purchase from the association or the decision to allocate exclusive territories to the members must first be assessed as a horizontal agreement. Once that assessment leads to the conclusion that the horizontal agreement is not anticompetitive, an assessment of the vertical agreements between the association and individual members or between the association and suppliers is necessary.

### 2.4 Vertical agreements containing provisions on intellectual property rights (IPRs)

(31) Article 2(3) of the Block Exemption Regulation includes vertical agreements containing certain provisions relating to the assignment of IPRs to or use of IPRs by the buyer in its application and thereby excludes all other vertical agreements containing IPR provisions from the Block Exemption Regulation. The Block Exemption Regulation applies to vertical agreements containing IPR provisions where five conditions are fulfilled:

(a) The IPR provisions must be part of a vertical agreement, that is, an agreement with conditions

under which the parties may purchase, sell or resell certain goods or services;

(b) The IPRs must be assigned to, or licensed for use by, the buyer;

(c) The IPR provisions must not constitute the primary object of the agreement;

(d) The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees;

(e) The IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object as vertical restraints which are not exempted under the Block Exemption Regulation.

(32) Such conditions ensure that the Block Exemption Regulation applies to vertical agreements where the use, sale or resale of goods or services can be performed more effectively because IPRs are assigned to or licensed for use by the buyer. In other words, restrictions concerning the assignment or use of IPRs can be covered when the main object of the agreement is the purchase or distribution of goods or services.

(33) The first condition makes clear that the context in which the IPRs are provided is an agreement to purchase or distribute goods or an agreement to purchase or provide services and not an agreement concerning the assignment or licensing of IPRs for the manufacture of goods, nor a pure licensing agreement. The Block Exemption Regulation does not cover for instance:

(a) agreements where a party provides another party with a recipe and licenses the other party to produce a drink with this recipe;

(b) agreements under which one party provides another party with a mould or master copy and licenses the other party to produce and distribute copies;

(c) the pure licence of a trade mark or sign for the purposes of merchandising;

<sup>(1)</sup> See paragraph (27).

- (d) sponsorship contracts concerning the right to advertise oneself as being an official sponsor of an event;
- (e) copyright licensing such as broadcasting contracts concerning the right to record and/or broadcast an event.
- (34) The second condition makes clear that the Block Exemption Regulation does not apply when the IPRs are provided by the buyer to the supplier, no matter whether the IPRs concern the manner of manufacture or of distribution. An agreement relating to the transfer of IPRs to the supplier and containing possible restrictions on the sales made by the supplier is not covered by the Block Exemption Regulation. That means, in particular, that subcontracting involving the transfer of know-how to a subcontractor<sup>(1)</sup> does not fall within the scope of application of the Block Exemption Regulation (see also paragraph (22)). However, vertical agreements under which the buyer provides only specifications to the supplier which describe the goods or services to be supplied fall within the scope of application of the Block Exemption Regulation.
- (35) The third condition makes clear that in order to be covered by the Block Exemption Regulation, the primary object of the agreement must not be the assignment or licensing of IPRs. The primary object must be the purchase, sale or resale of goods or services and the IPR provisions must serve the implementation of the vertical agreement.
- (36) The fourth condition requires that the IPR provisions facilitate the use, sale or resale of goods or services by the buyer or its customers. The goods or services for use or resale are usually supplied by the licensor but may also be purchased by the licensee from a third supplier. The IPR provisions will normally concern the marketing of goods or services. An example would be a franchise agreement where the franchisor sells goods for resale to the franchisee and licenses the franchisee to use its trade mark and know-how to market the goods or where the supplier of a concentrated extract licenses the buyer to dilute and bottle the extract before selling it as a drink.
- (37) The fifth condition highlights the fact that the IPR provisions should not have the same object as any of the hardcore restrictions listed in Article 4 of the Block Exemption Regulation or any of the restrictions excluded from the coverage of the Block Exemption Regulation by Article 5 of that Regulation (see paragraphs (47) to (69) of these Guidelines).
- (38) Intellectual property rights relevant to the implementation of vertical agreements within the meaning of Article 2(3) of the Block Exemption Regulation generally concern three main areas: trade marks, copyright and know-how.
- Trade mark**
- (39) A trade mark licence to a distributor may be related to the distribution of the licensor's products in a particular territory. If it is an exclusive licence, the agreement amounts to exclusive distribution.
- Copyright**
- (40) Resellers of goods covered by copyright (books, software, etc.) may be obliged by the copyright holder only to resell under the condition that the buyer, whether another reseller or the end user, shall not infringe the copyright. Such obligations on the reseller, to the extent that they fall under Article 101(1) at all, are covered by the Block Exemption Regulation.
- (41) Agreements, under which hard copies of software are supplied for resale and where the reseller does not acquire a licence to any rights over the software but only has the right to resell the hard copies, are to be regarded as agreements for the supply of goods for resale for the purpose of the Block Exemption Regulation. Under that form of distribution, licensing the software only occurs between the copyright owner and the user of the software. It may take the form of a 'shrink wrap' licence, that is, a set of conditions included in the package of the hard copy which the end user is deemed to accept by opening the package.
- (42) Buyers of hardware incorporating software protected by copyright may be obliged by the copyright holder not to infringe the copyright, and must therefore not make copies and resell the software or make copies and use the software in combination with other hardware. Such use-restrictions, to the extent that they fall within Article 101(1) at all, are covered by the Block Exemption Regulation.
- Know-how**
- (43) Franchise agreements, with the exception of industrial franchise agreements, are the most obvious example of where know-how for marketing purposes is communicated to the buyer<sup>(2)</sup>. Franchise agreements contain licences of intellectual property rights relating

<sup>(1)</sup> See the subcontracting notice (referred to in paragraph (22)).

<sup>(2)</sup> Paragraphs 43-45 apply by analogy to other types of distribution agreements which involve the transfer of substantial know-how from supplier to buyer.

to trade marks or signs and know-how for the use and distribution of goods or the provision of services. In addition to the licence of IPR, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance, such as procurement services, training, advice on real estate, financial planning etc. The licence and the assistance are integral components of the business method being franchised.

- (44) Licensing contained in franchise agreements is covered by the Block Exemption Regulation where all five conditions listed in paragraph (31) are fulfilled. Those conditions are usually fulfilled as under most franchise agreements, including master franchise agreements, the franchisor provides goods and/or services, in particular commercial or technical assistance services, to the franchisee. The IPRs help the franchisee to resell the products supplied by the franchisor or by a supplier designated by the franchisor or to use those products and sell the resulting goods or services. Where the franchise agreement only or primarily concerns licensing of IPRs, it is not covered by the Block Exemption Regulation, but the Commission will, as a general rule, apply the principles set out in the Block Exemption Regulation and these Guidelines to such an agreement.

- (45) The following IPR-related obligations are generally considered necessary to protect the franchisor's intellectual property rights and are, where these obligations fall under Article 101(1), also covered by the Block Exemption Regulation:

- (a) an obligation on the franchisee not to engage, directly or indirectly, in any similar business;
- (b) an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking such as would give the franchisee the power to influence the economic conduct of such undertaking;
- (c) an obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;
- (d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant the franchisor, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;
- (e) an obligation on the franchisee to inform the franchisor of infringements of licensed intellectual

property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

- (f) an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise;
- (g) an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent.

### 2.5 Relationship to other block exemption regulations

- (46) Article 2(5) states that the Block Exemption Regulation does 'not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation'. The Block Exemption Regulation does not therefore apply to vertical agreements covered by Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements<sup>(1)</sup>, Regulation 1400/2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector<sup>(2)</sup> or Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements<sup>(3)</sup> and Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements<sup>(4)</sup> exempting vertical agreements concluded in connection with horizontal agreements, or any future regulations of that kind, unless otherwise provided for in such a regulation.

### 3. Hardcore restrictions under the Block Exemption Regulation

- (47) Article 4 of the Block Exemption Regulation contains a list of hardcore restrictions which lead to the exclusion of the whole vertical agreement from the scope of application of the Block Exemption Regulation<sup>(5)</sup>. Where such a hardcore restriction is included in an agreement, that agreement is presumed to fall within Article 101(1). It is also presumed that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings

<sup>(1)</sup> OJ L 123, 27.4.2004, p. 11.

<sup>(2)</sup> See paragraph (25).

<sup>(3)</sup> OJ L 304, 5.12.2000, p. 3.

<sup>(4)</sup> OJ L 304, 5.12.2000, p. 7.

<sup>(5)</sup> This list of hardcore restrictions applies to vertical agreements concerning trade within the Union. In so far as vertical agreements concern exports outside the Union or imports/re-imports from outside the Union see judgment of the Court of Justice in Case C-306/96 *Javico v Yves Saint Laurent* [1998] ECR I-1983. In that judgment the ECJ held in paragraph 20 that 'an agreement in which the reseller gives to the producer an undertaking that it will sell the contractual products on a market outside the Community cannot be regarded as having the object of appreciably restricting competition within the common market or as being capable of affecting, as such, trade between Member States'.



may demonstrate pro-competitive effects under Article 101(3) in an individual case<sup>(1)</sup>. Where the undertakings substantiate that likely efficiencies result from including the hardcore restriction in the agreement and demonstrate that in general all the conditions of Article 101(3) are fulfilled, the Commission will be required to effectively assess the likely negative impact on competition before making an ultimate assessment of whether the conditions of Article 101(3) are fulfilled<sup>(2)</sup>.

- (48) The hardcore restriction set out in Article 4(a) of the Block Exemption Regulation concerns resale price maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. In the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is clear cut. However, RPM can also be achieved through indirect means. Examples of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level. Similarly, direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause. The same indirect means and the same 'supportive' measures can be used to make maximum or recommended prices work as RPM. However, the use of a particular supportive measure or the provision of a list of recommended prices or maximum prices by the supplier to the buyer is not considered in itself as leading to RPM.

<sup>(1)</sup> See in particular paragraphs 106 to 109 describing in general possible efficiencies related to vertical restraints and Section VI.2.10 on resale price restrictions. See for general guidance on this the Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

<sup>(2)</sup> Although, in legal terms, these are two distinct steps, they may in practice be an iterative process where the parties and Commission in several steps enhance and improve their respective arguments.

- (49) In the case of agency agreements, the principal normally establishes the sales price, as the agent does not become the owner of the goods. However, where such an agreement cannot be qualified as an agency agreement for the purposes of applying Article 101(1) (see paragraphs (12) to (21)) an obligation preventing or restricting the agent from sharing its commission, fixed or variable, with the customer would be a hardcore restriction under Article 4(a) of the Block Exemption Regulation. In order to avoid including such a hardcore restriction in the agreement, the agent should thus be left free to lower the effective price paid by the customer without reducing the income for the principal<sup>(3)</sup>.

- (50) The hardcore restriction set out in Article 4(b) of the Block Exemption Regulation concerns agreements or concerted practices that have as their direct or indirect object the restriction of sales by a buyer party to the agreement or its customers, in as far as those restrictions relate to the territory into which or the customers to whom the buyer or its customers may sell the contract goods or services. This hardcore restriction relates to market partitioning by territory or by customer group. That may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors. It may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported or profit pass-over obligations. It may further result from the supplier not providing a Union-wide guarantee service under which normally all distributors are obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory<sup>(4)</sup>. Such practices are even more likely to be viewed as a restriction of the buyer's sales when used in conjunction with the implementation by the supplier of a monitoring system aimed at verifying the effective

<sup>(3)</sup> See, for instance, Commission Decision 91/562/EEC in Case No IV/32.737 — *Eirpage*, OJ L 306, 7.11.1991, p. 22, in particular recital (6).

<sup>(4)</sup> If the supplier decides not to reimburse its distributors for services rendered under the Union-wide guarantee, it may be agreed with these distributors that a distributor which makes a sale outside its allocated territory, will have to pay the distributor appointed in the territory of destination a fee based on the cost of the services (to be) carried out including a reasonable profit margin. This type of scheme may not be seen as a restriction of the distributors' sales outside their territory (see judgment of the Court of First Instance in Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, paragraphs 136 to 145).

destination of the supplied goods, such as the use of differentiated labels or serial numbers. However, obligations on the reseller relating to the display of the supplier's brand name are not classified as hardcore. As Article 4(b) only concerns restrictions of sales by the buyer or its customers, this implies that restrictions of the supplier's sales are also not a hardcore restriction, subject to what is stated in paragraph (59) regarding sales of spare parts in the context of Article 4(e) of the Block Exemption Regulation. Article 4(b) applies without prejudice to a restriction on the buyer's place of establishment. Thus, the benefit of the Block Exemption Regulation is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory.

selling to that customer group or customers in that territory.

- (51) There are four exceptions to the hardcore restriction in Article 4(b) of the Block Exemption Regulation. The first exception in Article 4(b)(i) allows a supplier to restrict active sales by a buyer party to the agreement to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself. A territory or customer group is exclusively allocated when the supplier agrees to sell its product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier within the Union, irrespective of sales by the supplier. The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by for instance appointing an exclusive distributor for a particular customer group in a certain territory. Such protection of exclusively allocated territories or customer groups must, however, permit passive sales to such territories or customer groups. For the application of Article 4(b) of the Block Exemption Regulation, the Commission interprets 'active' and 'passive' sales as follows:

— 'Active' sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active

— 'Passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.

- (52) The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. The use of a website may have effects that extend beyond the distributor's own territory and customer group; however, such effects result from the technology allowing easy access from everywhere. If a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that is considered passive selling. The same is true if a customer opts to be kept (automatically) informed by the distributor and it leads to a sale. Offering different language options on the website does not, of itself, change the passive character of such selling. The Commission thus regards the following as examples of hardcore restrictions of passive selling given the capability of these restrictions to limit the distributor's access to a greater number and variety of customers:

- (a) an agreement that the (exclusive) distributor shall prevent customers located in another (exclusive) territory from viewing its website or shall automatically re-route its customers to the manufacturer's or other (exclusive) distributors' websites. This does not exclude an agreement that the distributor's website shall also offer a number of links to websites of other distributors and/or the supplier;

- (b) an agreement that the (exclusive) distributor shall terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory;
- (c) an agreement that the distributor shall limit its proportion of overall sales made over the internet. This does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick and mortar shop (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model (see paragraphs (54) and (56)). This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location;
- (d) an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a variable fee where the sum increases with the realised offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts.
- (53) A restriction on the use of the internet by distributors that are party to the agreement is compatible with the Block Exemption Regulation to the extent that promotion on the internet or use of the internet would lead to active selling into, for instance, other distributors' exclusive territories or customer groups. The Commission considers online advertisement specifically addressed to certain customers as a form of active selling to those customers. For instance, territory-based banners on third party websites are a form of active sales into the territory where these banners are shown. In general, efforts to be found specifically in a certain territory or by a certain customer group is active selling into that territory or to that customer group. For instance, paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory is active selling into that territory.
- (54) However, under the Block Exemption the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. This may be relevant in particular for selective distribution. Under the Block Exemption, the supplier may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. Subsequent changes to such a condition are also possible under the Block Exemption, except where those changes have as their object to directly or indirectly limit the online sales by the distributors. Similarly, a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.
- (55) There are three further exceptions to the hardcore restriction set out in Article 4(b) of the Block Exemption Regulation. All three exceptions allow for the restriction of both active and passive sales. Under the first exception, it is permissible to restrict a wholesaler from selling to end users, which allows a supplier to keep the wholesale and retail level of trade separate. However, that exception does not exclude the possibility that the wholesaler can sell to certain end users, such as bigger end users, while not allowing sales to (all) other end users. The second exception allows a supplier to restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorised distributors located in any territory where the system is currently operated or where the supplier does not yet sell the contract products (referred to as 'the territory reserved by the supplier to operate that system' in Article 4(b)(iii)). The third exception allows a supplier to restrict a buyer of components, to whom the components are supplied for incorporation, from reselling them to competitors of the supplier. The term 'component' includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods.
- (56) The hardcore restriction set out in Article 4(c) of the Block Exemption Regulation excludes the restriction of active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment. Accordingly, dealers in a selective distribution system, as defined in Article 1(1)(e) of the Block Exemption Regulation, cannot be restricted in the choice of users to whom they may sell, or purchasing agents acting on behalf of those users except to protect an exclusive distribution system operated elsewhere (see paragraph (51)). Within a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall

equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction. This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes. For example, in order to prevent sales to unauthorised dealers, a supplier can restrict its selected dealers from selling more than a given quantity of contract products to an individual end user. Such a requirement may have to be stricter for online sales if it is easier for an unauthorised dealer to obtain those products by using the internet. Similarly, it may have to be stricter for offline sales if it is easier to obtain them from a brick and mortar shop. In order to ensure timely delivery of contract products, a supplier may impose that the products be delivered instantly in the case of offline sales. Whereas an identical requirement cannot be imposed for online sales, the supplier may specify certain practicable delivery times for such sales. Specific requirements may have to be formulated for an online after-sales help desk, so as to cover the costs of customers returning the product and for applying secure payment systems.

- (57) Within the territory where the supplier operates selective distribution, this system may not be combined with exclusive distribution as that would lead to a hardcore restriction of active or passive selling by the dealers under Article 4(c) of the Block Exemption Regulation, with the exception that restrictions can be imposed on the dealer's ability to determine the location of its business premises. Selected dealers may be prevented from operating their business from different premises or from opening a new outlet in a different location. In that context, the use by a distributor of its own website cannot be considered to be the same thing as the opening of a new outlet in a different location. If the dealer's outlet is mobile, an area may be defined outside which the mobile outlet cannot be operated. In addition, the supplier may commit itself to supplying only one dealer or a limited number of dealers in a particular part of the territory where the selective distribution system is applied.

- (58) The hardcore restriction set out in Article 4(d) of the Block Exemption Regulation concerns the restriction of cross-supplies between appointed distributors within a selective distribution system. Accordingly, an agreement or concerted practice may not have as its direct or indirect object to prevent or restrict the active or

passive selling of the contract products between the selected distributors. Selected distributors must remain free to purchase the contract products from other appointed distributors within the network, operating either at the same or at a different level of trade. Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that within a selective distribution network, no restrictions can be imposed on appointed wholesalers as regards their sales of the product to appointed retailers.

- (59) The hardcore restriction set out in Article 4(e) of the Block Exemption Regulation concerns agreements that prevent or restrict end-users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of those spare parts. An agreement between a manufacturer of spare parts and a buyer that incorporates those parts into its own products (original equipment manufacturer (OEM)), may not, either directly or indirectly, prevent or restrict sales by the manufacturer of those spare parts to end users, independent repairers or service providers. Indirect restrictions may arise particularly when the supplier of the spare parts is restricted in supplying technical information and special equipment which are necessary for the use of spare parts by users, independent repairers or service providers. However, the agreement may place restrictions on the supply of the spare parts to the repairers or service providers entrusted by the original equipment manufacturer with the repair or servicing of its own goods. In other words, the original equipment manufacturer may require its own repair and service network to buy spare parts from it.

#### **4. Individual cases of hardcore sales restrictions that may fall outside the scope of Article 101(1) or may fulfil the conditions of Article 101(3)**

- (60) Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature<sup>(1)</sup> and therefore fall outside Article 101(1). For example, a hardcore restriction may be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected. In addition, undertakings may plead an efficiency defence under Article 101(3) in an individual case. This section provides some examples for (re)sales restrictions, whereas for RPM this is dealt with in section VI.2.10.

<sup>(1)</sup> See paragraph 18 of Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

(61) A distributor which will be the first to sell a new brand or the first to sell an existing brand on a new market, thereby ensuring a genuine entry on the relevant market, may have to commit substantial investments where there was previously no demand for that type of product in general or for that type of product from that producer. Such expenses may often be sunk and in such circumstances the distributor may not enter into the distribution agreement without protection for a certain period of time against (active and) passive sales into its territory or to its customer group by other distributors. For example such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor and where this distributor needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) during the first two years that the distributor is selling the contract goods or services in that territory or to that customer group, even though such hardcore restrictions are in general presumed to fall within the scope of Article 101(1).

(62) In the case of genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced without falling within the scope of Article 101(1) for the period necessary for the testing or introduction of the product.

(63) In the case of a selective distribution system, cross supplies between appointed distributors must normally remain free (see paragraph (58)). However, if appointed wholesalers located in different territories are obliged to invest in promotional activities in 'their' territories to support the sales by appointed retailers and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by the wholesalers to appointed retailers in other wholesalers' territories to overcome possible free riding may, in an individual case, fulfil the conditions of Article 101(3).

(64) In general, an agreement that a distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold

offline ('dual pricing') is a hardcore restriction (see paragraph (52)). However, in some specific circumstances, such an agreement may fulfil the conditions of Article 101(3). Such circumstances may be present where a manufacturer agrees such dual pricing with its distributors, because selling online leads to substantially higher costs for the manufacturer than offline sales. For example, where offline sales include home installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims for the manufacturer. In that context, the Commission will also consider to what extent the restriction is likely to limit internet sales and hinder the distributor to reach more and different customers.

#### 5. Excluded restrictions under the Block Exemption Regulation

(65) Article 5 of the Block Exemption Regulation excludes certain obligations from the coverage of the Block Exemption Regulation even though the market share threshold is not exceeded. However, the Block Exemption Regulation continues to apply to the remaining part of the vertical agreement if that part is severable from the non-exempted obligations.

(66) The first exclusion is provided for in Article 5(1)(a) of the Block Exemption Regulation and concerns non-compete obligations. Non-compete obligations are arrangements that result in the buyer purchasing from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year (as defined by Article 1(1)(d) of the Block Exemption Regulation), thereby preventing the buyer from purchasing competing goods or services or limiting such purchases to less than 20 % of total purchases. Where, in the first year after entering in the agreement, for the year preceding the conclusion of the contract no relevant purchasing data for the buyer are available, the buyer's best estimate of its annual total requirements may be used. Such non-compete obligations are not covered by the Block Exemption Regulation where the duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the Block Exemption Regulation (see the second subparagraph of Article 5(1)). In general, non-compete obligations are exempted under that Regulation where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period. If, for instance, the agreement provides for a five-year non-compete obligation and the supplier provides a loan to the buyer, the repayment of that loan should not hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. Similarly, when the supplier provides the buyer



with equipment which is not relationship-specific, the buyer should have the possibility to take over the equipment at its market asset value once the non-compete obligation expires.

competitors from using these outlets to distribute their products (foreclosure of a competing supplier which would be a form of collective boycott) <sup>(1)</sup>.

#### 6. Severability

(67) The five-year duration limit does not apply when the goods or services are resold by the buyer 'from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer'. In such cases the non-compete obligation may be of the same duration as the period of occupancy of the point of sale by the buyer (Article 5(2) of the Block Exemption Regulation). The reason for this exception is that it is normally unreasonable to expect a supplier to allow competing products to be sold from premises and land owned by the supplier without its permission. By analogy, the same principles apply where the buyer operates from a mobile outlet owned by the supplier or leased by the supplier from third parties not connected with the buyer. Artificial ownership constructions, such as a transfer by the distributor of its proprietary rights over the land and premises to the supplier for only a limited period, intended to avoid the five-year limit cannot benefit from this exception.

(70) The Block Exemption Regulation exempts vertical agreements on condition that no hardcore restriction, as set out in Article 4 of that Regulation, is contained in or practised with the vertical agreement. If there are one or more hardcore restrictions, the benefit of the Block Exemption Regulation is lost for the entire vertical agreement. There is no severability for hardcore restrictions.

(71) The rule of severability does apply, however, to the excluded restrictions set out in Article 5 of the Block Exemption Regulation. Therefore, the benefit of the block exemption is only lost in relation to that part of the vertical agreement which does not comply with the conditions set out in Article 5.

#### 7. Portfolio of products distributed through the same distribution system

(68) The second exclusion from the block exemption is provided for in Article 5(1)(b) of the Block Exemption Regulation and concerns post term non-compete obligations on the buyer. Such obligations are normally not covered by the Block Exemption Regulation, unless the obligation is indispensable to protect know-how transferred by the supplier to the buyer, is limited to the point of sale from which the buyer has operated during the contract period, and is limited to a maximum period of one year (see Article 5(3) of the Block Exemption Regulation). According to the definition in Article 1(1)(g) of the Block Exemption Regulation the know-how needs to be 'substantial', meaning that the know-how includes information which is significant and useful to the buyer for the use, sale or resale of the contract goods or services.

(72) Where a supplier uses the same distribution agreement to distribute several goods/services some of these may, in view of the market share threshold, be covered by the Block Exemption Regulation while others may not. In that case, the Block Exemption Regulation applies to those goods and services for which the conditions of application are fulfilled.

(73) In respect of the goods or services which are not covered by the Block Exemption Regulation, the ordinary rules of competition apply, which means:

(a) there is no block exemption but also no presumption of illegality;

(b) if there is an infringement of Article 101(1) which is not exemptible, consideration may be given to whether there are appropriate remedies to solve the competition problem within the existing distribution system;

(c) if there are no such appropriate remedies, the supplier concerned will have to make other distribution arrangements.

Such a situation can also arise where Article 102 applies in respect of some products but not in respect of others.

(69) The third exclusion from the block exemption is provided for in Article 5(1)(c) of the Block Exemption Regulation and concerns the sale of competing goods in a selective distribution system. The Block Exemption Regulation covers the combination of selective distribution with a non-compete obligation, obliging the dealers not to resell competing brands in general. However, if the supplier prevents its appointed dealers, either directly or indirectly, from buying products for resale from specific competing suppliers, such an obligation cannot enjoy the benefit of the Block Exemption Regulation. The objective of the exclusion of such an obligation is to avoid a situation whereby a number of suppliers using the same selective distribution outlets prevent one specific competitor or certain specific

<sup>(1)</sup> An example of indirect measures having such exclusionary effects can be found in Commission Decision 92/428/EEC in Case No IV/33.542 — *Parfum Givenchy*, OJ L 236, 19.8.1992, p. 11.

**IV. WITHDRAWAL OF THE BLOCK EXEMPTION AND  
DISAPPLICATION OF THE BLOCK EXEMPTION REGU-  
LATION**

**1. Withdrawal procedure**

- (74) The presumption of legality conferred by the Block Exemption Regulation may be withdrawn where a vertical agreement, considered either in isolation or in conjunction with similar agreements enforced by competing suppliers or buyers, comes within the scope of Article 101(1) and does not fulfil all the conditions of Article 101(3).
- (75) The conditions of Article 101(3) may in particular not be fulfilled when access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements practised by competing suppliers or buyers. Parallel networks of vertical agreements are to be regarded as similar if they contain restraints producing similar effects on the market. Such a situation may arise for example when, on a given market, certain suppliers practise purely qualitative selective distribution while other suppliers practise quantitative selective distribution. Such a situation may also arise when, on a given market, the cumulative use of qualitative criteria forecloses more efficient distributors. In such circumstances, the assessment must take account of the anti-competitive effects attributable to each individual network of agreements. Where appropriate, withdrawal may concern only a particular qualitative criterion or only the quantitative limitations imposed on the number of authorised distributors.
- (76) Responsibility for an anti-competitive cumulative effect can only be attributed to those undertakings which make an appreciable contribution to it. Agreements entered into by undertakings whose contribution to the cumulative effect is insignificant do not fall under the prohibition provided for in Article 101(1) <sup>(1)</sup> and are therefore not subject to the withdrawal mechanism. The assessment of such a contribution will be made in accordance with the criteria set out in paragraphs (128) to (229).
- (77) Where the withdrawal procedure is applied, the Commission bears the burden of proof that the agreement falls within the scope of Article 101(1) and that the agreement does not fulfil one or several of the conditions of Article 101(3). A withdrawal decision can only have ex nunc effect, which means that the exempted status of the agreements concerned will not be affected until the date at which the withdrawal becomes effective.

<sup>(1)</sup> Judgment of the Court of Justice of 28 February 1991 in Case C-234/89, *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935.

- (78) As referred to in recital 14 of the Block Exemption Regulation, the competition authority of a Member State may withdraw the benefit of the Block Exemption Regulation in respect of vertical agreements whose anti-competitive effects are felt in the territory of the Member State concerned or a part thereof, which has all the characteristics of a distinct geographic market. The Commission has the exclusive power to withdraw the benefit of the Block Exemption Regulation in respect of vertical agreements restricting competition on a relevant geographic market which is wider than the territory of a single Member State. When the territory of a single Member State, or a part thereof, constitutes the relevant geographic market, the Commission and the Member State concerned have concurrent competence for withdrawal.

**2. Disapplication of the Block Exemption Regulation**

- (79) Article 6 of the Block Exemption Regulation enables the Commission to exclude from the scope of the Block Exemption Regulation, by means of regulation, parallel networks of similar vertical restraints where these cover more than 50 % of a relevant market. Such a measure is not addressed to individual undertakings but concerns all undertakings whose agreements are defined in the regulation disapplying the Block Exemption Regulation.
- (80) Whereas the withdrawal of the benefit of the Block Exemption Regulation implies the adoption of a decision establishing an infringement of Article 101 by an individual company, the effect of a regulation under Article 6 is merely to remove, in respect of the restraints and the markets concerned, the benefit of the application of the Block Exemption Regulation and to restore the full application of Article 101(1) and (3). Following the adoption of a regulation declaring the Block Exemption Regulation inapplicable in respect of certain vertical restraints on a particular market, the criteria developed by the relevant case-law of the Court of Justice and the General Court and by notices and previous decisions adopted by the Commission will guide the application of Article 101 to individual agreements. Where appropriate, the Commission will take a decision in an individual case, which can provide guidance to all the undertakings operating on the market concerned.
- (81) For the purpose of calculating the 50 % market coverage ratio, account must be taken of each individual network of vertical agreements containing restraints, or combinations of restraints, producing similar effects on the market. Article 6 of the Block Exemption Regulation does not entail an obligation on the part of the Commission to act where the 50 % market-coverage ratio is exceeded. In general, disapplication is appropriate

when it is likely that access to the relevant market or competition therein is appreciably restricted. This may occur in particular when parallel networks of selective distribution covering more than 50 % of a market are liable to foreclose the market by using selection criteria which are not required by the nature of the relevant goods or which discriminate against certain forms of distribution capable of selling such goods.

- (82) In assessing the need to apply Article 6 of the Block Exemption Regulation, the Commission will consider whether individual withdrawal would be a more appropriate remedy. This may depend, in particular, on the number of competing undertakings contributing to a cumulative effect on a market or the number of affected geographic markets within the Union.

- (83) Any regulation referred to in Article 6 of the Block Exemption Regulation must clearly set out its scope. Therefore, the Commission must first define the relevant product and geographic market(s) and, secondly, must identify the type of vertical restraint in respect of which the Block Exemption Regulation will no longer apply. As regards the latter aspect, the Commission may modulate the scope of its regulation according to the competition concern which it intends to address. For instance, while all parallel networks of single-branding type arrangements shall be taken into account in view of establishing the 50 % market coverage ratio, the Commission may nevertheless restrict the scope of the disapplication regulation only to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, in consideration of the lesser degree of foreclosure attributable to such restraints. Similarly, when on a particular market selective distribution is practised in combination with additional restraints such as non-compete or quantity-forcing on the buyer, the disapplication regulation may concern only such additional restraints. Where appropriate, the Commission may also provide guidance by specifying the market share level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect.

- (84) Pursuant to Regulation No 19/65/EEC of 2 March 1965 of the Council on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices<sup>(1)</sup>, the Commission will have to set a transitional period of not less than six months before a regulation disapplying the Block Exemption Regulation becomes applicable. This should allow the undertakings concerned to adapt their agreements to take account of the regulation disapplying the Block Exemption Regulation.

<sup>(1)</sup> OJ 36, 6.3.1965, p. 533/65, English special edition: OJ Series I Chapter 1965-1966, p. 35.

- (85) A regulation disapplying the Block Exemption Regulation will not affect the exempted status of the agreements concerned for the period preceding its date of application.

## V. MARKET DEFINITION AND MARKET SHARE CALCULATION

### 1. Commission Notice on definition of the relevant market

- (86) The Commission Notice on definition of the relevant market for the purposes of Community competition law<sup>(2)</sup> provides guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues. That Notice will not be further explained in these Guidelines and should serve as the basis for market definition issues. These Guidelines will only deal with specific issues that arise in the context of vertical restraints and that are not dealt with in that notice.

### 2. The relevant market for calculating the 30 % market share threshold under the Block Exemption Regulation

- (87) Under Article 3 of the Block Exemption Regulation, the market share of both the supplier and the buyer are decisive to determine if the block exemption applies. In order for the block exemption to apply, the market share of the supplier on the market where it sells the contract products to the buyer, and the market share of the buyer on the market where it purchases the contract products, must each be 30 % or less. For agreements between small and medium-sized undertakings it is in general not necessary to calculate market shares (see paragraph (11)).
- (88) In order to calculate an undertaking's market share, it is necessary to determine the relevant market where that undertaking sells and purchases, respectively, the contract products. Accordingly, the relevant product market and the relevant geographic market must be defined. The relevant product market comprises any goods or services which are regarded by the buyers as interchangeable, by reason of their characteristics, prices and intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant goods 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.

<sup>(2)</sup> OJ C 372, 9.12.1997, p. 5.



- (89) The product market definition primarily depends on substitutability from the buyers' perspective. When the supplied product is used as an input to produce other products and is generally not recognisable in the final product, the product market is normally defined by the direct buyers' preferences. The customers of the buyers will normally not have a strong preference concerning the inputs used by the buyers. Usually, the vertical restraints agreed between the supplier and buyer of the input only relate to the sale and purchase of the intermediate product and not to the sale of the resulting product. In the case of distribution of final goods, substitutes for the direct buyers will normally be influenced or determined by the preferences of the final consumers. A distributor, as reseller, cannot ignore the preferences of final consumers when it purchases final goods. In addition, at the distribution level the vertical restraints usually concern not only the sale of products between supplier and buyer, but also their resale. As different distribution formats usually compete, markets are in general not defined by the form of distribution that is applied. Where suppliers generally sell a portfolio of products, the entire portfolio may determine the product market when the portfolios and not the individual products are regarded as substitutes by the buyers. As distributors are professional buyers, the geographic wholesale market is usually wider than the retail market, where the product is resold to final consumers. Often, this will lead to the definition of national or wider wholesale markets. But retail markets may also be wider than the final consumers' search area where homogeneous market conditions and overlapping local or regional catchment areas exist.
- (90) Where a vertical agreement involves three parties, each operating at a different level of trade, each party's market share must be 30 % or less in order for the block exemption to apply. As specified in Article 3(2) of the Block Exemption Regulation, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the block exemption applies only if its market share does not exceed the 30 % threshold both as a buyer and a supplier. If, for instance, in an agreement between a manufacturer, a wholesaler (or association of retailers) and a retailer, a non-compete obligation is agreed, then the market shares of the manufacturer and the wholesaler (or association of retailers) on their respective downstream markets must not exceed 30 % and the market share of the wholesaler (or association of retailers) and the retailer must not exceed 30 % on their respective purchase markets in order to benefit from the block exemption.
- (91) Where a supplier produces both original equipment and the repair or replacement parts for that equipment, the supplier will often be the only or the major supplier on the after-market for the repair and replacement parts. This may also arise where the supplier (OEM supplier) subcontracts the manufacturing of the repair or replacement parts. The relevant market for application of the Block Exemption Regulation may be the original equipment market including the spare parts or a separate original equipment market and after-market depending on the circumstances of the case, such as the effects of the restrictions involved, the lifetime of the equipment and importance of the repair or replacement costs<sup>(1)</sup>. In practice, the issue is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the product. If so, it indicates there is one market for the original equipment and spare parts combined.
- (92) Where the vertical agreement, in addition to the supply of the contract goods, also contains IPR provisions — such as a provision concerning the use of the supplier's trademark — which help the buyer to market the contract goods, the supplier's market share on the market where it sells the contract goods is relevant for the application of the Block Exemption Regulation. Where a franchisor does not supply goods to be resold but provides a bundle of services and goods combined with IPR provisions which together form the business method being franchised, the franchisor needs to take account of its market share as a provider of a business method. For that purpose, the franchisor needs to calculate its market share on the market where the business method is exploited, which is the market where the franchisees exploit the business method to provide goods or services to end users. The franchisor must base its market share on the value of the goods or services supplied by its franchisees on this market. On such a market, the competitors may be providers of other franchised business methods but also suppliers of substitutable goods or services not applying franchising. For instance, without prejudice to the definition of such market, if there was a market for fast-food services, a franchisor operating on such a market would need to calculate its market share on the basis of the relevant sales figures of its franchisees on this market.
- <sup>(1)</sup> See for example Commission Decision in *Pelikan/Kyocera* (1995), COM(96) 126 (not published), point 87, and Commission Decision 91/595/EEC in Case No IV/M.12 — *Varta/Bosch*, OJ L 320, 22.11.1991, p. 26, Commission Decision in Case No IV/M.1094 — *Caterpillar/Perkins Engines*, OJ C 94, 28.3.1998, p. 23, and Commission Decision in Case No IV/M.768 — *Lucas/Varity*, OJ C 266, 13.9.1996, p. 6. See also point 56 of the Notice on the definition of the relevant market for the purposes of Community competition law (see paragraph 86).

### 3. Calculation of market shares under the Block Exemption Regulation

- (93) The calculation of market shares needs to be based in principle on value figures. Where value figures are not available substantiated estimates can be made. Such estimates may be based on other reliable market information such as volume figures (see Article 7(a) of the Block Exemption Regulation).
- (94) In-house production, that is, production of an intermediate product for own use, may be very important in a competition analysis as one of the competitive constraints or to accentuate the market position of a company. However, for the purpose of market definition and the calculation of market share for intermediate goods and services, in-house production will not be taken into account.
- (95) However, in the case of dual distribution of final goods, that is, where a producer of final goods also acts as a distributor on the market, the market definition and market share calculation need to include sales of their own goods made by the producers through their vertically integrated distributors and agents (see Article 7(c) of the Block Exemption Regulation). 'Integrated distributors' are connected undertakings within the meaning of Article 1(2) of the Block Exemption Regulation<sup>(1)</sup>.

## VI. ENFORCEMENT POLICY IN INDIVIDUAL CASES

### 1. The framework of analysis

- (96) Outside the scope of the block exemption, it is relevant to examine whether in the individual case the agreement falls within the scope of Article 101(1) and if so whether the conditions of Article 101(3) are satisfied. Provided that they do not contain restrictions of competition by object and in particular hardcore restrictions of competition, there is no presumption that vertical agreements falling outside the block exemption because

the market share threshold is exceeded fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3). Individual assessment of the likely effects of the agreement is required. Companies are encouraged to do their own assessment. Agreements that either do not restrict competition within the meaning of Article 101(1) or which fulfil the conditions of Article 101(3) are valid and enforceable. Pursuant to Article 1(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>(2)</sup> no notification needs to be made to benefit from an individual exemption under Article 101(3). In the case of an individual examination by the Commission, the latter will bear the burden of proof that the agreement in question infringes Article 101(1). The undertakings claiming the benefit of Article 101(3) bear the burden of proving that the conditions of that paragraph are fulfilled. When likely anti-competitive effects are demonstrated, undertakings may substantiate efficiency claims and explain why a certain distribution system is indispensable to bring likely benefits to consumers without eliminating competition, before the Commission decides whether the agreement satisfies the conditions of Article 101(3).

- (97) The assessment of whether a vertical agreement has the effect of restricting competition will be made by comparing the actual or likely future situation on the relevant market with the vertical restraints in place with the situation that would prevail in the absence of the vertical restraints in the agreement. In the assessment of individual cases, the Commission will take, as appropriate, both actual and likely effects into account. For vertical agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of goods and services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable<sup>(3)</sup>. Appreciable anticompetitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102.

<sup>(1)</sup> For these market definition and market share calculation purposes, it is not relevant whether the integrated distributor sells in addition products of competitors.

<sup>(2)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(3)</sup> See Section II.1.

- (98) Vertical restraints are generally less harmful than horizontal restraints. The main reason for the greater focus on horizontal restraints is that such restraints may concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships, the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical relationships, the product of the one is the input for the other-, in other words, the activities of the parties to the agreement are complementary to each other. The exercise of market power by either the upstream or downstream company would therefore normally hurt the demand for the product of the other. The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other.
- (99) Such self-restraining character should not, however, be over-estimated. When a company has no market power, it can only try to increase its profits by optimising its manufacturing and distribution processes, with or without the help of vertical restraints. More generally, because of the complementary role of the parties to a vertical agreement in getting a product on the market, vertical restraints may provide substantial scope for efficiencies. However, when an undertaking does have market power it can also try to increase its profits at the expense of its direct competitors by raising their costs and at the expense of its buyers and ultimately consumers by trying to appropriate some of their surplus. This can happen when the upstream and downstream company share the extra profits or when one of the two uses vertical restraints to appropriate all the extra profits.
- 1.1 *Negative effects of vertical restraints*
- (100) The negative effects on the market that may result from vertical restraints which EU competition law aims at preventing are the following:
- (a) anticompetitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion;
- (b) softening of competition between the supplier and its competitors and/or facilitation of collusion amongst these suppliers, often referred to as reduction of inter-brand competition <sup>(1)</sup>;
- (c) softening of competition between the buyer and its competitors and/or facilitation of collusion amongst
- these competitors, often referred to as reduction of intra-brand competition if it concerns distributors' competition on the basis of the brand or product of the same supplier;
- (d) the creation of obstacles to market integration, including, above all, limitations on the possibilities for consumers to purchase goods or services in any Member State they may choose.
- (101) Foreclosure, softening of competition and collusion at the manufacturers' level may harm consumers in particular by increasing the wholesale prices of the products, limiting the choice of products, lowering their quality or reducing the level of product innovation. Foreclosure, softening of competition and collusion at the distributors' level may harm consumers in particular by increasing the retail prices of the products, limiting the choice of price-service combinations and distribution formats, lowering the availability and quality of retail services and reducing the level of innovation of distribution.
- (102) On a market where individual distributors distribute the brand(s) of only one supplier, a reduction of competition between the distributors of the same brand will lead to a reduction of intra-brand competition between these distributors, but may not have a negative effect on competition between distributors in general. In such a case, if inter-brand competition is fierce, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers.
- (103) Exclusive arrangements are generally more anti-competitive than non-exclusive arrangements. Exclusive arrangements, whether by means of express contractual language or their practical effects, result in one party sourcing all or practically all of its demand from another party. For instance, under a non-compete obligation the buyer purchases only one brand. Quantity forcing, on the other hand, leaves the buyer some scope to purchase competing goods. The degree of foreclosure may therefore be less with quantity forcing.
- (104) Vertical restraints agreed for non-branded goods and services are in general less harmful than restraints affecting the distribution of branded goods and services. Branding tends to increase product differentiation and reduce substitutability of the product, leading to a reduced elasticity of demand and an increased possibility to raise price. The distinction between branded and non-branded goods or services will often coincide with the distinction between intermediate goods and services and final goods and services.

<sup>(1)</sup> By collusion is meant both explicit collusion and tacit collusion (conscious parallel behaviour).

- (105) In general, a combination of vertical restraints aggravates their individual negative effects. However, certain combinations of vertical restraints are less anti-competitive than their use in isolation. For instance, in an exclusive distribution system, the distributor may be tempted to increase the price of the products as intra-brand competition has been reduced. The use of quantity forcing or the setting of a maximum resale price may limit such price increases. Possible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way, leading to so-called cumulative effects.

#### 1.2. Positive effects of vertical restraints

- (106) It is important to recognise that vertical restraints may have positive effects by, in particular, promoting non-price competition and improved quality of services. When a company has no market power, it can only try to increase its profits by optimising its manufacturing or distribution processes. In a number of situations vertical restraints may be helpful in this respect since the usual arm's length dealings between supplier and buyer, determining only price and quantity of a certain transaction, can lead to a sub-optimal level of investments and sales.

- (107) While trying to give a fair overview of the various justifications for vertical restraints, these Guidelines do not claim to be complete or exhaustive. The following reasons may justify the application of certain vertical restraints:

- (a) To solve a 'free-rider' problem. One distributor may free-ride on the promotion efforts of another distributor. That type of problem is most common at the wholesale and retail level. Exclusive distribution or similar restrictions may be helpful in avoiding such free-riding. Free-riding can also occur between suppliers, for instance where one invests in promotion at the buyer's premises, in general at the retail level, that may also attract customers for its competitors. Non-compete type restraints can help to overcome free-riding<sup>(1)</sup>.

<sup>(1)</sup> Whether consumers actually benefit overall from extra promotional efforts depends on whether the extra promotion informs and convinces and thus benefits many new customers or mainly reaches customers who already know what they want to buy and for whom the extra promotion only or mainly implies a price increase.

For there to be a problem, there needs to be a real free-rider issue. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. The product will usually need to be relatively new or technically complex or the reputation of the product must be a major determinant of its demand, as the customer may otherwise very well know what it wants, based on past purchases. And the product must be of a reasonably high value as it is otherwise not attractive for a customer to go to one shop for information and to another to buy. Lastly, it must not be practical for the supplier to impose on all buyers, by contract, effective promotion or service requirements.

Free-riding between suppliers is also restricted to specific situations, namely to cases where the promotion takes place at the buyer's premises and is generic, not brand specific.

- (b) To 'open up or enter new markets'. Where a manufacturer wants to enter a new geographic market, for instance by exporting to another country for the first time, this may involve special 'first time investments' by the distributor to establish the brand on the market. In order to persuade a local distributor to make these investments, it may be necessary to provide territorial protection to the distributor so that it can recoup these investments by temporarily charging a higher price. Distributors based in other markets should then be restrained for a limited period from selling on the new market (see also paragraph (61) in Section III.4). This is a special case of the free-rider problem described under point (a).
- (c) The 'certification free-rider issue'. In some sectors, certain retailers have a reputation for stocking only 'quality' products. In such a case, selling through those retailers may be vital for the introduction of a new product. If the manufacturer cannot initially limit its sales to the premium stores, it runs the risk of being de-listed and the product introduction may fail. There may, therefore, be a reason for allowing for a limited duration a restriction such as exclusive distribution or selective distribution. It must be enough to guarantee introduction of the new product but not so long as to hinder large-scale dissemination. Such benefits are more likely with 'experience' goods or complex goods that represent a relatively large purchase for the final consumer.

- (d) The so-called 'hold-up problem'. Sometimes there are client-specific investments to be made by either the supplier or the buyer, such as in special equipment or training. For instance, a component manufacturer that has to build new machines and tools in order to satisfy a particular requirement of one of its customers. The investor may not commit the necessary investments before particular supply arrangements are fixed.

However, as in the other free-riding examples, there are a number of conditions that have to be met before the risk of under-investment is real or significant. Firstly, the investment must be relationship-specific. An investment made by the supplier is considered to be relationship-specific when, after termination of the contract, it cannot be used by the supplier to supply other customers and can only be sold at a significant loss. An investment made by the buyer is considered to be relationship-specific when, after termination of the contract, it cannot be used by the buyer to purchase and/or use products supplied by other suppliers and can only be sold at a significant loss. An investment is thus relationship-specific because it can only, for instance, be used to produce a brand-specific component or to store a particular brand and thus cannot be used profitably to produce or resell alternatives. Secondly, it must be a long-term investment that is not recouped in the short run. And thirdly, the investment must be asymmetric, that is, one party to the contract invests more than the other party. Where these conditions are met, there is usually a good reason to have a vertical restraint for the duration it takes to depreciate the investment. The appropriate vertical restraint will be of the non-compete type or quantity-forcing type when the investment is made by the supplier and of the exclusive distribution, exclusive customer allocation or exclusive supply type when the investment is made by the buyer.

- (e) The 'specific hold-up problem that may arise in the case of transfer of substantial know-how'. The know-how, once provided, cannot be taken back and the provider of the know-how may not want it to be used for or by its competitors. In as far as the know-how was not readily available to the buyer, is substantial and indispensable for the operation of the agreement, such a transfer may justify a non-compete type of restriction, which would normally fall outside Article 101(1).

- (f) The 'vertical externality issue'. A retailer may not gain all the benefits of its action taken to improve sales; some may go to the manufacturer. For every extra unit a retailer sells by lowering its resale price or by increasing its sales effort, the manufacturer benefits if its wholesale price exceeds its marginal production costs. Thus, there may be a positive externality bestowed on the manufacturer by such retailer's actions and from the manufacturer's perspective the retailer may be pricing too high and/or making too little sales efforts. The negative externality of too high pricing by the retailer is sometimes called the "double marginalisation problem" and it can be avoided by imposing a maximum resale price on the retailer. To increase the retailer's sales efforts selective distribution, exclusive distribution or similar restrictions may be helpful <sup>(1)</sup>.

- (g) 'Economies of scale in distribution'. In order to have scale economies exploited and thereby see a lower retail price for its product, the manufacturer may want to concentrate the resale of its products on a limited number of distributors. To do so, it could use exclusive distribution, quantity forcing in the form of a minimum purchasing requirement, selective distribution containing such a requirement or exclusive sourcing.

- (h) 'Capital market imperfections'. The usual providers of capital (banks, equity markets) may provide capital sub-optimally when they have imperfect information on the quality of the borrower or there is an inadequate basis to secure the loan. The buyer or supplier may have better information and be able, through an exclusive relationship, to obtain extra security for its investment. Where the supplier provides the loan to the buyer, this may lead to non-compete or quantity forcing on the buyer. Where the buyer provides the loan to the supplier, this may be the reason for having exclusive supply or quantity forcing on the supplier.

- (i) 'Uniformity and quality standardisation'. A vertical restraint may help to create a brand image by imposing a certain measure of uniformity and quality standardisation on the distributors, thereby increasing the attractiveness of the product to the final consumer and increasing its sales. This can for instance be found in selective distribution and franchising.

<sup>(1)</sup> See however the previous footnote.



(108) The nine situations listed in paragraph (107) make clear that under certain conditions, vertical agreements are likely to help realise efficiencies and the development of new markets and that this may offset possible negative effects. The case is in general strongest for vertical restraints of a limited duration which help the introduction of new complex products or protect relationship-specific investments. A vertical restraint is sometimes necessary for as long as the supplier sells its product to the buyer (see in particular the situations described in paragraph (107)(a), (e), (f), (g) and (i)).

(109) A large measure of substitutability exists between the different vertical restraints. As a result, the same inefficiency problem can be solved by different vertical restraints. For instance, economies of scale in distribution may possibly be achieved by using exclusive distribution, selective distribution, quantity forcing or exclusive sourcing. However, the negative effects on competition may differ between the various vertical restraints, which plays a role when indispensability is discussed under Article 101(3).

### 1.3. Methodology of analysis

(110) The assessment of a vertical restraint generally involves the following four steps<sup>(1)</sup>:

- (a) First, the undertakings involved need to establish the market shares of the supplier and the buyer on the market where they respectively sell and purchase the contract products.
- (b) If the relevant market share of the supplier and the buyer each do not exceed the 30 % threshold, the vertical agreement is covered by the Block Exemption Regulation, subject to the hardcore restrictions and excluded restrictions set out in that Regulation.
- (c) If the relevant market share is above the 30 % threshold for supplier and/or buyer, it is necessary to assess whether the vertical agreement falls within Article 101(1).
- (d) If the vertical agreement falls within Article 101(1), it is necessary to examine whether it fulfils the conditions for exemption under Article 101(3).

#### 1.3.1. Relevant factors for the assessment under Article 101(1)

(111) In assessing cases above the market share threshold of 30 %, the Commission will undertake a full competition

analysis. The following factors are particularly relevant to establish whether a vertical agreement brings about an appreciable restriction of competition under Article 101(1):

- (a) nature of the agreement;
- (b) market position of the parties;
- (c) market position of competitors;
- (d) market position of buyers of the contract products;
- (e) entry barriers;
- (f) maturity of the market;
- (g) level of trade;
- (h) nature of the product;
- (i) other factors.

(112) The importance of individual factors may vary from case to case and depends on all other factors. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers it may not be indicative of market power. It is therefore not possible to provide firm rules on the importance of the individual factors.

(113) Vertical agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the restraints that it contains, the duration of those restraints and the percentage of total sales on the market affected by those restraints. It may be necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement is implemented by the parties and the incentives that they face.

(114) The market position of the parties provides an indication of the degree of market power, if any, possessed by the supplier, the buyer or both. The higher their market share, the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. Such competitive advantages may, for instance, result from being a first mover on the market (having the best site, etc.), from holding essential patents or having superior technology, from being the brand leader or having a superior portfolio.

<sup>(1)</sup> These steps are not intended to present a legal reasoning that the Commission should follow in this order to take a decision.

- (115) Such indicators, namely market share and possible competitive advantages, are used to assess the market position of competitors. The stronger the competitors are and the greater their number, the less risk there is that the parties will be able to individually exercise market power and foreclose the market or soften competition. It is also relevant to consider whether there are effective and timely counterstrategies that competitors would be likely to deploy. However, if the number of competitors becomes rather small and their market position (size, costs, R&D potential, etc.) is rather similar, such a market structure may increase the risk of collusion. Fluctuating or rapidly changing market shares are in general an indication of intense competition.
- (116) The market position of the parties' customers provides an indication of whether or not one or more of those customers possess buyer power. The first indicator of buyer power is the market share of the customer on the purchase market. That share reflects the importance of its demand for possible suppliers. Other indicators focus on the position of the customer on its resale market, including characteristics such as a wide geographic spread of its outlets, own brands including private labels and its brand image amongst final consumers. In some circumstances, buyer power may prevent the parties from exercising market power and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong customers have the capacity and incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices. Where strong customers merely extract favourable terms for themselves or simply pass on any price increase to their customers, their position does not prevent the parties from exercising market power.
- (117) Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within one or two years, entry barriers can, as a general rule, be said to be low. Entry barriers may result from a wide variety of factors such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations<sup>(1)</sup>, essential facilities, a first mover advantage and brand loyalty of consumers created by strong advertising over a period of time. Vertical restraints and vertical integration may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. Entry barriers may be present at only the supplier or buyer level or at both levels. The question whether certain of those factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are those costs that have to be incurred to enter or be active on a market but that are lost when the market is exited. Advertising costs to build consumer loyalty are normally sunk costs, unless an exiting firm could either sell its brand name or use it somewhere else without a loss. The more costs are sunk, the more potential entrants have to weigh the risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. If, for instance, distributors are tied to a manufacturer via a non-compete obligation, the foreclosing effect will be more significant if setting up its own distributors will impose sunk costs on the potential entrant. In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.
- (118) A mature market is a market that has existed for some time, where the technology used is well known and widespread and not changing very much, where there are no major brand innovations and in which demand is relatively stable or declining. In such a market, negative effects are more likely than in more dynamic markets.
- (119) The level of trade is linked to the distinction between intermediate and final goods and services. Intermediate goods and services are sold to undertakings for use as an input to produce other goods or services and are generally not recognisable in the final goods or services. The buyers of intermediate products are usually well-informed customers, able to assess quality and therefore less reliant on brand and image. Final goods are, directly or indirectly, sold to final consumers that often rely more on brand and image. As distributors have to respond to the demand of final consumers, competition may suffer more when distributors are foreclosed from selling one or a number of brands than when buyers of intermediate products are prevented from buying competing products from certain sources of supply.
- <sup>(1)</sup> See Commission Decision 97/26/EC (Case No IV/M.619 — *Gencor/Lonrho*), OJ L 11, 14.1.1997, p. 30.

(120) The nature of the product plays a role in particular for final products in assessing both the likely negative and the likely positive effects. When assessing the likely negative effects, it is important whether the products on the market are more homogeneous or heterogeneous, whether the product is expensive, taking up a large part of the consumer's budget, or is inexpensive and whether the product is a one-off purchase or repeatedly purchased. In general, when the product is more heterogeneous, less expensive and resembles more a one-off purchase, vertical restraints are more likely to have negative effects.

(121) In the assessment of particular restraints other factors may have to be taken into account. Among these factors can be the cumulative effect, that is, the coverage of the market by similar agreements of others, whether the agreement is 'imposed' (mainly one party is subject to the restrictions or obligations) or 'agreed' (both parties accept restrictions or obligations), the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and discussions on the 'right' price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

### 1.3.2. Relevant factors for the assessment under Article 101(3)

(122) Restrictive vertical agreements may also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. Such an assessment takes place within the framework of Article 101(3), which contains an exception from the prohibition rule of Article 101(1). For that exception to be applicable, the vertical agreement must produce objective economic benefits, the restrictions on competition must be indispensable to attain the efficiencies, consumers must receive a fair share of the efficiency gains, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned <sup>(1)</sup>.

(123) The assessment of restrictive agreements under Article 101(3) is made within the actual context in which they occur <sup>(2)</sup> and on the basis of the facts existing at any given point in time. The assessment is

sensitive to material changes in the facts. The exception rule of Article 101(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case <sup>(3)</sup>. When applying Article 101(3) in accordance with these principles it is necessary to take into account the investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment.

(124) The first condition of Article 101(3) requires an assessment of what are the objective benefits in terms of efficiencies produced by the agreement. In this respect, vertical agreements often have the potential to help realise efficiencies, as explained in section 1.2, by improving the way in which the parties conduct their complementary activities.

(125) In the application of the indispensability test contained in Article 101(3), the Commission will in particular examine whether individual restrictions make it possible to perform the production, purchase and/or (re)sale of the contract products more efficiently than would have been the case in the absence of the restriction concerned. In making such an assessment, the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of Article 101(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable.

(126) The condition that consumers must receive a fair share of the benefits implies that consumers of the products purchased and/or (re)sold under the vertical agreement must at least be compensated for the negative effects of the agreement. <sup>(4)</sup> In other words, the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement.

<sup>(1)</sup> See Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

<sup>(2)</sup> See Judgment of the Court of Justice in Joined Cases 25/84 and 26/84 *Ford* [1985] ECR 2725.

<sup>(3)</sup> See in this respect for example Commission Decision 1999/242/EC (Case No IV/36.237 - TPS), OJ L 90, 2.4.1999, p. 6. Similarly, the prohibition of Article 101(1) also only applies as long as the agreement has a restrictive object or restrictive effects.

<sup>(4)</sup> See paragraph 85 of Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.



(127) The last condition of Article 101(3), according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. In the application of the last condition of Article 101(3), the relationship between Article 101(3) and Article 102 must be taken into account. According to settled case law, the application of Article 101(3) cannot prevent the application of Article 102<sup>(1)</sup>. Moreover, since Articles 101 and 102 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 101(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position<sup>(2)</sup>. The vertical agreement may not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence, the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. A restrictive agreement which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

## 2. Analysis of specific vertical restraints

(128) The most common vertical restraints and combinations of vertical restraints are analysed in the remainder of these Guidelines following the framework of analysis developed in paragraphs (96) to (127). Other restraints and combinations exist for which no direct guidance is provided in these Guidelines. They will, however, be treated according to the same principles and with the same emphasis on the effect on the market.

### 2.1. Single branding

(129) Under the heading of 'single branding' fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier.

That component can be found amongst others in non-compete and quantity-forcing on the buyer. A non-compete arrangement is based on an obligation or incentive scheme which makes the buyer purchase more than 80% of its requirements on a particular market from only one supplier. It does not mean that the buyer can only buy directly from the supplier, but that the buyer will not buy and resell or incorporate competing goods or services. Quantity-forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate its purchases to a large extent with one supplier. Quantity-forcing may for example take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit). A so-called 'English clause', requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer.

(130) The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition. Such restrictive effects have a direct impact on inter-brand competition.

(131) Single branding is exempted by the Block Exemption Regulation where the supplier's and buyer's market share each do not exceed 30 % and are subject to a limitation in time of five years for the non-compete obligation. The remainder of this section provides guidance for the assessment of individual cases above the market share threshold or beyond the time limit of five years.

(132) The capacity for single branding obligations of one specific supplier to result in anticompetitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors that either are not yet present on the market at the time the obligations are concluded, or that are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand

<sup>(1)</sup> See Judgment of the Court of Justice in Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge* [2000] ECR I-1365, paragraph 130. Similarly, the application of Article 101(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 101(1), see to that effect Judgment of the Court of Justice in Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 120.

<sup>(2)</sup> See in this respect Judgment of the Court of First Instance in Case T-51/89 *Tetra Pak (I)* [1990] ECR II-309. See also paragraph 106 of Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

because the supplier in question is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the supplier in question.<sup>(1)</sup> The market position of the supplier is thus of main importance to assess possible anti-competitive effects of single branding obligations.

- (133) If competitors can compete on equal terms for each individual customer's entire demand, single branding obligations of one specific supplier are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration and market coverage of the single branding obligations. The higher its tied market share, that is, the part of its market share sold under a single branding obligation, the more significant foreclosure is likely to be. Similarly, the longer the duration of the single branding obligations, the more significant foreclosure is likely to be. Single branding obligations shorter than one year entered into by non-dominant companies are generally not considered to give rise to appreciable anti-competitive effects or net negative effects. Single branding obligations between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects, while single branding obligations exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant companies.

- (134) When assessing the supplier's market power, the market position of its competitors is important. As long as the competitors are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected. Foreclosure of competitors is not very likely where they have similar market positions and can offer similarly attractive products. In such a case, foreclosure may, however, occur for potential entrants when a number of major suppliers enter into single branding contracts with a significant number of buyers on the relevant market (cumulative effect situation). This is also a situation where single branding agreements may facilitate collusion between competing suppliers. If, individually, those suppliers are covered by the Block Exemption

Regulation, a withdrawal of the block exemption may be necessary to deal with such a negative cumulative effect. A tied market share of less than 5 % is not considered in general to contribute significantly to a cumulative foreclosure effect.

- (135) In cases where the market share of the largest supplier is below 30 % and the market share of the five largest suppliers is below 50 %, there is unlikely to be a single or a cumulative anti-competitive effect situation. Where a potential entrant cannot penetrate the market profitably, it is likely to be due to factors other than single branding obligations, such as consumer preferences.
- (136) Entry barriers are important to establish whether there is anticompetitive foreclosure. Wherever it is relatively easy for competing suppliers to create new buyers or find alternative buyers for their product, foreclosure is unlikely to be a real problem. However, there are often entry barriers, both at the manufacturing and at the distribution level.
- (137) Countervailing power is relevant, as powerful buyers will not easily allow themselves to be cut off from the supply of competing goods or services. More generally, in order to convince customers to accept single branding, the supplier may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into a single branding obligation with the supplier. But it would be wrong to conclude automatically from this that all single branding obligations, taken together, are overall beneficial for customers on that market and for the final consumers. It is in particular unlikely that consumers as a whole will benefit if there are many customers and the single branding obligations, taken together, have the effect of preventing the entry or expansion of competing undertakings.
- (138) Lastly, 'the level of trade' is relevant. Anticompetitive foreclosure is less likely in case of an intermediate product. When the supplier of an intermediate product is not dominant, the competing suppliers still have a substantial part of demand that is free. Below the level of dominance an anticompetitive foreclosure effect may however arise in a cumulative effect situation. A cumulative anticompetitive effect is unlikely to arise as long as less than 50 % of the market is tied.

<sup>(1)</sup> Judgment of the Court of First Instance in Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraphs 104 and 156.

- (139) Where the agreement concerns the supply of a final product at the wholesale level, the question whether a competition problem is likely to arise depends in large part on the type of wholesaling and the entry barriers at the wholesale level. There is no real risk of anticompetitive foreclosure if competing manufacturers can easily establish their own wholesaling operation. Whether entry barriers are low depends in part on the type of wholesaling, that is, whether or not wholesalers can operate efficiently with only the product concerned by the agreement (for example ice cream) or whether it is more efficient to trade in a whole range of products (for example frozen foodstuffs). In the latter case, it is not efficient for a manufacturer selling only one product to set up its own wholesaling operation. In that case, anti-competitive effects may arise. In addition, cumulative effect problems may arise if several suppliers tie most of the available wholesalers.
- (140) For final products, foreclosure is in general more likely to occur at the retail level, given the significant entry barriers for most manufacturers to start retail outlets just for their own products. In addition, it is at the retail level that single branding agreements may lead to reduced in-store inter-brand competition. It is for these reasons that for final products at the retail level, significant anti-competitive effects may start to arise, taking into account all other relevant factors, if a non-dominant supplier ties 30 % or more of the relevant market. For a dominant company, even a modest tied market share may already lead to significant anti-competitive effects.
- (141) At the retail level, a cumulative foreclosure effect may also arise. Where all suppliers have market shares below 30 %, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is less than 40 % and withdrawal of the block exemption is therefore unlikely. That figure may be higher when other factors like the number of competitors, entry barriers etc. are taken into account. Where not all companies have market shares below the threshold of the Block Exemption Regulation but none is dominant, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is below 30 %.
- (142) Where the buyer operates from premises and land owned by the supplier or leased by the supplier from a third party not connected with the buyer, the possibility of imposing effective remedies for a possible foreclosure effect will be limited. In that case, intervention by the Commission below the level of dominance is unlikely.
- (143) In certain sectors, the selling of more than one brand from a single site may be difficult, in which case a foreclosure problem can better be remedied by limiting the effective duration of contracts.
- (144) Where appreciable anti-competitive effects are established, the question of a possible exemption under Article 101(3) arises. For non-compete obligations, the efficiencies described in points (a) (free riding between suppliers), (d), (e) (hold-up problems) and (h) (capital market imperfections) of paragraph (107), may be particularly relevant.
- (145) In the case of an efficiency as described in paragraph (107)(a), (107)(d) and (107)(h), quantity forcing on the buyer could possibly be a less restrictive alternative. A non-compete obligation may be the only viable way to achieve an efficiency as described in paragraph (107)(e), (hold-up problem related to the transfer of know-how).
- (146) In the case of a relationship-specific investment made by the supplier (see paragraph (107)(d) ), a non-compete or quantity forcing agreement for the period of depreciation of the investment will in general fulfil the conditions of Article 101(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment by the supplier when this equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are normally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans on the premises of or next to the canning facility of a food producer, this new capacity may only be economically viable when producing for this particular customer, in which case the investment would be considered to be relationship-specific.
- (147) Where the supplier provides the buyer with a loan or provides the buyer with equipment which is not relationship-specific, this in itself is normally not sufficient to justify the exemption of an anticompetitive foreclosure effect on the market. In case of capital market imperfection, it may be more efficient for the supplier of a product than for a bank to provide a loan (see paragraph (107)(h)). However, in such a case the loan should be provided in the least restrictive way and the buyer should thus in general not be prevented from terminating the obligation and repaying the outstanding part of the loan at any point in time and without payment of any penalty.

- (148) The transfer of substantial know-how (paragraph (107)(e)) usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the context of franchising.

(149) Example of non-compete obligation

The market leader in a national market for an impulse consumer product, with a market share of 40 %, sells most of its products (90 %) through tied retailers (tied market share 36 %). The agreements oblige the retailers to purchase only from the market leader for at least four years. The market leader is especially strongly represented in the more densely populated areas like the capital. Its competitors, 10 in number, of which some are only locally available, all have much smaller market shares, the biggest having 12 %. Those 10 competitors together supply another 10 % of the market via tied outlets. There is strong brand and product differentiation in the market. The market leader has the strongest brands. It is the only one with regular national advertising campaigns. It provides its tied retailers with special stocking cabinets for its product.

The result on the market is that in total 46 % (36 % + 10 %) of the market is foreclosed to potential entrants and to incumbents not having tied outlets. Potential entrants find entry even more difficult in the densely populated areas where foreclosure is even higher, although it is there that they would prefer to enter the market. In addition, owing to the strong brand and product differentiation and the high search costs relative to the price of the product, the absence of in-store inter-brand competition leads to an extra welfare loss for consumers. The possible efficiencies of the outlet exclusivity, which the market leader claims result from reduced transport costs and a possible hold-up problem concerning the stocking cabinets, are limited and do not outweigh the negative effects on competition. The efficiencies are limited, as the transport costs are linked to quantity and not exclusivity and the stocking cabinets do not contain special know-how and are not brand specific. Accordingly, it is unlikely that the conditions of Article 101(3) are fulfilled.

(150) Example of quantity forcing

A producer X with a 40 % market share sells 80 % of its products through contracts which specify that the reseller is required to purchase at least 75 % of its requirements for that type of product from X. In return X is offering financing and equipment at favourable rates. The contracts have a duration of five years in which repayment of the loan is foreseen in equal instalments. However, after the first two years buyers have the possi-

bility to terminate the contract with a six-month notice period if they repay the outstanding loan and take over the equipment at its market asset value. At the end of the five-year period the equipment becomes the property of the buyer. Most of the competing producers are small, twelve in total with the biggest having a market share of 20 %, and engage in similar contracts with different durations. The producers with market shares below 10 % often have contracts with longer durations and with less generous termination clauses. The contracts of producer X leave 25 % of requirements free to be supplied by competitors. In the last three years, two new producers have entered the market and gained a combined market share of around 8 %, partly by taking over the loans of a number of resellers in return for contracts with these resellers.

Producer X's tied market share is 24 % ( $0,75 \times 0,80 \times 40 \%$ ). The other producers' tied market share is around 25 %. Therefore, in total around 49 % of the market is foreclosed to potential entrants and to incumbents not having tied outlets for at least the first two years of the supply contracts. The market shows that the resellers often have difficulty in obtaining loans from banks and are too small in general to obtain capital through other means like the issuing of shares. In addition, producer X is able to demonstrate that concentrating its sales on a limited number of resellers allows him to plan its sales better and to save transport costs. In the light of the efficiencies on the one hand and the 25 % non-tied part in the contracts of producer X, the real possibility for early termination of the contract, the recent entry of new producers and the fact that around half the resellers are not tied on the other hand, the quantity forcing of 75 % applied by producer X is likely to fulfil the conditions of Article 101(3).

2.2 Exclusive distribution

- (151) In an exclusive distribution agreement, the supplier agrees to sell its products to only one distributor for resale in a particular territory. At the same time, the distributor is usually limited in its active selling into other (exclusively allocated) territories. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may facilitate price discrimination in particular. When most or all of the suppliers apply exclusive distribution, it may soften competition and facilitate collusion, both at the suppliers' and distributors' level. Lastly, exclusive distribution may lead to foreclosure of other distributors and therewith reduce competition at that level.

- (152) Exclusive distribution is exempted by the Block Exemption Regulation where both the supplier's and buyer's market share each do not exceed 30 %, even if combined with other non-hardcore vertical restraints, such as a non-compete obligation limited to five years, quantity forcing or exclusive purchasing. A combination of exclusive distribution and selective distribution is only exempted by the Block Exemption Regulation if active selling in other territories is not restricted. The remainder of this section provides guidance for the assessment of exclusive distribution in individual cases above the 30 % market share threshold.
- (153) The market position of the supplier and its competitors is of major importance, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, the more serious is the loss of intra-brand competition. Above the 30 % market share threshold, there may be a risk of a significant reduction of intra-brand competition. In order to fulfil the conditions of Article 101(3), the loss of intra-brand competition may need to be balanced with real efficiencies.
- (154) The position of the competitors can have a dual significance. Strong competitors will generally mean that the reduction in intra-brand competition is outweighed by sufficient inter-brand competition. However, if the number of competitors becomes rather small and their market position is rather similar in terms of market share, capacity and distribution network, there is a risk of collusion and/or softening of competition. The loss of intra-brand competition can increase that risk, especially when several suppliers operate similar distribution systems. Multiple exclusive dealerships, that is, when different suppliers appoint the same exclusive distributor in a given territory, may further increase the risk of collusion and/or softening of competition. If a dealer is granted the exclusive right to distribute two or more important competing products in the same territory, inter-brand competition may be substantially restricted for those brands. The higher the cumulative market share of the brands distributed by the exclusive multiple brand dealers, the higher the risk of collusion and/or softening of competition and the more inter-brand competition will be reduced. If a retailer is the exclusive distributor for a number of brands this may have as result that if one producer cuts the wholesale price for its brand, the exclusive retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, compared to the situation without multiple exclusive dealerships, producers have a reduced interest in entering into price competition with one another. Such cumulative effect situations may be a reason to withdraw the benefit of the Block Exemption Regulation where the market shares of the suppliers and buyers are below the threshold of the Block Exemption Regulation.
- (155) Entry barriers that may hinder suppliers from creating new distributors or finding alternative distributors are less important in assessing the possible anti-competitive effects of exclusive distribution. Foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding.
- (156) Foreclosure of other distributors is not an issue where the supplier which operates the exclusive distribution system appoints a high number of exclusive distributors on the same market and those exclusive distributors are not restricted in selling to other non-appointed distributors. Foreclosure of other distributors may however become an issue where there is buying power and market power downstream, in particular in the case of very large territories where the exclusive distributor becomes the exclusive buyer for a whole market. An example would be a supermarket chain which becomes the only distributor of a leading brand on a national food retail market. The foreclosure of other distributors may be aggravated in the case of multiple exclusive dealership.
- (157) Buying power may also increase the risk of collusion on the buyers' side when the exclusive distribution arrangements are imposed by important buyers, possibly located in different territories, on one or several suppliers.
- (158) Maturity of the market is important, as loss of intra-brand competition and price discrimination may be a serious problem in a mature market but may be less relevant on a market with growing demand, changing technologies and changing market positions.
- (159) The level of trade is important as the possible negative effects may differ between the wholesale and retail level. Exclusive distribution is mainly applied in the distribution of final goods and services. A loss of intra-brand competition is especially likely at the retail level if coupled with large territories, since final consumers may be confronted with little possibility of choosing between a high price/high service and a low price/low service distributor for an important brand.



- (160) A manufacturer that chooses a wholesaler to be its exclusive distributor will normally do so for a larger territory, such as a whole Member State. As long as the wholesaler can sell the products without limitation to downstream retailers there are not likely to be appreciable anti-competitive effects. A possible loss of intra-brand competition at the wholesale level may be easily outweighed by efficiencies obtained in logistics, promotion etc., especially when the manufacturer is based in a different country. The possible risks for inter-brand competition of multiple exclusive dealerships are however higher at the wholesale than at the retail level. Where one wholesaler becomes the exclusive distributor for a significant number of suppliers, not only is there a risk that competition between these brands is reduced, but also that there is foreclosure at the wholesale level of trade.
- (161) As stated in paragraph (155), foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding. But even when exclusive distribution is combined with single branding anticompetitive foreclosure of other suppliers is unlikely, except possibly when the single branding is applied to a dense network of exclusive distributors with small territories or in case of a cumulative effect. In such a case it may be necessary to apply the principles on single branding set out in section 2.1. However, when the combination does not lead to significant foreclosure, the combination of exclusive distribution and single branding may be pro-competitive by increasing the incentive for the exclusive distributor to focus its efforts on the particular brand. Therefore, in the absence of such a foreclosure effect, the combination of exclusive distribution with non-compete may very well fulfil the conditions of Article 101(3) for the whole duration of the agreement, particularly at the wholesale level.
- (162) The combination of exclusive distribution with exclusive sourcing increases the possible competition risks of reduced intra-brand competition and market partitioning which may facilitate price discrimination in particular. Exclusive distribution already limits arbitrage by customers, as it limits the number of distributors and usually also restricts the distributors in their freedom of active selling. Exclusive sourcing, requiring the exclusive distributors to buy their supplies for the particular brand directly from the manufacturer, eliminates in addition possible arbitrage by the exclusive distributors, which are prevented from buying from other distributors in the system. As a result, the supplier's possibilities to limit intra-brand competition by applying dissimilar conditions of sale to the detriment of consumers are enhanced, unless the combination allows the creation of efficiencies leading to lower prices to all final consumers.
- (163) The nature of the product is not particularly relevant to the assessment of possible anti-competitive effects of exclusive distribution. It is, however, relevant to an assessment of possible efficiencies, that is, after an appreciable anti-competitive effect is established.
- (164) Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image. In general, the case for efficiencies is strongest for new products, complex products, and products whose qualities are difficult to judge before consumption (so-called experience products) or whose qualities are difficult to judge even after consumption (so-called credence products). In addition, exclusive distribution may lead to savings in logistic costs due to economies of scale in transport and distribution.
- (165) Example of exclusive distribution at the wholesale level
- On the market for a consumer durable, A is the market leader. A sells its product through exclusive wholesalers. Territories for the wholesalers correspond to the entire Member State for small Member States, and to a region for larger Member States. Those exclusive distributors deal with sales to all the retailers in their territories. They do not sell to final consumers. The wholesalers are in charge of promotion in their markets, including sponsoring of local events, but also explaining and promoting the new products to the retailers in their territories. Technology and product innovation are evolving fairly quickly on this market, and pre-sale service to retailers and to final consumers plays an important role. The wholesalers are not required to purchase all their requirements of the brand of supplier A from the producer himself, and arbitrage by wholesalers or retailers is practicable because the transport costs are relatively low compared to the value of the product. The wholesalers are not under a non-compete obligation. Retailers also sell a number of brands of competing suppliers, and there are no exclusive or selective distribution agreements at the retail level. On the EU market of sales to wholesalers A has around 50 % market share. Its market share on the various national retail markets varies between 40 % and 60 %. A has between 6 and 10 competitors on every national market. B, C and D are its biggest competitors and are also present on each national market, with market shares varying between 20 % and 5 %. The remaining producers are national producers, with smaller market shares. B, C and D have similar distribution networks, whereas the local producers tend to sell their products directly to retailers.

On the wholesale market described in this example, the risk of reduced intra-brand competition and price discrimination is low. Arbitrage is not hindered, and the absence of intra-brand competition is not very relevant at the wholesale level. At the retail level, neither intra- nor inter-brand competition are hindered. Moreover, inter-brand competition is largely unaffected by the exclusive arrangements at the wholesale level. Therefore it is likely, even if anti-competitive effects exist, that also the conditions of Article 101(3) are fulfilled.

(166) Example of multiple exclusive dealerships in an oligopolistic market

On a national market for a final product, there are four market leaders, which each have a market share of around 20 %. Those four market leaders sell their product through exclusive distributors at the retail level. Retailers are given an exclusive territory which corresponds to the town in which they are located or a district of the town for large towns. In most territories, the four market leaders happen to appoint the same exclusive retailer ('multiple dealership'), often centrally located and rather specialised in the product. The remaining 20 % of the national market is composed of small local producers, the largest of these producers having a market share of 5 % on the national market. Those local producers sell their products in general through other retailers, in particular because the exclusive distributors of the four largest suppliers show in general little interest in selling less well-known and cheaper brands. There is strong brand and product differentiation on the market. The four market leaders have large national advertising campaigns and strong brand images, whereas the fringe producers do not advertise their products at the national level. The market is rather mature, with stable demand and no major product and technological innovation. The product is relatively simple.

In such an oligopolistic market, there is a risk of collusion between the four market leaders. That risk is increased through multiple dealerships. Intra-brand competition is limited by the territorial exclusivity. Competition between the four leading brands is reduced at the retail level, since one retailer fixes the price of all four brands in each territory. The multiple dealership implies that, if one producer cuts the price for its brand, the retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, producers have a reduced interest in entering into price competition with one another. Inter-brand price competition exists mainly with the low brand image

goods of the fringe producers. The possible efficiency arguments for (joint) exclusive distributors are limited, as the product is relatively simple, the resale does not require any specific investments or training and advertising is mainly carried out at the level of the producers.

Even though each of the market leaders has a market share below the threshold, the conditions of Article 101(3) may not be fulfilled and withdrawal of the block exemption may be necessary for the agreements concluded with distributors whose market share is below 30 % of the procurement market.

(167) Example of exclusive distribution combined with exclusive sourcing

Manufacturer A is the European market leader for a bulky consumer durable, with a market share of between 40 % and 60 % in most national retail markets. In Member States where it has a high market share, it has less competitors with much smaller market shares. The competitors are present on only one or two national markets. A's long time policy is to sell its product through its national subsidiaries to exclusive distributors at the retail level, which are not allowed to sell actively into each other's territories. Those distributors are thereby incentivised to promote the product and provide pre-sales services. Recently the retailers are in addition obliged to purchase manufacturer A's products exclusively from the national subsidiary of manufacturer A in their own country. The retailers selling the brand of manufacturer A are the main resellers of that type of product in their territory. They handle competing brands, but with varying degrees of success and enthusiasm. Since the introduction of exclusive sourcing, A applies price differences of 10 % to 15 % between markets with higher prices in the markets where it has less competition. The markets are relatively stable on the demand and the supply side, and there are no significant technological changes.

In the high price markets, the loss of intra-brand competition results not only from the territorial exclusivity at the retail level but is aggravated by the exclusive sourcing obligation imposed on the retailers. The exclusive sourcing obligation helps to keep markets and territories separate by making arbitrage between the exclusive retailers, the main resellers of that type of product, impossible. The exclusive retailers also cannot sell actively into each other's territory and in practice tend to avoid delivering outside their own territory. As a result, price discrimination is possible, without it leading to a significant increase in total sales. Arbitrage by consumers or independent traders is limited due to the bulkiness of the product.

While the possible efficiency arguments for appointing exclusive distributors may be convincing, in particular because of the incentivising of retailers, the possible efficiency arguments for the combination of exclusive distribution and exclusive sourcing, and in particular the possible efficiency arguments for exclusive sourcing, linked mainly to economies of scale in transport, are unlikely to outweigh the negative effect of price discrimination and reduced intra-brand competition. Consequently, it is unlikely that the conditions of Article 101(3) are fulfilled.

### 2.3. Exclusive customer allocation

(168) In an exclusive customer allocation agreement, the supplier agrees to sell its products to only one distributor for resale to a particular group of customers. At the same time, the distributor is usually limited in its active selling to other (exclusively allocated) groups of customers. The Block Exemption Regulation does not limit the way an exclusive customer group can be defined; it could for instance be a particular type of customers defined by their occupation but also a list of specific customers selected on the basis of one or more objective criteria. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination. Where most or all of the suppliers apply exclusive customer allocation, competition may be softened and collusion, both at the suppliers' and the distributors' level, may be facilitated. Lastly, exclusive customer allocation may lead to foreclosure of other distributors and therewith reduce competition at that level.

(169) Exclusive customer allocation is exempted by the Block Exemption Regulation when both the supplier's and buyer's market share does not exceed the 30 % market share threshold, even if combined with other non-hardcore vertical restraints such as non-compete, quantity-forcing or exclusive sourcing. A combination of exclusive customer allocation and selective distribution is normally a hardcore restriction, as active selling to end-users by the appointed distributors is usually not left free. Above the 30 % market share threshold, the guidance provided in paragraphs (151) to (167) applies also to the assessment of exclusive customer allocation, subject to the specific remarks in the remainder of this section.

(170) The allocation of customers normally makes arbitrage by the customers more difficult. In addition, as each appointed distributor has its own class of customers, non-appointed distributors not falling within such a class may find it difficult to obtain the product. Consequently, possible arbitrage by non-appointed distributors will be reduced.

(171) Exclusive customer allocation is mainly applied to intermediate products and at the wholesale level when it concerns final products, where customer groups with different specific requirements concerning the product can be distinguished.

(172) Exclusive customer allocation may lead to efficiencies, especially when the distributors are required to make investments in for instance specific equipment, skills or know-how to adapt to the requirements of their group of customers. The depreciation period of these investments indicates the justified duration of an exclusive customer allocation system. In general the case is strongest for new or complex products and for products requiring adaptation to the needs of the individual customer. Identifiable differentiated needs are more likely for intermediate products, that is, products sold to different types of professional buyers. Allocation of final consumers is unlikely to lead to efficiencies.

### (173) Example of exclusive customer allocation

A company has developed a sophisticated sprinkler installation. The company has currently a market share of 40 % on the market for sprinkler installations. When it started selling the sophisticated sprinkler it had a market share of 20 % with an older product. The installation of the new type of sprinkler depends on the type of building that it is installed in and on the use of the building (office, chemical plant, hospital etc.). The company has appointed a number of distributors to sell and install the sprinkler installation. Each distributor needed to train its employees for the general and specific requirements of installing the sprinkler installation for a particular class of customers. To ensure that distributors would specialise, the company assigned to each distributor an exclusive class of customers and prohibited active sales to each others' exclusive customer classes. After five years, all the exclusive distributors will be allowed to sell actively to all classes of customers, thereby ending the system of exclusive customer allocation. The supplier may then also start selling to new distributors. The market is quite dynamic, with two recent entries and a number of technological developments. Competitors, with market shares between 25 % and 5 %, are also upgrading their products.

As the exclusivity is of limited duration and helps to ensure that the distributors may recoup their investments and concentrate their sales efforts first on a certain class of customers in order to learn the trade, and as the possible anti-competitive effects seem limited in a dynamic market, the conditions of Article 101(3) are likely to be fulfilled.



#### 2.4. Selective distribution

(174) Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorised distributors on the one hand and the possibilities of resale on the other. The difference with exclusive distribution is that the restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product. Another difference with exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-authorised distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products.

(175) The possible competition risks are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain type(s) of distributors and softening of competition and facilitation of collusion between suppliers or buyers. To assess the possible anti-competitive effects of selective distribution under Article 101(1), a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. Purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product such as training of sales personnel, the service provided at the point of sale, a certain range of the products being sold etc. <sup>(1)</sup> The application of such criteria does not put a direct limit on the number of dealers. Purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anti-competitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary <sup>(2)</sup>. Quantitative selective distribution adds further criteria for selection that more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc.

(176) Qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation as long

<sup>(1)</sup> See for example judgment of the Court of First Instance in Case T-88/92 *Groupement d'achat Édouard Leclerc v Commission* [1996] ECR II-1961.

<sup>(2)</sup> See judgments of the Court of Justice in Case 31/80 *L'Oréal v PVBA* [1980] ECR 3775, paragraphs 15 and 16; Case 26/76 *Metro I* [1977] ECR 1875, paragraphs 20 and 21; Case 107/82 *AEG* [1983] ECR 3151, paragraph 35; and judgment of the Court of First Instance in Case T-19/91 *Vichy v Commission* [1992] ECR II-415, paragraph 65.

as the market share of both supplier and buyer each do not exceed 30 %, even if combined with other non-hardcore vertical restraints, such as non-compete or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted. The Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria. However, where the characteristics of the product <sup>(3)</sup> do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the Block Exemption Regulation is likely to be withdrawn. In addition, the remainder of this section provides guidance for the assessment of selective distribution in individual cases which are not covered by the Block Exemption Regulation or in the case of cumulative effects resulting from parallel networks of selective distribution.

(177) The market position of the supplier and its competitors is of central importance in assessing possible anti-competitive effects, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, the more problematic is the loss of intra-brand competition. Another important factor is the number of selective distribution networks present in the same market. Where selective distribution is applied by only one supplier on the market, quantitative selective distribution does not normally create net negative effects provided that the contract goods, having regard to their nature, require the use of a selective distribution system and on condition that the selection criteria applied are necessary to ensure efficient distribution of the goods in question. The reality, however, seems to be that selective distribution is often applied by a number of the suppliers on a given market.

(178) The position of competitors can have a dual significance and plays in particular a role in case of a cumulative effect. Strong competitors will mean in general that the reduction in intra-brand competition is easily outweighed by sufficient inter-brand competition. However, when a majority of the main suppliers apply selective distribution, there will be a significant loss of intra-brand competition and possible foreclosure of certain

<sup>(3)</sup> See for example judgments of the Court of First Instance in Case T-19/92, *Groupement d'achat Édouard Leclerc v Commission* [1996] ECR II-1851, paragraphs 112 to 123; Case T-88/92 *Groupement d'achat Édouard Leclerc v Commission* [1996] ECR II-1961, paragraphs 106 to 117, and the case law referred to in the preceding footnote.

types of distributors as well as an increased risk of collusion between those major suppliers. The risk of foreclosure of more efficient distributors has always been greater with selective distribution than with exclusive distribution, given the restriction on sales to non-authorised dealers in selective distribution. That restriction is designed to give selective distribution systems a closed character, making it impossible for non-authorised dealers to obtain supplies. Accordingly, selective distribution is particularly well suited to avoid pressure by price discounters (whether offline or online-only distributors) on the margins of the manufacturer, as well as on the margins of the authorised dealers. Foreclosure of such distribution formats, whether resulting from the cumulative application of selective distribution or from the application by a single supplier with a market share exceeding 30 %, reduces the possibilities for consumers to take advantage of the specific benefits offered by these formats such as lower prices, more transparency and wider access.

total turnover achieved with the type of products in question and it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realise economies of scale in distribution. As regards individual contributions, a supplier with a market share of less than 5 % is in general not considered to contribute significantly to a cumulative effect.

(179) Where the Block Exemption Regulation applies to individual networks of selective distribution, withdrawal of the block exemption or disapplication of the Block Exemption Regulation may be considered in case of cumulative effects. However, a cumulative effect problem is unlikely to arise when the share of the market covered by selective distribution is below 50 %. Also, no problem is likely to arise where the market coverage ratio exceeds 50 %, but the aggregate market share of the five largest suppliers (CR5) is below 50 %. Where both the CR5 and the share of the market covered by selective distribution exceed 50 %, the assessment may vary depending on whether or not all five largest suppliers apply selective distribution. The stronger the position of the competitors which do not apply selective distribution, the less likely other distributors will be foreclosed. If all five largest suppliers apply selective distribution, competition concerns may arise with respect to those agreements in particular that apply quantitative selection criteria by directly limiting the number of authorised dealers or that apply qualitative criteria, such as a requirement to have one or more brick and mortar shops or to provide specific services, which forecloses certain distribution formats. The conditions of Article 101(3) are in general unlikely to be fulfilled if the selective distribution systems at issue prevent access to the market by new distributors capable of adequately selling the products in question, especially price discounters or online-only distributors offering lower prices to consumers, thereby limiting distribution to the advantage of certain existing channels and to the detriment of final consumers. More indirect forms of quantitative selective distribution, resulting for instance from the combination of purely qualitative selection criteria with the requirement imposed on the dealers to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, if such an amount does not represent a significant proportion of the dealer's

(180) Entry barriers are mainly of interest in the case of foreclosure of the market to non-authorised dealers. In general, entry barriers will be considerable as selective distribution is usually applied by manufacturers of branded products. It will in general take time and considerable investment for excluded retailers to launch their own brands or obtain competitive supplies elsewhere.

(181) Buying power may increase the risk of collusion between dealers and thus appreciably change the analysis of possible anti-competitive effects of selective distribution. Foreclosure of the market to more efficient retailers may especially result where a strong dealer organisation imposes selection criteria on the supplier aimed at limiting distribution to the advantage of its members.

(182) Article 5(1)(c) of the Block Exemption Regulation provides that the supplier may not impose an obligation causing the authorised dealers, either directly or indirectly, not to sell the brands of particular competing suppliers. Such a condition aims specifically at avoiding horizontal collusion to exclude particular brands through the creation of a selective club of brands by the leading suppliers. That kind of obligation is unlikely to be exemptible when the CR5 is equal to or above 50 %, unless none of the suppliers imposing such an obligation belongs to the five largest suppliers on the market.

(183) Foreclosure of other suppliers is normally not a problem as long as other suppliers can use the same distributors, that is, as long as the selective distribution system is not combined with single branding. In the case of a dense network of authorised distributors or in the case of a cumulative effect, the combination of selective

distribution and a non-compete obligation may pose a risk of foreclosure to other suppliers. In that case, the principles set out in section 2.1. on single branding apply. Where selective distribution is not combined with a non-compete obligation, foreclosure of the market to competing suppliers may still be a problem where the leading suppliers apply not only purely qualitative selection criteria, but impose on their dealers certain additional obligations such as the obligation to reserve a minimum shelf-space for their products or to ensure that the sales of their products by the dealer achieve a minimum percentage of the dealer's total turnover. Such a problem is unlikely to arise if the share of the market covered by selective distribution is below 50 % or, where this coverage ratio is exceeded, if the market share of the five largest suppliers is below 50 %.

(184) Maturity of the market is important, as loss of intra-brand competition and possible foreclosure of suppliers or dealers may be a serious problem on a mature market but is less relevant on a market with growing demand, changing technologies and changing market positions.

(185) Selective distribution may be efficient when it leads to savings in logistical costs due to economies of scale in transport and that may occur irrespective of the nature of the product (paragraph (107)(g)). However, such an efficiency is usually only marginal in selective distribution systems. To help solve a free-rider problem between the distributors (paragraph (107)(a) ) or to help create a brand image (paragraph (107)(i) ), the nature of the product is very relevant. In general, the case is strongest for new products, complex products, products whose qualities are difficult to judge before consumption (so-called experience products) or whose qualities are difficult to judge even after consumption (so-called credence products). The combination of selective distribution with a location clause, protecting an appointed dealer against other appointed dealers opening up a shop in its vicinity, may in particular fulfil the conditions of Article 101(3) if the combination is indispensable to protect substantial and relationship-specific investments made by the authorised dealer (paragraph (107)(d)).

(186) To ensure that the least anti-competitive restraint is chosen, it is relevant to see whether the same efficiencies can be obtained at a comparable cost by for instance service requirements alone.

#### (187) Example of quantitative selective distribution

On a market for consumer durables, the market leader (brand A) with a market share of 35 %, sells its product to final consumers through a selective distribution network. There are several criteria for admission to the network: the shop must employ trained staff and provide pre-sales services, there must be a specialised area in the shop devoted to the sales of the product and similar hi-tech products, and the shop is required to sell a wide range of models of the supplier and to display them in an attractive manner. Moreover, the number of admissible retailers in the network is directly limited through the establishment of a maximum number of retailers per number of inhabitants in each province or urban area. Manufacturer A has 6 competitors in that market. Its largest competitors, B, C and D, have market shares of respectively 25, 15 and 10 %, whilst the other producers have smaller market shares. A is the only manufacturer to use selective distribution. The selective distributors of brand A always handle a few competing brands. However, competing brands are also widely sold in shops which are not member of A's selective distribution network. Channels of distribution are various: for instance, brands B and C are sold in most of A's selected shops, but also in other shops providing a high quality service and in hypermarkets. Brand D is mainly sold in high service shops. Technology is evolving quite rapidly in this market, and the main suppliers maintain a strong quality image for their products through advertising.

On that market, the coverage ratio of selective distribution is 35 %. Inter-brand competition is not directly affected by the selective distribution system of A. Intra-brand competition for brand A may be reduced, but consumers have access to low service/low price retailers for brands B and C, which have a comparable quality image to brand A. Moreover, access to high service retailers for other brands is not foreclosed, since there is no limitation on the capacity of selected distributors to sell competing brands, and the quantitative limitation on the number of retailers for brand A leaves other high service retailers free to distribute competing brands. In this case, in view of the service requirements and the efficiencies these are likely to provide and the limited effect on intra-brand competition the conditions of Article 101(3) are likely to be fulfilled.

(188) Example of selective distribution with cumulative effects

On a market for a particular sports article, there are seven manufacturers, whose respective market shares are: 25 %, 20 %, 15 %, 15 %, 10 %, 8 % and 7 %. The five largest manufacturers distribute their products through quantitative selective distribution, whilst the two smallest use different types of distribution systems, which results in a coverage ratio of selective distribution of 85 %. The criteria for access to the selective distribution networks are remarkably uniform amongst manufacturers: the distributors are required to have one or more brick and mortar shops, those shops are required to have trained personnel and to provide pre-sale services, there must be a specialised area in the shop devoted to the sales of the article and a minimum size for this area is specified. The shop is required to sell a wide range of the brand in question and to display the article in an attractive manner, the shop must be located in a commercial street, and that type of article must represent at least 30 % of the total turnover of the shop. In general, the same dealer is appointed selective distributor for all five brands. The two brands which do not use selective distribution usually sell through less specialised retailers with lower service levels. The market is stable, both on the supply and on the demand side, and there is strong brand image and product differentiation. The five market leaders have strong brand images, acquired through advertising and sponsoring, whereas the two smaller manufacturers have a strategy of cheaper products, with no strong brand image.

On that market, access by general price discounters and online-only distributors to the five leading brands is denied. Indeed, the requirement that this type of article represents at least 30 % of the activity of the dealers and the criteria on presentation and pre-sales services rule out most price discounters from the network of authorised dealers. The requirement to have one or more brick and mortar shops excludes online-only distributors from the network. As a consequence, consumers have no choice but to buy the five leading brands in high service/high price shops. This leads to reduced inter-brand competition between the five leading brands. The fact that the two smallest brands can be bought in low service/low price shops does not compensate for this, because the brand image of the five market leaders is much better. Inter-brand competition is also limited through multiple dealership. Even though there exists some degree of intra-brand competition and the number of retailers is not directly limited, the criteria for admission are strict enough to lead to a small number of retailers for the five leading brands in each territory.

The efficiencies associated with these quantitative selective distribution systems are low: the product is not very complex and does not justify a particularly high service. Unless the manufacturers can prove that there are clear efficiencies linked to their network of selective distribution, it is probable that the block exemption will have to be withdrawn because of its cumulative effects resulting in less choice and higher prices for consumers.

2.5. *Franchising*

(189) Franchise agreements contain licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance. The licence and the assistance are integral components of the business method being franchised. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of its products. In addition to the provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution and/or non-compete and/or exclusive distribution or weaker forms thereof.

(190) The coverage by the Block Exemption Regulation of the licensing of IPRs contained in franchise agreements is dealt with in paragraphs (24) to (46). As for the vertical restraints on the purchase, sale and resale of goods and services within a franchising arrangement, such as selective distribution, non-compete obligations or exclusive distribution, the Block Exemption Regulation applies up to the 30 % market share threshold<sup>(1)</sup>. The guidance provided in respect of those types of restraints applies also to franchising, subject to the following two specific remarks:

- (a) The more important the transfer of know-how, the more likely it is that the restraints create efficiencies and/or are indispensable to protect the know-how and that the vertical restraints fulfil the conditions of Article 101(3);

<sup>(1)</sup> See also paragraphs (86) to (95), in particular paragraph (92).

- (b) A non-compete obligation on the goods or services purchased by the franchisee falls outside the scope of Article 101(1) where the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 101(1), as long as it does not exceed the duration of the franchise agreement itself.

#### (191) Example of franchising

A manufacturer has developed a new format for selling sweets in so-called fun shops where the sweets can be coloured specially on demand from the consumer. The manufacturer of the sweets has also developed the machines to colour the sweets. The manufacturer also produces the colouring liquids. The quality and freshness of the liquid is of vital importance to producing good sweets. The manufacturer made a success of its sweets through a number of own retail outlets all operating under the same trade name and with the uniform fun image (style of lay-out of the shops, common advertising etc.). In order to expand sales the manufacturer started a franchising system. The franchisees are obliged to buy the sweets, liquid and colouring machine from the manufacturer, to have the same image and operate under the trade name, pay a franchise fee, contribute to common advertising and ensure the confidentiality of the operating manual prepared by the franchisor. In addition, the franchisees are only allowed to sell from the agreed premises, to sell to end users or other franchisees and are not allowed to sell other sweets. The franchisor is obliged not to appoint another franchisee nor operate a retail outlet himself in a given contract territory. The franchisor is also under the obligation to update and further develop its products, the business outlook and the operating manual and make these improvements available to all retail franchisees. The franchise agreements are concluded for a duration of 10 years.

Sweet retailers buy their sweets on a national market from either national producers that cater for national tastes or from wholesalers which import sweets from foreign producers in addition to selling products from national producers. On that market the franchisor's products compete with other brands of sweets. The franchisor has a market share of 30 % on the market for sweets sold to retailers. Competition comes from a number of national and international brands, sometimes produced by large diversified food companies. There are many potential points of sale of sweets in the form of tobacconists, general food retailers, cafeterias and specialised sweet shops. The franchisor's market share of the market for machines for colouring food is below 10 %.

Most of the obligations contained in the franchise agreements can be deemed necessary to protect the intellectual property rights or maintain the common identity and reputation of the franchised network and fall outside Article 101(1). The restrictions on selling (contract territory and selective distribution) provide an incentive to the franchisees to invest in the colouring machine and the franchise concept and, if not necessary to, at least help maintain the common identity, thereby offsetting the loss of intra-brand competition. The non-compete clause excluding other brands of sweets from the shops for the full duration of the agreements does allow the franchisor to keep the outlets uniform and prevent competitors from benefiting from its trade name. It does not lead to any serious foreclosure in view of the great number of potential outlets available to other sweet producers. The franchise agreements of this franchisor are likely to fulfil the conditions for exemption under Article 101(3) in as far as the obligations contained therein fall under Article 101(1).

#### 2.6 Exclusive supply

- (192) Under the heading of exclusive supply fall those restrictions that have as their main element that the supplier is obliged or induced to sell the contract products only or mainly to one buyer, in general or for a particular use. Such restrictions may take the form of an exclusive supply obligation, restricting the supplier to sell to only one buyer for the purposes of resale or a particular use, but may for instance also take the form of quantity forcing on the supplier, where incentives are agreed between the supplier and buyer which make the former concentrate its sales mainly with one buyer. For intermediate goods or services, exclusive supply is often referred to as industrial supply.
- (193) Exclusive supply is exempted by the Block Exemption Regulation where both the supplier's and buyer's market share does not exceed 30 %, even if combined with other non-hardcore vertical restraints such as non-compete. The remainder of this section provides guidance for the assessment of exclusive supply in individual cases above the market share threshold.
- (194) The main competition risk of exclusive supply is anti-competitive foreclosure of other buyers. There is a similarity with the possible effects of exclusive distribution, in particular when the exclusive distributor becomes the exclusive buyer for a whole market (see section 2.2, in particular paragraph (156)). The market share of the buyer on the upstream purchase market is obviously important for assessing the ability of the buyer to impose exclusive supply which forecloses other buyers from access to supplies. The importance of the buyer on the downstream market is however the factor which



determines whether a competition problem may arise. If the buyer has no market power downstream, then no appreciable negative effects for consumers can be expected. Negative effects may arise when the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30 %. Where the market share of the buyer on the upstream market does not exceed 30 %, significant foreclosure effects may still result, especially when the market share of the buyer on its downstream market exceeds 30 % and the exclusive supply relates to a particular use of the contract products. Where a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anti-competitive effects.

(195) It is not only the market position of the buyer on the upstream and downstream market that is important but also the extent to and the duration for which it applies an exclusive supply obligation. The higher the tied supply share, and the longer the duration of the exclusive supply, the more significant the foreclosure is likely to be. Exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while agreements lasting longer than five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

(196) The market position of the competing buyers on the upstream market is important as it is likely that competing buyers will be foreclosed for anti-competitive reasons, that is, to increase their costs, if they are significantly smaller than the foreclosing buyer. Foreclosure of competing buyers is not very likely where those competitors have similar buying power and can offer the suppliers similar sales possibilities. In such a case, foreclosure could only occur for potential entrants, which may not be able to secure supplies when a number of major buyers all enter into exclusive supply contracts with the majority of suppliers on the market. Such a cumulative effect may lead to withdrawal of the benefit of the Block Exemption Regulation.

(197) Entry barriers at the supplier level are relevant to establishing whether there is real foreclosure. In as far as it is efficient for competing buyers to provide the goods or services themselves via upstream vertical integration,

foreclosure is unlikely to be a real problem. However, there are often significant entry barriers.

(198) Countervailing power of suppliers is relevant, as important suppliers will not easily allow themselves to be cut off from alternative buyers. Foreclosure is therefore mainly a risk in the case of weak suppliers and strong buyers. In the case of strong suppliers, the exclusive supply may be found in combination with non-compete obligations. The combination with non-compete obligations brings in the rules developed for single branding. Where there are relationship-specific investments involved on both sides (hold-up problem) the combination of exclusive supply and non-compete obligations that is, reciprocal exclusivity in industrial supply agreements may often be justified, in particular below the level of dominance.

(199) Lastly, the level of trade and the nature of the product are relevant for foreclosure. Anticompetitive foreclosure is less likely in the case of an intermediate product or where the product is homogeneous. Firstly, a foreclosed manufacturer that uses a certain input usually has more flexibility to respond to the demand of its customers than the wholesaler or retailer has in responding to the demand of the final consumer for whom brands may play an important role. Secondly, the loss of a possible source of supply matters less for the foreclosed buyers in the case of homogeneous products than in the case of a heterogeneous product with different grades and qualities. For final branded products or differentiated intermediate products where there are entry barriers, exclusive supply may have appreciable anti-competitive effects where the competing buyers are relatively small compared to the foreclosing buyer, even if the latter is not dominant on the downstream market.

(200) Efficiencies can be expected in the case of a hold-up problem (paragraph (107)(d) and (107)(e)), and such efficiencies are more likely for intermediate products than for final products. Other efficiencies are less likely. Possible economies of scale in distribution (paragraph (107)(g)) do not seem likely to justify exclusive supply.

(201) In the case of a hold-up problem and even more so in the case of economies of scale in distribution, quantity forcing on the supplier, such as minimum supply requirements, could well be a less restrictive alternative.

(202) Example of exclusive supply

On a market for a certain type of components (intermediate product market) supplier A agrees with buyer B to develop, with its own know-how and considerable investment in new machines and with the help of specifications supplied by buyer B, a different version of the component. B will have to make considerable investments to incorporate the new component. It is agreed that A will supply the new product only to buyer B for a period of five years from the date of first entry on the market. B is obliged to buy the new product only from A for the same period of five years. Both A and B can continue to sell and buy respectively other versions of the component elsewhere. The market share of buyer B on the upstream component market and on the downstream final goods market is 40 %. The market share of the component supplier is 35 %. There are two other component suppliers with around 20-25 % market share and a number of small suppliers.

Given the considerable investments, the agreement is likely to fulfil the conditions of Article 101(3) in view of the efficiencies and the limited foreclosure effect. Other buyers are foreclosed from a particular version of a product of a supplier with 35 % market share and there are other component suppliers that could develop similar new products. The foreclosure of part of buyer B's demand to other suppliers is limited to maximum 40 % of the market.

2.7. Upfront access payments

(203) Upfront access payments are fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the retailers. This category includes various practices such as slotting allowances<sup>(1)</sup>, the so called pay-to-stay fees<sup>(2)</sup>, payments to have access to a distributor's promotion campaigns etc. Upfront access payments are exempted under the Block Exemption Regulation when both the supplier's and buyer's market share does not exceed 30 %. The remainder of this section provides guidance for the assessment of upfront access payments in individual cases above the market share threshold.

(204) Upfront access payments may sometimes result in anti-competitive foreclosure of other distributors if such

payments induce the supplier to channel its products through only one or a limited number of distributors. A high fee may make that a supplier wants to channel a substantial volume of its sales through this distributor in order to cover the costs of the fee. In such a case, upfront access payments may have the same downstream foreclosure effect as an exclusive supply type of obligation. The assessment of that negative effect is made by analogy to the assessment of exclusive supply obligations (in particular paragraphs (194) to (199)).

(205) Exceptionally, upfront access payments may also result in anticompetitive foreclosure of other suppliers, where the widespread use of upfront access payments increases barriers to entry for small entrants. The assessment of that possible negative effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)).

(206) In addition to possible foreclosure effects, upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products since the supplier must cover the expense of those payments. Higher supply prices may reduce the incentive of the retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments. Such reduction of competition between distributors through the cumulative use of upfront access payments normally requires the distribution market to be highly concentrated.

(207) However, the use of upfront access payments may in many cases contribute to an efficient allocation of shelf space for new products. Distributors often have less information than suppliers on the potential for success of new products to be introduced on the market and, as a result, the amount of products to be stocked may be sub-optimal. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors by explicitly allowing suppliers to compete for shelf space. The distributor may thus receive a signal of which products are most likely to be successful since a supplier would normally agree to pay an upfront access fee if it estimates a low probability of failure of the product introduction.

<sup>(1)</sup> Fixed fees that manufacturers pay to retailers in order to get access to their shelf space.

<sup>(2)</sup> Lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period.

(208) Furthermore, due to the asymmetry in information mentioned in paragraph (207), suppliers may have incentives to free-ride on distributors' promotional efforts in order to introduce sub-optimal products. If a product is not successful, the distributors will pay part of the costs of the product failure. The use of upfront access fees may prevent such free riding by shifting the risk of product failure back to the suppliers, thereby contributing to an optimal rate of product introductions.

#### 2.8. Category Management Agreements

(209) Category management agreements are agreements by which, within a distribution agreement, the distributor entrusts the supplier (the 'category captain') with the marketing of a category of products including in general not only the supplier's products, but also the products of its competitors. The category captain may thus have an influence on for instance the product placement and product promotion in the shop and product selection for the shop. Category management agreements are exempted under the Block Exemption Regulation when both the supplier's and buyer's market share does not exceed 30 %. The remainder of this section provides guidance for the assessment of category management agreements in individual cases above the market share threshold.

(210) While in most cases category management agreements will not be problematic, they may sometimes distort competition between suppliers, and finally result in anti-competitive foreclosure of other suppliers, where the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers. While in most cases the distributor may not have an interest in limiting its choice of products, when the distributor also sells competing products under its own brand (private labels), the distributor may also have incentives to exclude certain suppliers, in particular intermediate range products. The assessment of such upstream foreclosure effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)) by addressing issues like the market coverage of these agreements, the market position of competing suppliers and the possible cumulative use of such agreements.

(211) In addition, category management agreements may facilitate collusion between distributors when the same supplier serves as a category captain for all or most of the competing distributors on a market and provides these distributors with a common point of reference for their marketing decisions.

(212) Category management may also facilitate collusion between suppliers through increased opportunities to exchange via retailers sensitive market information,

such as for instance information related to future pricing, promotional plans or advertising campaigns <sup>(1)</sup>.

(213) However, the use of category management agreements may also lead to efficiencies. Category management agreements may allow distributors to have access to the supplier's marketing expertise for a certain group of products and to achieve economies of scale as they ensure that the optimal quantity of products is presented timely and directly on the shelves. As category management is based on customers' habits, category management agreements may lead to higher customer satisfaction as they help to better meet demand expectations. In general, the higher the inter-brand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management.

#### 2.9 Tying

(214) Tying refers to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter. Tying may constitute an abuse within the meaning of Article 102 <sup>(2)</sup>. Tying may also constitute a vertical restraint falling under Article 101 where it results in a single branding type of obligation (see paragraphs (129) to (150)) for the tied product. Only the latter situation is dealt with in these Guidelines.

(215) Whether products will be considered as distinct depends on customer demand. Two products are distinct where, in the absence of the tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product <sup>(3)</sup>. Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product <sup>(4)</sup>, or evidence indicating that undertakings with little market power,

<sup>(1)</sup> Direct information exchange between competitors is not covered by the Block Exemption Regulation, see Article 2(4) of that Regulation and paragraphs 27-28 of these Guidelines.

<sup>(2)</sup> Judgment of the Court of Justice in Case C-333/94 P *Tetrapak v Commission* [1996] ECR I-5951, paragraph 37. See also Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7.

<sup>(3)</sup> Judgment of the Court of First Instance in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraphs 917, 921 and 922.

<sup>(4)</sup> Judgment of the Court of First Instance in Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 67.



particularly on competitive markets, tend not to tie or not to bundle such products. For instance, since customers want to buy shoes with laces and it is not practicable for distributors to lace new shoes with the laces of their choice, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice.

hardcore restrictions under that Regulation, such as non-compete obligations or quantity forcing in respect of the tying product, or exclusive sourcing. The remainder of this section provides guidance for the assessment of tying in individual cases above the market share threshold.

- (216) Tying may lead to anticompetitive foreclosure effects on the tied market, the tying market, or both at the same time. The foreclosure effect depends on the tied percentage of total sales on the market of the tied product. On the question of what can be considered appreciable foreclosure under Article 101(1), the analysis for single branding can be applied. Tying means that there is at least a form of quantity-forcing on the buyer in respect of the tied product. Where in addition a non-compete obligation is agreed in respect of the tied product, this increases the possible foreclosure effect on the market of the tied product. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers that will buy the tied product alone to sustain competitors of the supplier on the tied market, the tying can lead to those customers facing higher prices. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry onto the tying market alone more difficult.
- (217) Tying may also directly lead to prices that are above the competitive level, especially in three situations. Firstly, if the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the supplier may seek to avoid this substitution and as a result be able to raise its prices. Secondly, when the tying allows price discrimination according to the use the customer makes of the tying product, for example the tying of ink cartridges to the sale of photocopying machines (metering). Thirdly, when in the case of long-term contracts or in the case of after-markets with original equipment with a long replacement time, it becomes difficult for the customers to calculate the consequences of the tying.
- (218) Tying is exempted under the Block Exemption Regulation when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30 %. It may be combined with other vertical restraints, which are not
- (219) The market position of the supplier on the market of the tying product is obviously of central importance to assess possible anti-competitive effects. In general, this type of agreement is imposed by the supplier. The importance of the supplier on the market of the tying product is the main reason why a buyer may find it difficult to refuse a tying obligation.
- (220) The market position of the supplier's competitors on the market of the tying product is important in assessing the supplier's market power. As long as its competitors are sufficiently numerous and strong, no anti-competitive effects can be expected, as buyers have sufficient alternatives to purchase the tying product without the tied product, unless other suppliers are applying similar tying. In addition, entry barriers on the market of the tying product are relevant to establish the market position of the supplier. When tying is combined with a non-compete obligation in respect of the tying product, this considerably strengthens the position of the supplier.
- (221) Buying power is relevant, as important buyers will not easily be forced to accept tying without obtaining at least part of the possible efficiencies. Tying not based on efficiency is therefore mainly a risk where buyers do not have significant buying power.
- (222) Where appreciable anti-competitive effects are established, the question whether the conditions of Article 101(3) are fulfilled arises. Tying obligations may help to produce efficiencies arising from joint production or joint distribution. Where the tied product is not produced by the supplier, an efficiency may also arise from the supplier buying large quantities of the tied product. For tying to fulfil the conditions of Article 101(3), it must, however, be shown that at least part of these cost reductions are passed on to the consumer, which is normally not the case when the retailer is able to obtain, on a regular basis, supplies of the same or equivalent products on the same or better conditions than those offered by the supplier which applies the tying practice. Another efficiency may exist where tying helps to ensure a certain uniformity and quality standardisation (see paragraph (107)(i)). However, it needs to be demonstrated that the positive

effects cannot be realised equally efficiently by requiring the buyer to use or resell products satisfying minimum quality standards, without requiring the buyer to purchase these from the supplier or someone designated by the latter. The requirements concerning minimum quality standards would not normally fall within the scope of Article 101(1). Where the supplier of the tying product imposes on the buyer the suppliers from which the buyer must purchase the tied product, for instance because the formulation of minimum quality standards is not possible, this may also fall outside the scope of Article 101(1), especially where the supplier of the tying product does not derive a direct (financial) benefit from designating the suppliers of the tied product.

#### 2.10 Resale price restrictions

- (223) As explained in section III.3, resale price maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated as a hardcore restriction. Where an agreement includes RPM, that agreement is presumed to restrict competition and thus to fall within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case. It is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled. It then falls to the Commission to effectively assess the likely negative effects on competition and consumers before deciding whether the conditions of Article 101(3) are fulfilled.

- (224) RPM may restrict competition in a number of ways. Firstly, RPM may facilitate collusion between suppliers by enhancing price transparency on the market, thereby making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. RPM also undermines the incentive for the supplier to cut its price to its distributors, as the fixed resale price will prevent it from benefiting from expanded sales. Such a negative effect is particularly plausible where the market is prone to collusive outcomes, for instance if the manufacturers form a tight oligopoly, and a significant part of the market is covered by RPM agreements. Second, by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, that is, at the distribution level. Strong or well organised distributors

may be able to force or convince one or more suppliers to fix their resale price above the competitive level and thereby help them to reach or stabilise a collusive equilibrium. The resulting loss of price competition seems especially problematic when the RPM is inspired by the buyers, whose collective horizontal interests can be expected to work out negatively for consumers. Third, RPM may more generally soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them. Fourth, the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. In other words, the direct effect of RPM is a price increase. Fifth, RPM may lower the pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin. Sixth, RPM may be implemented by a manufacturer with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors, may entice the latter to favour the particular brand over rival brands when advising customers, even where such advice is not in the interest of these customers, or not to sell these rival brands at all. Lastly, RPM may reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market or acquiring sufficient scale with low prices. It also may prevent or hinder the entry and expansion of distribution formats based on low prices, such as price discounters.

- (225) However, RPM may not only restrict competition but may also, in particular where it is supplier driven, lead to efficiencies, which will be assessed under Article 101(3). Most notably, where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the product. RPM may provide the distributors with the means to increase sales efforts and if the distributors on this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers<sup>(1)</sup>. Similarly, fixed resale prices, and not just maximum

<sup>(1)</sup> This assumes that it is not practical for the supplier to impose on all buyers by contract effective promotion requirements, see also paragraph 107 point (a).

resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit the consumers. In some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products. If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled.

- (226) The practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price is covered by the Block Exemption Regulation when the market share of each of the parties to the agreement does not exceed the 30 % threshold, provided it does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties. The remainder of this section provides guidance for the assessment of maximum or recommended prices above the market

share threshold and for cases of withdrawal of the block exemption.

- (227) The possible competition risk of maximum and recommended prices is that they will work as a focal point for the resellers and might be followed by most or all of them and/or that maximum or recommended prices may soften competition or facilitate collusion between suppliers.
- (228) An important factor for assessing possible anti-competitive effects of maximum or recommended resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a maximum resale price or a recommended resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market.
- (229) Where appreciable anti-competitive effects are established for maximum or recommended resale prices, the question of a possible exemption under Article 101(3) arises. For maximum resale prices, the efficiency described in paragraph (107)(f) (avoiding double marginalisation), may be particularly relevant. A maximum resale price may also help to ensure that the brand in question competes more forcefully with other brands, including own label products, distributed by the same distributor.



## **ii. Horizontal agreements**

5. Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C11/1 + Corrigenda OJ 2011 C33/20

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



**CORRIGENDA**

**Corrigendum to Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements**

*(Official Journal of the European Union C 11 of 14 January 2011)*

(2011/C 33/08)

On page 5, paragraph 8:

*for:* 'These guidelines complement Commission Regulation (EU) No [...] of [...] on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements <sup>(1)</sup> (the R&D Block Exemption Regulation) and Commission Regulation (EU) No [...] of [...] on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements <sup>(2)</sup> (the Specialisation Block Exemption Regulation).';

*read:* 'These guidelines complement Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements <sup>(1)</sup> (the R&D Block Exemption Regulation) and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements <sup>(2)</sup> (the Specialisation Block Exemption Regulation).';

on page 5, footnote 1:

*for:* 'OJ L [...], [...], p. [...].';

*read:* 'OJ L 335, 18.12.2010, p. 36.';

on page 5, footnote 2:

*for:* 'OJ L [...], [...], p. [...].';

*read:* 'OJ L 335, 18.12.2010, p. 43.'.

## IV

(Notices)

### NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

## EUROPEAN COMMISSION

### COMMUNICATION FROM THE COMMISSION

#### **Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements**

(Text with EEA relevance)

(2011/C 11/01)

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## 1. INTRODUCTION

### 1.1. Purpose and scope

1. These guidelines set out the principles for the assessment under Article 101 of the Treaty on the Functioning of the European Union (\*) ('Article 101') of agreements between undertakings, decisions by associations of undertakings and concerted practices (collectively referred to as 'agreements') pertaining to horizontal co-operation. Co-operation is of a 'horizontal nature' if an agreement is entered into between actual or potential competitors. In addition, these guidelines also cover horizontal co-operation agreements between non-competitors, for example, between two companies active in the same product markets but in different geographic markets without being potential competitors.
2. Horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster.
3. On the other hand, horizontal co-operation agreements may lead to competition problems. This is, for example, the case if the parties agree to fix prices or output or to share markets, or if the co-operation enables the parties to maintain, gain or increase market power and thereby is likely to give rise to negative market effects with respect to prices, output, product quality, product variety or innovation.
4. The Commission, while recognising the benefits that can be generated by horizontal co-operation agreements, has to ensure that effective competition is maintained. Article 101 provides the legal framework for a balanced assessment taking into account both adverse effects on competition and pro-competitive effects.
5. The purpose of these guidelines is to provide an analytical framework for the most common types of horizontal co-operation agreements; they deal with research and development agreements, production agreements including subcontracting and specialisation agreements, purchasing agreements, commercialisation agreements, standardisation agreements including standard contracts, and information exchange. This framework is primarily based on legal and economic criteria that help to analyse a horizontal co-operation agreement and the context in which it occurs. Economic criteria such as the market power of the parties and other factors relating to the market structure form a key element of the assessment of the market impact likely to be caused by a horizontal co-operation agreement and, therefore, for the assessment under Article 101.
6. These guidelines apply to the most common types of horizontal co-operation agreements irrespective of the level of integration they entail with the exception of operations constituting a concentration within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings <sup>(1)</sup> ('the Merger Regulation') as would be the case, for example, with joint ventures performing on a lasting basis all the functions of an autonomous economic entity ('full-function joint ventures') <sup>(2)</sup>.

(\*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union (TFEU). The two Articles are, in substance, identical. For the purposes of these guidelines, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout these guidelines.

<sup>(1)</sup> OJ L 24, 29.1.2004, p. 1.

<sup>(2)</sup> See Article 3(4) of the Merger Regulation. However, in assessing whether there is a full-function joint venture, the Commission examines whether the joint venture is autonomous in an operational sense. This does not mean that it enjoys autonomy from its parent companies as regards the adoption of its strategic decisions (see Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1, paragraphs 91–109 ('Consolidated Jurisdictional Notice')). It also needs to be recalled that if the creation of a joint venture constituting a concentration under Article 3 of the Merger Regulation has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, then that coordination will be appraised under Article 101 of the Treaty (see Article 2(4) of the Merger Regulation).

7. Given the potentially large number of types and combinations of horizontal co-operation and market circumstances in which they operate, it is difficult to provide specific answers for every possible scenario. These guidelines will nevertheless assist businesses in assessing the compatibility of an individual co-operation agreement with Article 101. Those criteria do not, however, constitute a 'checklist' which can be applied mechanically. Each case must be assessed on the basis of its own facts, which may require a flexible application of these guidelines.
  8. The criteria set out in these guidelines apply to horizontal co-operation agreements concerning both goods and services (collectively referred to as 'products'). These guidelines complement Commission Regulation (EU) No [...] of [...] on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements <sup>(1)</sup> ('the R&D Block Exemption Regulation') and Commission Regulation (EU) No [...] of [...] on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements <sup>(2)</sup> ('the Specialisation Block Exemption Regulation').
  9. Although these guidelines contain certain references to cartels, they are not intended to give any guidance as to what does and does not constitute a cartel as defined by the decisional practice of the Commission and the case-law of the Court of Justice of the European Union.
  10. The term 'competitors' as used in these guidelines includes both actual and potential competitors. Two companies are treated as actual competitors if they are active on the same relevant market. A company is treated as a potential competitor of another company if, in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time <sup>(3)</sup>, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active. This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient (see Commission Notice on the definition of the relevant market for the purposes of Community competition law) <sup>(4)</sup> ('the Market Definition Notice').
  11. Companies that form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines. Article 101 only applies to agreements between independent undertakings. When a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking. <sup>(5)</sup> The same is true for sister companies, that is to say, companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets.
  12. Agreements that are entered into between undertakings operating at a different level of the production or distribution chain, that is to say, vertical agreements, are in principle dealt with in Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on
- <sup>(1)</sup> OJ L [...], [...], p. [...].  
<sup>(2)</sup> OJ L [...], [...], p. [...].  
<sup>(3)</sup> What constitutes a 'short period of time' depends on the facts of the case at hand, its legal and economic context, and, in particular, on whether the company in question is a party to the agreement or a third party. In the first case, that is to say, where it is analysed whether a party to an agreement should be considered a potential competitor of the other party, the Commission would normally consider a longer period to be a 'short period of time' than in the second case, that is to say, where the capacity of a third party to act as a competitive constraint on the parties to an agreement is analysed. For a third party to be considered a potential competitor, market entry would need to take place sufficiently fast so that the threat of potential entry is a constraint on the parties' and other market participants' behaviour. For these reasons, both the R&D and the Specialisation Block Exemption Regulations consider a period of not more than three years a 'short period of time'.  
<sup>(4)</sup> OJ C 372, 9.12.1997, p. 5, paragraph 24; see also the Commission's Thirteenth Report on Competition Policy, point 55 and Commission Decision in Case IV/32.009, *Elopak/Metal Box-Odin*, OJ L 209, 8.8.1990, p. 15.  
<sup>(5)</sup> See, for example, Case C-73/95, *Viho*, [1996] ECR I-5457, paragraph 51. The exercise of decisive influence by the parent company over the conduct of a subsidiary can be presumed in case of wholly-owned subsidiaries; see, for example, Case 107/82, *AEG*, [1983] ECR-3151, paragraph 50; Case C-286/98 P, *Stora*, [2000] ECR-I 9925, paragraph 29; or Case C-97/08 P, *Akzo*, [2009] ECR I-8237, paragraphs 60 *et seq.*

the Functioning of the European Union to categories of vertical agreements and concerted practices<sup>(1)</sup> ('the Block Exemption Regulation on Vertical Restraints') and the Guidelines on Vertical Restraints<sup>(2)</sup>. However, to the extent that vertical agreements, for example, distribution agreements, are concluded between competitors, the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements. Therefore, vertical agreements between competitors fall under these guidelines<sup>(3)</sup>. Should there be a need to also assess such agreements under the Block Exemption Regulation on Vertical Restraints and the Guidelines on Vertical Restraints, this will be specifically stated in the relevant chapter of these guidelines. In the absence of such a reference, only these guidelines will be applicable to vertical agreements between competitors.

13. Horizontal co-operation agreements may combine different stages of co-operation, for example research and development ('R&D') and the production and/or commercialisation of its results. Such agreements are generally also covered by these guidelines. When using these guidelines for the analysis of such integrated co-operation, as a general rule, all the chapters pertaining to the different parts of the co-operation will be relevant. However, where the relevant chapters of these guidelines contain graduated messages, for example with regard to safe harbours or whether certain conduct will normally be considered a restriction of competition by object or by effect, what is set out in the chapter pertaining to that part of an integrated co-operation which can be considered its 'centre of gravity' prevails for the entire co-operation<sup>(4)</sup>.
14. Two factors are in particular relevant for the determination of the centre of gravity of integrated co-operation: firstly, the starting point of the co-operation, and, secondly, the degree of integration of the different functions which are combined. For example, the centre of gravity of a horizontal co-operation agreement involving both joint R&D and joint production of the results would thus normally be the joint R&D, as the joint production will only take place if the joint R&D is successful. This implies that the results of the joint R&D are decisive for the subsequent joint production. The assessment of the centre of gravity would change if the parties would have engaged in the joint production in any event, that is to say, irrespective of the joint R&D, or if the agreement provided for a full integration in the area of production and only a partial integration of some R&D activities. In this case, the centre of gravity of the co-operation would be the joint production.
15. Article 101 only applies to those horizontal co-operation agreements which may affect trade between Member States. The principles on the applicability of Article 101 set out in these guidelines are therefore based on the assumption that a horizontal co-operation agreement is capable of affecting trade between Member States to an appreciable extent.
16. The assessment under Article 101 as described in these guidelines is without prejudice to the possible parallel application of Article 102 of the Treaty to horizontal co-operation agreements<sup>(5)</sup>.
17. These guidelines are without prejudice to the interpretation the Court of Justice of the European Union may give to the application of Article 101 to horizontal co-operation agreements.

<sup>(1)</sup> OJ L 102, 23.4.2010, p. 1.

<sup>(2)</sup> OJ C 130, 19.5.2010, p. 1.

<sup>(3)</sup> This does not apply where competitors enter into a non-reciprocal vertical agreement and (i) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level, or (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services. Such agreements are exclusively assessed under the Block Exemption Regulation and the Guidelines on Vertical Restraints (see Article 2(4) of the Block Exemption Regulation on Vertical Restraints).

<sup>(4)</sup> It should be noted that this test only applies to the relationship between the different chapters of these guidelines, not to the relationship between different block exemption regulations. The scope of a block exemption regulation is defined by its own provisions.

<sup>(5)</sup> See Case T-51/89, *Tetra Pak I*, [1990] ECR-II 309, paragraphs 25 *et seq.* and Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7 ('Article 102 Guidance Paper').

18. These guidelines replace the Commission guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements<sup>(1)</sup> which were published by the Commission in 2001 and do not apply to the extent that sector specific rules apply as is the case for certain agreements with regard to agriculture<sup>(2)</sup>, transport<sup>(3)</sup> or insurance<sup>(4)</sup>. The Commission will continue to monitor the operation of the R&D and Specialisation Block Exemption Regulations and these guidelines based on market information from stakeholders and national competition authorities and may revise these guidelines in the light of future developments and of evolving insight.
19. The Commission guidelines on the application of Article 81(3) of the Treaty<sup>(5)</sup> ('the General Guidelines') contain general guidance on the interpretation of Article 101. Consequently, these guidelines have to be read in conjunction with the General Guidelines.

#### 1.2. Basic principles for the assessment under Article 101

20. The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential<sup>(6)</sup> restrictive effects on competition. The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition<sup>(7)</sup>. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3)<sup>(8)</sup>. If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void.
21. The analysis of horizontal co-operation agreements has certain common elements with the analysis of horizontal mergers pertaining to the potential restrictive effects, in particular as regards joint ventures. There is often only a fine line between full-function joint ventures that fall under the Merger Regulation and non-full-function joint ventures that are assessed under Article 101. Hence, their effects can be quite similar.
22. In certain cases, companies are encouraged by public authorities to enter into horizontal co-operation agreements in order to attain a public policy objective by way of self-regulation. However, companies remain subject to Article 101 if a national law merely encourages or makes it easier for them to

<sup>(1)</sup> OJ C 3, 6.1.2001, p. 2. These guidelines do not contain a separate chapter on 'environmental agreements' as was the case in the previous guidelines. Standard-setting in the environment sector, which was the main focus of the former chapter on environmental agreements, is more appropriately dealt with in the standardisation chapter of these guidelines. In general, depending on the competition issues 'environmental agreements' give rise to, they are to be assessed under the relevant chapter of these guidelines, be it the chapter on R&D, production, commercialisation or standardisation agreements.

<sup>(2)</sup> Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, OJ L 214, 4.8.2006, p. 7.

<sup>(3)</sup> Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway, OJ L 61, 5.3.2009, p. 1; Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices between liner shipping companies (consortia), OJ L 79, 25.3.2009, p. 1; Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 100, 20.4.2000, p. 24; Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ C 245, 26.9.2008, p. 2.

<sup>(4)</sup> Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 83, 31.3.2010, p. 1.

<sup>(5)</sup> OJ C 101, 27.4.2004, p. 97.

<sup>(6)</sup> Article 101(1) prohibits both actual and potential anti-competitive effects; see for example Case C-7/95 P, *John Deere*, [1998] ECR I-3111, paragraph 77; Case C-238/05, *Asnef-Equifax*, [2006] ECR I-11125, paragraph 50.

<sup>(7)</sup> See Joined Cases C-501/06 P and others, *GlaxoSmithKline*, [2009] ECR I-9291, paragraph 95.

<sup>(8)</sup> See Case T-65/98, *Van den Bergh Foods*, [2003] ECR II-4653, paragraph 107; Case T-112/99, *Métropole télévision (M6)* and others, [2001] ECR II-2459, paragraph 74; Case T-328/03, O2, [2006] ECR II-1231, paragraphs 69 *et seq.*, where the General Court held that it is only in the precise framework of Article 101(3) that the pro- and anti-competitive aspects of a restriction may be weighed.

engage in autonomous anti-competitive conduct<sup>(1)</sup>. In other words, the fact that public authorities encourage a horizontal co-operation agreement does not mean that it is permissible under Article 101<sup>(2)</sup>. It is only if anti-competitive conduct is required of companies by national legislation, or if the latter creates a legal framework which precludes all scope for competitive activity on their part, that Article 101 does not apply<sup>(3)</sup>. In such a situation, the restriction of competition is not attributable, as Article 101 implicitly requires, to the autonomous conduct of the companies and they are shielded from all the consequences of an infringement of that article<sup>(4)</sup>. Each case must be assessed on its own facts according to the general principles set out in these guidelines.

#### 1.2.1. Article 101(1)

23. Article 101(1) prohibits agreements the object or effect of which is to restrict<sup>(5)</sup> competition.

##### (i) Restrictions of competition by object

24. Restrictions of competition *by object* are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1)<sup>(6)</sup>. It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established<sup>(7)</sup>.

25. According to the settled case-law of the Court of Justice of the European Union, in order to assess whether an agreement has an anti-competitive object, regard must be had to the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement has an anti-competitive object, the Commission may nevertheless take this aspect into account in its analysis<sup>(8)</sup>. Further guidance with regard to the notion of restrictions of competition by object can be obtained in the General Guidelines.

##### (ii) Restrictive effects on competition

26. If a horizontal co-operation agreement does not restrict competition by object, it must be examined whether it has appreciable restrictive effects on competition. Account must be taken of both actual and potential effects. In other words, the agreement must at least be likely to have anti-competitive effects.

27. For an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties. This means that the agreement must reduce the parties' decision-making independence<sup>(9)</sup>, either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives.

<sup>(1)</sup> See judgment of 14 October 2010 in Case C-280/08 P, *Deutsche Telekom*, ECR I not yet reported, paragraph 82 and the case-law cited therein.

<sup>(2)</sup> See Case C-198/01, *CIF*, [2003] ECR I-8055, paragraphs 56–58; Joined Cases T-217/03 and T-245/03, *French Beef*, [2006] ECR II-4987, paragraph 92; Case T-7/92, *Asia Motor France II*, [1993] ECR II-669, paragraph 71; and Case T-148/89, *Tréfilunion*, [1995] ECR II-1063, paragraph 118.

<sup>(3)</sup> See Case C-280/08 P, *Deutsche Telekom*, paragraph 80–81. This possibility has been narrowly interpreted; see, for example, Joined Cases 209/78 and others, *Van Landuyck*, [1980] ECR 3125, paragraphs 130–134; Joined Cases 240/82 and others, *Stichting Sigarettenindustrie*, [1985] ECR 3831, paragraphs 27–29; and Joined Cases C-359/95 P and C-379/95 P, *Ladbroke Racing*, [1997] ECR I-6265, paragraphs 33 *et seq.*

<sup>(4)</sup> At least until a decision to disapply the national legislation has been adopted and that decision has become definitive; see Case C-198/01, *CIF*, paragraphs 54 *et seq.*

<sup>(5)</sup> For the purpose of these guidelines, the term 'restriction of competition' includes the prevention and distortion of competition.

<sup>(6)</sup> See, for example, Case C-209/07, *BIDS*, [2008] ECR I-8637, paragraph 17.

<sup>(7)</sup> See, for example, Joined Cases C-501/06 P and others, *GlaxoSmithKline*, paragraph 55; Case C-209/07, *BIDS*, paragraph 16; Case C-8/08, *T-Mobile Netherlands*, ECR [2009] I-4529, paragraph 29 *et seq.*; Case C-7/95 P, *John Deere*, paragraph 77.

<sup>(8)</sup> See, for example, Joined Cases C-501/06 P and others, *GlaxoSmithKline*, paragraph 58; Case C-209/07, *BIDS*, paragraphs 15 *et seq.*

<sup>(9)</sup> See Case C-7/95 P, *John Deere*, paragraph 88; Case C-238/05, *Asnef-Equifax*, paragraph 51.

28. Restrictive effects on competition within the relevant market are likely to occur where it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. This will depend on several factors such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power, and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.
29. The assessment of whether a horizontal co-operation agreement has restrictive effects on competition within the meaning of Article 101(1) must be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement with all of its alleged restrictions (that is to say, in the absence of the agreement as it stands (if already implemented) or as envisaged (if not yet implemented) at the time of assessment). Hence, in order to prove actual or potential restrictive effects on competition, it is necessary to take into account competition between the parties and competition from third parties, in particular actual or potential competition that would have existed in the absence of the agreement. This comparison does not take into account any potential efficiency gains generated by the agreement as these will only be assessed under Article 101(3).
30. Consequently, horizontal co-operation agreements between competitors that, on the basis of objective factors, would not be able to independently carry out the project or activity covered by the co-operation, for instance, due to the limited technical capabilities of the parties, will normally not give rise to restrictive effects on competition within the meaning of Article 101(1) unless the parties could have carried out the project with less stringent restrictions <sup>(1)</sup>.
31. General guidance with regard to the notion of restrictions of competition by effect can be obtained in the General Guidelines. These guidelines provide additional guidance specific to the competition assessment of horizontal co-operation agreements.

***Nature and content of the agreement***

32. The nature and content of an agreement relates to factors such as the area and objective of the co-operation, the competitive relationship between the parties and the extent to which they combine their activities. Those factors determine which kinds of possible competition concerns can arise from a horizontal co-operation agreement.
33. Horizontal co-operation agreements may limit competition in several ways. The agreement may:
- be exclusive in the sense that it limits the possibility of the parties to compete against each other or third parties as independent economic operators or as parties to other, competing agreements;
  - require the parties to contribute such assets that their decision-making independence is appreciably reduced; or
  - affect the parties' financial interests in such a way that their decision-making independence is appreciably reduced. Both financial interests in the agreement and also financial interests in other parties to the agreement are relevant for the assessment.
34. The potential effect of such agreements may be the loss of competition between the parties to the agreement. Competitors can also benefit from the reduction of competitive pressure that results from the agreement and may therefore find it profitable to increase their prices. The reduction in those competitive constraints may lead to price increases in the relevant market. Factors such as whether the parties to the agreement have high market shares, whether they are close competitors, whether the customers have limited possibilities of switching suppliers, whether competitors are unlikely to increase supply if prices increase, and whether one of the parties to the agreement is an important competitive force, are all relevant for the competitive assessment of the agreement.

<sup>(1)</sup> See also paragraph 18 of the General Guidelines.



35. A horizontal co-operation agreement may also:
- lead to the disclosure of strategic information thereby increasing the likelihood of coordination among the parties within or outside the field of the co-operation;
  - achieve significant commonality of costs (that is to say, the proportion of variable costs which the parties have in common), so the parties may more easily coordinate market prices and output.
36. Significant commonality of costs achieved by a horizontal co-operation agreement can only allow the parties to more easily coordinate market prices and output where the parties have market power, the market characteristics are conducive to such coordination, the area of co-operation accounts for a high proportion of the parties' variable costs in a given market, and the parties combine their activities in the area of co-operation to a significant extent. This could, for instance, be the case, where they jointly manufacture or purchase an important intermediate product or jointly manufacture or distribute a high proportion of their total output of a final product.
37. A horizontal agreement may therefore decrease the parties' decision-making independence and as a result increase the likelihood that they will coordinate their behaviour in order to reach a collusive outcome but it may also make coordination easier, more stable or more effective for parties that were already coordinating before, either by making the coordination more robust or by permitting them to achieve even higher prices.
38. Some horizontal co-operation agreements, for example production and standardisation agreements, may also give rise to anti-competitive foreclosure concerns.

***Market power and other market characteristics***

39. Market power is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time.
40. In markets with fixed costs undertakings must price above their variable costs of production in order to ensure a competitive return on their investment. The fact that undertakings price above their variable costs is therefore not in itself a sign that competition in the market is not functioning well and that undertakings have market power that allows them to price above the competitive level. It is when competitive constraints are insufficient to maintain prices, output, product quality, product variety and innovation at competitive levels that undertakings have market power in the context of Article 101(1).
41. The creation, maintenance or strengthening of market power can result from superior skill, foresight or innovation. It can also result from reduced competition between the parties to the agreement or between any one of the parties and third parties, for example, because the agreement leads to anti-competitive foreclosure of competitors by raising competitors' costs and limiting their capacity to compete effectively with the contracting parties.
42. Market power is a question of degree. The degree of market power required for the finding of an infringement under Article 101(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 102, where a substantial degree of market power is required.
43. The starting point for the analysis of market power is the position of the parties on the markets affected by the co-operation. To carry out this analysis the relevant market(s) have to be defined by using the methodology of the Commission's Market Definition Notice. Where specific types of markets, such as purchasing or technology markets, are concerned these guidelines will provide additional guidance.



44. If the parties have a low combined market share, the horizontal co-operation agreement is unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1) and, normally, no further analysis will be required. What is considered to be a 'low combined market share' depends on the type of agreement in question and can be inferred from the 'safe harbour' thresholds set out in various chapters of these guidelines and, more generally, from the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*)<sup>(1)</sup> ('the *De Minimis* Notice'). If one of just two parties has only an insignificant market share and if it does not possess important resources, even a high combined market share normally cannot be seen as indicating a likely restrictive effect on competition in the market<sup>(2)</sup>. Given the variety of horizontal co-operation agreements and the different effects they may cause in different market situations, it is not possible to give a general market share threshold above which sufficient market power for causing restrictive effects on competition can be assumed.
45. Depending on the market position of the parties and the concentration in the market, other factors such as the stability of market shares over time, entry barriers and the likelihood of market entry, and the countervailing power of buyers/suppliers also have to be considered.
46. Normally, the Commission uses current market shares in its competitive analysis<sup>(3)</sup>. However, reasonably certain future developments may also be taken into account, for instance in the light of exit, entry or expansion in the relevant market. Historic data may be used if market shares have been volatile, for instance when the market is characterised by large, lumpy orders. Changes in historic market shares may provide useful information about the competitive process and the likely future importance of the various competitors, for instance, by indicating whether undertakings have been gaining or losing market shares. In any event, the Commission interprets market shares in the light of likely market conditions, for instance, if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth.
47. When entering a market is sufficiently easy, a horizontal co-operation agreement will normally not be expected to give rise to restrictive effects on competition. For entry to be considered a sufficient competitive constraint on the parties to a horizontal co-operation agreement, it must be shown to be likely, timely and sufficient to deter or defeat any potential restrictive effects of the agreement. The analysis of entry may be affected by the presence of horizontal co-operation agreements. The likely or possible termination of a horizontal co-operation agreement may influence the likelihood of entry.

#### 1.2.2. Article 101(3)

48. The assessment of restrictions of competition by object or effect under Article 101(1) is only one side of the analysis. The other side, which is reflected in Article 101(3), is the assessment of the pro-competitive effects of restrictive agreements. The general approach when applying Article 101(3) is presented in the General Guidelines. Where in an individual case a restriction of competition within the meaning of Article 101(1) has been proven, Article 101(3) can be invoked as a defence. According to Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>(4)</sup>, the burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of this provision. Therefore, the factual arguments and the evidence provided by the undertaking(s) must enable the Commission to arrive at the conviction that the agreement in question is sufficiently likely to give rise to pro-competitive effects or that it is not<sup>(5)</sup>.

<sup>(1)</sup> OJ C 368, 22.12.2001, p. 13.

<sup>(2)</sup> If there are more than two parties, then the collective share of all co-operating competitors has to be significantly greater than the share of the largest single participating competitor.

<sup>(3)</sup> As to the calculation of market shares, see also Market Definition Notice, paragraphs 54–55.

<sup>(4)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(5)</sup> See, for example, Joined Cases C-501/06 P and others, *GlaxoSmithKline*, paragraphs 93–95.

49. The application of the exception rule of Article 101(3) is subject to four cumulative conditions, two positive and two negative:
- the agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress, that is to say, lead to efficiency gains;
  - the restrictions must be indispensable to the attainment of those objectives, that is to say, the efficiency gains;
  - consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement; hence, efficiencies only accruing to the parties to the agreement will not suffice; for the purposes of these guidelines, the concept of ‘consumers’ encompasses the customers, potential and/or actual, of the parties to the agreement <sup>(1)</sup>; and
  - the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.
50. In the area of horizontal co-operation agreements there are block exemption regulations based on Article 101(3) for research and development <sup>(2)</sup> and specialisation (including joint production) <sup>(3)</sup> agreements. Those Block Exemption Regulations are based on the premise that the combination of complementary skills or assets can be the source of substantial efficiencies in research and development and specialisation agreements. This may also be the case for other types of horizontal co-operation agreements. The analysis of the efficiencies of an individual agreement under Article 101(3) is therefore to a large extent a question of identifying the complementary skills and assets that each of the parties brings to the agreement and evaluating whether the resulting efficiencies are such that the conditions of Article 101(3) are fulfilled.
51. Complementarities may arise from horizontal co-operation agreements in various ways. A research and development agreement may bring together different research capabilities that allow the parties to produce better products more cheaply and shorten the time for those products to reach the market. A production agreement may allow the parties to achieve economies of scale or scope that they could not achieve individually.
52. Horizontal co-operation agreements that do not involve the combination of complementary skills or assets are less likely to lead to efficiency gains that benefit consumers. Such agreements may reduce duplication of certain costs, for instance because certain fixed costs can be eliminated. However, fixed cost savings are, in general, less likely to result in benefits to consumers than savings in, for instance, variable or marginal costs.
53. Further guidance regarding the Commission's application of the criteria of Article 101(3) can be obtained in the General Guidelines.

### 1.3. Structure of these guidelines

54. Chapter 2 will first set out some general principles for the assessment of the exchange of information, which are applicable to all types of horizontal co-operation agreements entailing the exchange of information. The subsequent chapters of these guidelines will each address one specific type of horizontal co-operation agreement. Each chapter will apply the analytical framework described in section 1.2 as well as the general principles on the exchange of information to the specific type of co-operation in question.

<sup>(1)</sup> More detail on the concept of consumer is provided in paragraph 84 of the General Guidelines.

<sup>(2)</sup> R&D Block Exemption Regulation.

<sup>(3)</sup> Specialisation Block Exemption Regulation.

## 2. GENERAL PRINCIPLES ON THE COMPETITIVE ASSESSMENT OF INFORMATION EXCHANGE

### 2.1. Definition and scope

55. The purpose of this chapter is to guide the competitive assessment of information exchange. Information exchange can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organisation or through the companies' suppliers or retailers.
56. Information exchange takes place in different contexts. There are agreements, decisions by associations of undertakings, or concerted practices under which information is exchanged, where the main economic function lies in the exchange of information itself. Moreover, information exchange can be part of another type of horizontal co-operation agreement (for example, the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges should be carried out in the context of the assessment of the horizontal co-operation agreement itself.
57. Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries<sup>(1)</sup>, thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other's best practices. Sharing of information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.
58. However, the exchange of market information may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors<sup>(2)</sup>. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination.
59. Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel.

#### *Concerted practice*

60. Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings. The existence of an agreement, a concerted practice or decision by an association of undertakings does not prejudice whether the agreement, concerted practice or decision by an association of undertakings gives rise to a restriction of competition within the meaning of Article 101(1). In line with the case-law of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition<sup>(3)</sup>. The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are

<sup>(1)</sup> Economic theory on information asymmetries deals with the study of decisions in transactions where one party has more information than the other.

<sup>(2)</sup> See Case C-7/95 P, *John Deere*, paragraph 88.

<sup>(3)</sup> See for example Case C-8/08, *T-Mobile Netherlands*, paragraph 26; Joined Cases C-89/85 and others, *Wood Pulp*, [1993] ECR 1307, paragraph 63.

to be understood in the light of the concept inherent in the provisions of the Treaty on competition, according to which each company must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers<sup>(1)</sup>.

61. This does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market<sup>(2)</sup>. This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market<sup>(3)</sup>. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty<sup>(4)</sup> in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete.
62. A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice<sup>(5)</sup>. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour<sup>(6)</sup>. For example, mere attendance at a meeting<sup>(7)</sup> where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices<sup>(8)</sup>. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data<sup>(9)</sup>.
63. Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1)<sup>(10)</sup>. However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.

<sup>(1)</sup> See Case C-7/95 P, *John Deere*, paragraph 86.

<sup>(2)</sup> Case C-7/95 P, *John Deere*, paragraph 87.

<sup>(3)</sup> See Cases 40/73 and others, *Suiker Unie*, [1975] ECR 1663, paragraph 173 *et seq.*

<sup>(4)</sup> Strategic uncertainty in the market arises as there is a variety of possible collusive outcomes available and because companies cannot perfectly observe past and current actions of their competitors and entrants.

<sup>(5)</sup> See for example Joined Cases T-25/95 and others, *Cimenteries*, [2000] ECR II-491, paragraph 1849: '[...] the concept of concerted practice does in fact imply the existence of reciprocal contacts [...]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it'.

<sup>(6)</sup> See Opinion of Advocate General Kokott, Case C-8/08, *T-Mobile Netherlands*, [2009] ECR I-4529, paragraph 54.

<sup>(7)</sup> See Case C-8/08, *T-Mobile Netherlands*, paragraph 59: 'Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.'

<sup>(8)</sup> See Joined Cases T-202/98 and others, *Tate & Lyle v Commission*, [2001] ECR II-2035, paragraph 54.

<sup>(9)</sup> See Case C-199/92 P, *Hüls*, [1999] ECR I-4287, paragraph 162; Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, paragraph 121.

<sup>(10)</sup> This would not cover situations where such announcements involve invitations to collude.

## 2.2. Assessment under Article 101(1)

### 2.2.1. Main competition concerns <sup>(1)</sup>

64. Once it has been established that there is an agreement, concerted practice or decision by an association of undertakings, it is necessary to consider the main competition concerns pertaining to information exchanges.

#### *Collusive outcome*

65. By artificially increasing transparency in the market, the exchange of strategic information can facilitate coordination (that is to say, alignment) of companies' competitive behaviour and result in restrictive effects on competition. This can occur through different channels.
66. One way is that through information exchange companies may reach a common understanding on the terms of coordination, which can lead to a collusive outcome on the market. Information exchange can create mutually consistent expectations regarding the uncertainties present in the market. On that basis companies can then reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement on coordination. Exchange of information about intentions concerning future conduct is the most likely means to enable companies to reach such a common understanding.
67. Another channel through which information exchange can lead to restrictive effects on competition is by increasing the internal stability of a collusive outcome on the market. In particular, it can do so by enabling the companies involved to monitor deviations. Namely, information exchange can make the market sufficiently transparent to allow the colluding companies to monitor to a sufficient degree whether other companies are deviating from the collusive outcome, and thus to know when to retaliate. Both exchanges of present and past data can constitute such a monitoring mechanism. This can either enable companies to achieve a collusive outcome on markets where they would otherwise not have been able to do so, or it can increase the stability of a collusive outcome already present on the market (see Example 3, paragraph 107).
68. A third channel through which information exchange can lead to restrictive effects on competition is by increasing the external stability of a collusive outcome on the market. Information exchanges that make the market sufficiently transparent can allow colluding companies to monitor where and when other companies are attempting to enter the market, thus allowing the colluding companies to target the new entrant. This may also tie into the anti-competitive foreclosure concerns discussed in paragraphs 69 to 71. Both exchanges of present and past data can constitute such a monitoring mechanism.

#### *Anti-competitive foreclosure*

69. Apart from facilitating collusion, an exchange of information can also lead to anti-competitive foreclosure <sup>(2)</sup>.
70. An exclusive exchange of information can lead to anti-competitive foreclosure on the same market where the exchange takes place. This can occur when the exchange of commercially sensitive information places unaffiliated competitors at a significant competitive disadvantage as compared to the companies affiliated within the exchange system. This type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market.
71. It cannot be excluded that information exchange may also lead to anti-competitive foreclosure of third parties in a related market. For instance, by gaining enough market power through an information exchange, parties exchanging information in an upstream market, for instance vertically integrated companies, may be able to raise the price of a key component for a market downstream. Thereby, they could raise the costs of their rivals downstream, which could result in anti-competitive foreclosure in the downstream market.

<sup>(1)</sup> The use of the term 'main competition concerns' means that the ensuing description of competition concerns is neither exclusive nor exhaustive.

<sup>(2)</sup> With regard to foreclosure concerns that vertical agreements can give rise to, see paragraphs 100 *et seq.* of the Guidelines on Vertical Restraints.

2.2.2. *Restriction of competition by object*

72. Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the legal and economic context in which the information exchange takes place<sup>(1)</sup>. To this end, the Commission will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition<sup>(2)</sup>.
73. Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities<sup>(3)</sup> is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices (see Example 1, paragraph 105). Moreover, it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data.
74. Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object<sup>(4)</sup><sup>(5)</sup>. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. Information exchanges that constitute cartels not only infringe Article 101(1), but, in addition, are very unlikely to fulfil the conditions of Article 101(3).

2.2.3. *Restrictive effects on competition*

75. The likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange<sup>(6)</sup>. For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged.
76. Certain market conditions may make coordination easier to achieve, sustain internally, or sustain externally<sup>(7)</sup>. Exchanges of information in such markets may have more restrictive effects compared to markets with different conditions. However, even where market conditions are such that coordination

<sup>(1)</sup> See, for example, Joined Cases C-501/06 P and others, *GlaxoSmithKline*, paragraph 58; Case C-209/07, *BIDS*, paragraphs 15 *et seq.*

<sup>(2)</sup> See also General Guidelines, paragraph 22.

<sup>(3)</sup> Information regarding intended future quantities could for instance include intended future sales, market shares, territories, and sales to particular groups of consumers.

<sup>(4)</sup> The notion of 'intended future prices' is illustrated in Example 1. In specific situations where companies are fully committed to sell in the future at the prices that they have previously announced to the public (that is to say, they can not revise them), such public announcements of future individualised prices or quantities would not be considered as intentions, and hence would normally not be found to restrict competition by object. This could occur, for example, because of the repeated interactions and the specific type of relationship companies may have with their customers, for instance since it is essential that the customers know future prices in advance or because they can already take advanced orders at these prices. This is because in these situations the information exchange would be a more costly means for reaching a collusive outcome in the market than exchanging information on future intentions, and would be more likely to be done for pro-competitive reasons. However, this does not imply that in general price commitment towards customers is necessarily pro-competitive. On the contrary, it could limit the possibility of deviating from a collusive outcome and hence render it more stable.

<sup>(5)</sup> This is without prejudice to the fact that public announcements of intended individualised prices may give rise to efficiencies and that the parties to such exchange would have a possibility to rely on Article 101(3).

<sup>(6)</sup> Case C-7/95 P, *John Deere v Commission*, paragraph 76.

<sup>(7)</sup> Information exchange may restrict competition in a similar way to a merger if it leads to more effective, more stable or more likely coordination in the market; see Case C-413/06 P, *Sony*, [2008] ECR I-4951, paragraph 123, where the Court of Justice endorsed the criteria established by the General Court in Case T-342/99, *Airtours*, [2002] ECR II-2585, paragraph 62.

may be difficult to sustain before the exchange, the exchange of information may change the market conditions in such a way that coordination becomes possible after the exchange – for example by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. For this reason it is important to assess the restrictive effects of the information exchange in the context of both the initial market conditions, and how the information exchange changes those conditions. This will include an assessment of the specific characteristics of the system concerned, including its purpose, conditions of access to the system and conditions of participation in the system. It will also be necessary to examine the frequency of the information exchanges, the type of information exchanged (for example, whether it is public or confidential, aggregated or detailed, and historical or current), and the importance of the information for the fixing of prices, volumes or conditions of service<sup>(1)</sup>. The following factors are relevant for this assessment.

(i) Market characteristics

77. Companies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric. In those types of markets companies can reach a common understanding on the terms of coordination and successfully monitor and punish deviations. However, information exchange can also enable companies to achieve a collusive outcome in other market situations where they would not be able to do so in the absence of the information exchange. Information exchange can thereby facilitate a collusive outcome by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. In this context, the competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place (such as concentration, transparency, stability, complexity etc.), but also on how the type of the information exchanged may change those characteristics<sup>(2)</sup>.
78. Collusive outcomes are more likely in transparent markets. Transparency can facilitate collusion by enabling companies to reach a common understanding on the terms of coordination, or/and by increasing internal and external stability of collusion. Information exchange can increase transparency and hence limit uncertainties about the strategic variables of competition (for example, prices, output, demand, costs etc.). The lower the pre-existing level of transparency in the market, the more value an information exchange may have in achieving a collusive outcome. An information exchange that contributes little to the transparency in a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the information exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. The pre-existing degree of transparency, inter alia, depends on the number of market participants and the nature of transactions, which can range from public transactions to confidential bilateral negotiations between buyers and sellers. When evaluating the change in the level of transparency in the market, the key element is to identify to what extent the available information can be used by companies to determine the actions of their competitors.
79. Tight oligopolies can facilitate a collusive outcome on the market as it is easier for fewer companies to reach a common understanding on the terms of coordination and to monitor deviations. A collusive outcome is also more likely to be sustainable with fewer companies. With more companies coordinating, the gains from deviating are greater because a larger market share can be gained through undercutting. At the same time, gains from the collusive outcome are smaller because, when there are more companies, the share of the rents from the collusive outcome declines. Exchanges of information in tight oligopolies are more likely to cause restrictive effects on competition than in less tight oligopolies, and are not likely to cause such restrictive effects on competition in very fragmented markets. However, by increasing transparency, or modifying the market environment in another way towards one more liable to coordination, information exchanges may facilitate coordination and monitoring among more companies than would be possible in its absence.

<sup>(1)</sup> Case C-238/05, *Asnef-Equifax*, paragraph 54.

<sup>(2)</sup> It should be noted that the discussion in paragraphs 78 to 85 is not a complete list of relevant market characteristics. There may be other characteristics of the market which are important in the setting of certain information exchanges.



80. Companies may find it difficult to achieve a collusive outcome in a complex market environment. However, to some extent, the use of information exchange may simplify such environments. In a complex market environment more information exchange is normally needed to reach a common understanding on the terms of coordination and to monitor deviations. For example, it is easier to achieve a collusive outcome on a price for a single, homogeneous product, than on numerous prices in a market with many differentiated products. It is nonetheless possible that to circumvent the difficulties involved in achieving a collusive outcome on a large number of prices, companies may exchange information to establish simple pricing rules (for example, pricing points).
81. Collusive outcomes are more likely where the demand and supply conditions are relatively stable<sup>(1)</sup>. In an unstable environment it may be difficult for a company to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices, and therefore it is difficult to sustain a collusive outcome. In this context, volatile demand, substantial internal growth by some companies in the market, or frequent entry by new companies, may indicate that the current situation is not sufficiently stable for coordination to be likely<sup>(2)</sup>. Information exchange in certain situations can serve the purpose of increasing stability in the market, and thereby may enable a collusive outcome in the market. Moreover, in markets where innovation is important, coordination may be more difficult since particularly significant innovations may allow one company to gain a major advantage over its rivals. For a collusive outcome to be sustainable, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be capable of jeopardising the results expected from the collusive outcome. In this context, the existence of barriers to entry makes it more likely that a collusive outcome on the market is feasible and sustainable.
82. A collusive outcome is more likely in symmetric market structures. When companies are homogenous in terms of their costs, demand, market shares, product range, capacities etc., they are more likely to reach a common understanding on the terms of coordination because their incentives are more aligned. However, information exchange may in some situations also allow a collusive outcome to occur in more heterogeneous market structures. Information exchange could make companies aware of their differences and help them to design means to accommodate for their heterogeneity in the context of coordination.
83. The stability of a collusive outcome also depends on the companies' discounting of future profits. The more companies value the current profits that they could gain from undercutting versus all the future ones that they could gain by the collusive outcome, the less likely it is that they will be able to achieve a collusive outcome.
84. By the same token, a collusive outcome is more likely among companies that will continue to operate in the same market for a long time, as in such a scenario they will be more committed to coordinate. If a company knows that it will interact with the others for a long time, it will have a greater incentive to achieve the collusive outcome because the stream of future profits from the collusive outcome will be worth more than the short term profit it could have if it deviated, that is to say, before the other companies detect the deviation and retaliate.
85. Overall, for a collusive outcome to be sustainable, the threat of a sufficiently credible and prompt retaliation must be likely. Collusive outcomes are not sustainable in markets in which the consequences of deviation are not sufficiently severe to convince coordinating companies that it is in their best interest to adhere to the terms of the collusive outcome. For example, in markets characterised by infrequent, lumpy orders, it may be difficult to establish a sufficiently severe deterrence mechanism, since the gain from deviating at the right time may be large, certain and immediate, whereas the losses

<sup>(1)</sup> See Case T-35/92, *John Deere v Commission*, [1994] ECR II-957, paragraph 78.

<sup>(2)</sup> See Commission Decision in Cases IV/31.370 and 31.446, *UK Agricultural Tractor Registration Exchange*, OJ L 68, 13.3.1992, p. 19, paragraph 51 and Case T-35/92, *John Deere v Commission*, paragraph 78. It is not necessary that absolute stability be established or fierce competition excluded.



from being punished small and uncertain, and only materialise after some time. The credibility of the deterrence mechanism also depends on whether the other coordinating companies have an incentive to retaliate, determined by their short-term losses from triggering a price war versus their potential long-term gain in case they induce a return to a collusive outcome. For example, companies' ability to retaliate may be reinforced if they are also interrelated by vertical commercial relationships which they can use as a threat of punishment for deviations.

(ii) Characteristics of the information exchange

**Strategic information**

86. The exchange between competitors of strategic data, that is to say, data that reduces strategic uncertainty in the market, is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete. Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition. The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.

**Market coverage**

87. For an information exchange to be likely to have restrictive effects on competition, the companies involved in the exchange have to cover a sufficiently large part of the relevant market. Otherwise, the competitors that are not participating in the information exchange could constrain any anti-competitive behaviour of the companies involved. For example, by pricing below the coordinated price level companies unaffiliated within the information exchange system could threaten the external stability of a collusive outcome.
88. What constitutes 'a sufficiently large part of the market' cannot be defined in the abstract and will depend on the specific facts of each case and the type of information exchange in question. Where, however, an information exchange takes place in the context of another type of horizontal co-operation agreement and does not go beyond what is necessary for its implementation, market coverage below the market share thresholds set out in the relevant chapter of these guidelines, the relevant block exemption regulation <sup>(1)</sup> or the *De Minimis* Notice pertaining to the type of agreement in question will usually not be large enough for the information exchange to give rise to restrictive effects on competition.

**Aggregated/individualised data**

89. Exchanges of genuinely aggregated data, that is to say, where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than exchanges of company level data. Collection and publication of aggregated market data (such as sales data, data on capacities or data on costs of inputs and components) by a trade organisation or market intelligence firm may benefit suppliers and customers alike by allowing them to get a clearer picture of the economic situation of a sector. Such data collection and publication may allow market participants to make better-informed individual choices in order to adapt

<sup>(1)</sup> Exchanges of information in the context of an R&D agreement, if they do not exceed what is necessary for implementation of the agreement, can benefit from the safe harbour of 25 % set out in the R&D Block Exemption Regulation. For the Specialisation Block Exemption Regulation, the relevant safe harbour is 20 %.

efficiently their strategy to the market conditions. More generally, unless it takes place in a tight oligopoly, the exchange of aggregated data is unlikely to give rise to restrictive effects on competition. Conversely, the exchange of individualised data facilitates a common understanding on the market and punishment strategies by allowing the coordinating companies to single out a deviator or entrant. Nevertheless, the possibility cannot be excluded that even the exchange of aggregated data may facilitate a collusive outcome in markets with specific characteristics. Namely, members of a very tight and stable oligopoly exchanging aggregated data who detect a market price below a certain level could automatically assume that someone has deviated from the collusive outcome and take market-wide retaliatory steps. In other words, in order to keep collusion stable, companies may not always need to know who deviated, it may be enough to learn that 'someone' deviated.

#### ***Age of data***

90. The exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market<sup>(1)</sup>. Moreover, exchanging historic data is unlikely to facilitate monitoring of deviations because the older the data, the less useful it would be for timely detection of deviations and thus as a credible threat of prompt retaliation<sup>(2)</sup>. There is no predetermined threshold when data becomes historic, that is to say, old enough not to pose risks to competition. Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry. For example, data can be considered as historic if it is several times older than the average length of contracts in the industry if the latter are indicative of price re-negotiations. Moreover, the threshold when data becomes historic also depends on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency).

#### ***Frequency of the information exchange***

91. Frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome. In more unstable markets, more frequent exchanges of information may be necessary to facilitate a collusive outcome than in stable markets. In markets with long-term contracts (which are indicative of infrequent price re-negotiations) a less frequent exchange of information would normally be sufficient to achieve a collusive outcome. By contrast, infrequent exchanges would not tend to be sufficient to achieve a collusive outcome in markets with short-term contracts indicative of frequent price re-negotiations<sup>(3)</sup>. However, the frequency at which data needs to be exchanged to facilitate a collusive outcome also depends on the nature, age and aggregation of data<sup>(4)</sup>.

#### ***Public/non-public information***

92. In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101<sup>(5)</sup>. *Genuinely public information* is information that is generally equally accessible (in terms of costs of access) to all competitors and customers. For information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. For this reason, competitors would normally not choose to exchange data that they can collect from the market at equal ease, and hence in practice

<sup>(1)</sup> The collection of historic data can also be used to convey a sector association's input to or analysis of a review of public policy.

<sup>(2)</sup> For example, in past cases the Commission has considered the exchange of individual data which was more than one year old as historic and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent; Commission Decision in Case IV/31.370, *UK Agricultural Tractor Registration Exchange*, paragraph 50; Commission Decision in Case IV/36.069, *Wirtschaftsvereinigung Stahl*, OJ L 1, 3.1.1998, p. 10, paragraph 17.

<sup>(3)</sup> However, infrequent contracts could decrease the likelihood of a sufficiently prompt retaliation.

<sup>(4)</sup> However, depending on the structure of the market and the overall context of the exchange, the possibility cannot be excluded that an isolated exchange may constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical co-operation between them for competition and the risks that that entails; see Case C-8/08, *T-Mobile Netherlands*, paragraph 59.

<sup>(5)</sup> Joined Cases T-191/98 and others, *Atlantic Container Line (TACA)*, [2003] ECR II-3275, paragraph 1154. This may not be the case if the exchange underpins a cartel.

exchanges of genuinely public data are unlikely. In contrast, even if the data exchanged between competitors is what is often referred to as being 'in the public domain', it is not genuinely public if the costs involved in collecting the data deter other companies and customers from doing so <sup>(1)</sup>. A possibility to gather the information in the market, for example to collect it from customers, does not necessarily mean that such information constitutes market data readily accessible to competitors <sup>(2)</sup>.

93. Even if there is public availability of data (for example, information published by regulators), the existence of an additional information exchange by competitors may give rise to restrictive effects on competition if it further reduces strategic uncertainty in the market. In that case, it is the incremental information that could be critical to tip the market balance towards a collusive outcome.

#### **Public/non-public exchange of information**

94. An *information exchange* is genuinely public if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers <sup>(3)</sup>. The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market to the extent that non-coordinating companies, potential competitors, as well as costumers may be able to constrain potential restrictive effect on competition <sup>(4)</sup>. However, the possibility cannot be entirely excluded that even genuinely public exchanges of information may facilitate a collusive outcome in the market.

### **2.3. Assessment under Article 101(3)**

#### **2.3.1. Efficiency gains <sup>(5)</sup>**

95. Information exchange may lead to efficiency gains. Information about competitors' costs can enable companies to become more efficient if they benchmark their performance against the best practices in the industry and design internal incentive schemes accordingly.
96. Moreover, in certain situations information exchange can help companies allocate production towards high-demand markets (for example, demand information) or low cost companies (for example, cost information). The likelihood of those types of efficiencies depends on market characteristics such as whether companies compete on prices or quantities and the nature of uncertainties on the market. Some forms of information exchanges in this context may allow substantial cost savings where, for example, they reduce unnecessary inventories or enable quicker delivery of perishable products to areas with high demand and their reduction in areas with low demand (see Example 6, paragraph 110).
97. Exchange of consumer data between companies in markets with asymmetric information about consumers can also give rise to efficiencies. For instance, keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also makes it possible to detect which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from that information when switching to another company. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics.

<sup>(1)</sup> Moreover, the fact that the parties to the exchange have previously communicated the data to the public (for example through a daily newspaper or on their websites) does not imply that a subsequent non-public exchange would not infringe Article 101.

<sup>(2)</sup> See Joined Cases T-202/98 and others, *Tate & Lyle v Commission*, paragraph 60.

<sup>(3)</sup> This does not preclude that a database be offered at a lower price to customers which themselves have contributed data to it, as by doing so they normally would have also incurred costs.

<sup>(4)</sup> Assessing barriers to entry and countervailing 'buyer power' in the market would be relevant for determining whether outsiders to the information exchange system would be able to jeopardise the outcomes expected from coordination. However, increased transparency to consumers may either decrease or increase scope for a collusive outcome because with increased transparency to consumers, as price elasticity of demand is higher, pay-offs from deviation are higher but retaliation is also harsher.

<sup>(5)</sup> The discussion of potential efficiency gains from information exchange is neither exclusive nor exhaustive.

98. Exchanging past and present data related to market shares may in some situations provide benefits to both companies and consumers by allowing companies to announce it as a signal of quality of their products to consumers. In situations of imperfect information about product quality, consumers often use indirect means to gain information on the relative qualities of products such as price and market shares (for example, consumers use best-selling lists in order to choose their next book).
99. Information exchange that is genuinely public can also benefit consumers by helping them to make a more informed choice (and reducing their search costs). Consumers are most likely to benefit in this way from public exchanges of current data, which are the most relevant for their purchasing decisions. Similarly, public information exchange about current input prices can lower search costs for companies, which would normally benefit consumers through lower final prices. Those types of direct consumer benefits are less likely to be generated by exchanges of future pricing intentions because companies which announce their pricing intentions are likely to revise them before consumers actually purchase based on that information. Consumers generally cannot rely on companies' future intentions when making their consumption plans. However, to some extent, companies may be disciplined not to change the announced future prices before implementation when, for example, they have repeated interactions with consumers and consumers rely on knowing the prices in advance or, for example, when consumers can make advance orders. In those situations, exchanging information related to the future may improve customers' planning of expenditure.
100. Exchanging present and past data is more likely to generate efficiency gains than exchanging information about future intentions. However, in specific circumstances announcing future intentions could also give rise to efficiency gains. For example, companies knowing early the winner of an R&D race could avoid duplicating costly efforts and wasting resources that cannot be recovered<sup>(1)</sup>.

#### 2.3.2. Indispensability

101. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an information exchange do not fulfil the conditions of Article 101(3). For fulfilling the condition of indispensability, the parties will need to prove that the data's subject matter, aggregation, age, confidentiality and frequency, as well as coverage, of the exchange are of the kind that carries the lowest risks indispensable for creating the claimed efficiency gains. Moreover, the exchange should not involve information beyond the variables that are relevant for the attainment of the efficiency gains. For instance, for the purpose of benchmarking, an exchange of individualised data would generally not be indispensable because information aggregated in for example some form of industry ranking could also generate the claimed efficiency gains while carrying a lower risk of leading to a collusive outcome (see Example 4, paragraph 108). Finally, it is generally unlikely that the sharing of individualised data on future intentions is indispensable, especially if it is related to prices and quantities.
102. Similarly, information exchanges that form part of horizontal co-operation agreements are also more likely to fulfil the conditions of Article 101(3) if they do not go beyond what is indispensable for the implementation of the economic purpose of the agreement (for example, sharing technology necessary for an R&D agreement or cost data in the context of a production agreement).

#### 2.3.3. Pass-on to consumers

103. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by an information exchange. The lower is the market power of the parties involved in the information exchange, the more likely it is that the efficiency gains would be passed on to consumers to an extent that outweighs the restrictive effects on competition.

<sup>(1)</sup> Such efficiencies need to be weighed against the potential negative effects of, for example, limiting competition for the market which stimulates innovation.

2.3.4. *No elimination of competition*

104. The criteria of Article 101(3) cannot be met if the companies involved in the information exchange are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned.

2.4. **Examples**

105. Exchange of intended future prices as a restriction of competition by object

Example 1

**Situation:** A trade association of coach companies in country X disseminates individualised information on intended future prices only to the member coach companies. The information contains several elements, such as the intended fare and the route to which the fare applies, the possible restrictions to this fare, such as which consumers can buy it, if advanced payment or minimum stay is required, the period during which tickets can be sold for the given fare (first and last ticket date), and the time during which the ticket with the given fare can be used for travel (first and last travel dates).

**Analysis:** This information exchange, which is triggered by a decision by an association of undertakings, concerns pricing intentions of competitors. This information exchange is a very efficient tool for reaching a collusive outcome and therefore restricts competition by object. This is because the companies are free to change their own intended prices as announced within the association at any time if they learn that their competitors intend to charge higher prices. This allows the companies to reach a common higher price level without incurring the cost of losing market share. For example, coach Company A can announce today a price increase on the route from city 1 to city 2 for travel as of the following month. Since this information is accessible to all other coach companies, Company A can then wait and see the reaction of its competitors to this price announcement. If a competitor on the same route, say, Company B, matched the price increase, then Company A's announcement would be left unchanged and later would likely become effective. However, if Company B did not match the price increase, then Company A could still revise its fare. The adjustment would continue until the companies converged to an increased anti-competitive price level. This information exchange is unlikely to fulfil the conditions of Article 101(3). The information exchange is only confined to competitors, that is to say, customers of the coach companies do not directly benefit from it.

106. Exchange of current prices with sufficient efficiency gains for consumers

Example 2

**Situation:** A national tourist office together with the coach companies in small country X agree to disseminate information on current prices of coach tickets through a freely accessible website (in contrast to Example 1, paragraph 105, consumers can already purchase tickets at the prices and conditions which are exchanged, thus they are not intended future prices but present prices of current and future services). The information contains several elements, such as the fare and the route to which the fare is applied, the possible restrictions to this fare, such as which consumers can buy it, if advanced payment or minimum stay is required, and the time during which the ticket with the given fare can be used for travel (first and last travel dates). Coach travel in country X is not in the same relevant market as train and air travel. It is presumed that the relevant market is concentrated, stable and relatively non-complex, and pricing becomes transparent with the information exchange.

**Analysis:** This information exchange does not constitute a restriction of competition by object. The companies are exchanging current prices rather than intended future prices because they are effectively already selling tickets at these prices (unlike in Example 1, paragraph 105). Therefore, this exchange of information is less likely to constitute an efficient mechanism for reaching a focal point for coordination. Nevertheless, given the market structure and strategic nature of the data, this information exchange is likely to constitute an efficient mechanism for monitoring deviations from a collusive outcome, which would be likely to occur in this type of market setting. Therefore, this information exchange could give rise to restrictive effects on competition within the meaning of Article 101(1). However, to the extent that some restrictive effects on competition could result from the possibility to monitor deviations, it is likely that the efficiency gains stemming from the

information exchange would be passed on to consumers to an extent that outweighs the restrictive effects on competition in both their likelihood and magnitude. Unlike in Example 1, paragraph 105, the information exchange is public and consumers can actually purchase tickets at the prices and conditions that are exchanged. Therefore this information exchange is likely to directly benefit consumers by reducing their search costs and improving choice, and thereby also stimulating price competition. Hence, the conditions of Article 101(3) are likely to be met.

107. Current prices deduced from the information exchanged

Example 3

**Situation:** The luxury hotels in the capital of country A operate in a tight, non-complex and stable oligopoly, with largely homogenous cost structures, which constitute a separate relevant market from other hotels. They directly exchange individual information about current occupancy rates and revenues. In this case, from the information exchanged the parties can directly deduce their actual current prices.

**Analysis:** Unless it is a disguised means of exchanging information on future intentions, this exchange of information would not constitute a restriction of competition by object because the hotels exchange present data and not information on intended future prices or quantities. However, the information exchange would give rise to restrictive effects on competition within the meaning of Article 101(1) because knowing the competitors' actual current prices would be likely to facilitate coordination (that is to say, alignment) of companies' competitive behaviour. It would be most likely used to monitor deviations from the collusive outcome. The information exchange increases transparency in the market as even though the hotels normally publish their list prices, they also offer various discounts to the list price resulting from negotiations or for early or group bookings, etc. Therefore, the incremental information that is non-publicly exchanged between the hotels is commercially sensitive, that is to say, strategically useful. This exchange is likely to facilitate a collusive outcome on the market because the parties involved constitute a tight, non-complex and stable oligopoly involved in a long-term competitive relationship (repeated interactions). Moreover, the cost structures of the hotels are largely homogeneous. Finally, neither consumers nor market entry can constrain the incumbents' anti-competitive behaviour as consumers have little buyer power and barriers to entry are high. It is unlikely that in this case the parties would be able to demonstrate any efficiency gains stemming from the information exchange that would be passed on to consumers to an extent that would outweigh the restrictive effects on competition. Therefore it is unlikely that the conditions of Article 101(3) can be met.

108. Benchmarking benefits – criteria of Article 101(3) not fulfilled

Example 4

**Situation:** Three large companies with a combined market share of 80 % in a stable, non-complex, concentrated market with high barriers to entry, non-publicly and frequently exchange information directly between themselves about a substantial fraction of their individual costs. The companies claim that they do this to benchmark their performance against their competitors and thereby intend to become more efficient.

**Analysis:** This information exchange does not in principle constitute a restriction of competition by object. Consequently, its effects on the market need to be assessed. Because of the market structure, the fact that the information exchanged relates to a large proportion of the companies' variable costs, the individualised form of presentation of the data, and its large coverage of the relevant market, the information exchange is likely to facilitate a collusive outcome and thereby gives rise to restrictive effects on competition within the meaning of Article 101(1). It is unlikely that the criteria of Article 101(3) are fulfilled because there are less restrictive means to achieve the claimed

efficiency gains, for example by way of a third party collecting, anonymising and aggregating the data in some form of industry ranking. Finally, in this case, since the parties form a very tight, non-complex and stable oligopoly, even the exchange of aggregated data could facilitate a collusive outcome in the market. However, this would be very unlikely if this exchange of information happened in a non-transparent, fragmented, unstable, and complex market.

109. Genuinely public information

Example 5

**Situation:** The four companies owning all the petrol stations in a large country A exchange current gasoline prices over the telephone. They claim that this information exchange cannot have restrictive effects on competition because the information is public as it is displayed on large display panels at every petrol station.

**Analysis:** The pricing data exchanged over the telephone is not genuinely public, as in order to obtain the same information in a different way it would be necessary to incur substantial time and transport costs. One would have to travel frequently large distances to collect the prices displayed on the boards of petrol stations spread all over the country. The costs for this are potentially high, so that the information could in practice not be obtained but for the information exchange. Moreover, the exchange is systematic and covers the entire relevant market, which is a tight, non-complex, stable oligopoly. Therefore it is likely to create a climate of mutual certainty as to the competitors' pricing policy and thereby it is likely to facilitate a collusive outcome. Consequently, this information exchange is likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

110. Improved meeting of demand as an efficiency gain

Example 6

**Situation:** There are five producers of fresh bottled carrot juice in the relevant market. Demand for this product is very unstable and vary from location to location in different points in time. The juice has to be sold and consumed within one day from the date of production. The producers agree to establish an independent market research company that on a daily basis collects current information about unsold juice in each point of sale, which it publishes on its website the following week in a form that is aggregated per point of sale. The published statistics allow producers and retailers to forecast demand and to better position the product. Before the information exchange was put in place, the retailers had reported large quantities of wasted juice and therefore had reduced the quantity of juice purchased from the producers; that is to say, the market was not working efficiently. Consequently, in some periods and areas there were frequent instances of unmet demand. The information exchange system, which allows better forecasting of oversupply and undersupply, has significantly reduced the instances of unmet consumer demand and increased the quantity sold in the market.

**Analysis:** Even though the market is quite concentrated and the data exchanged is recent and strategic, it is not very likely that this exchange would facilitate a collusive outcome because a collusive outcome would be unlikely to occur in such an unstable market. Even if the exchange creates some risk of giving rise to restrictive effects on competition, the efficiency gains stemming from increasing supply to places with high demand and decreasing supply in places with low demand is likely to offset potential restrictive effects. The information is exchanged in a public and aggregated form, which carries lower anti-competitive risks than if it were non-public and individualised. The information exchange therefore does not go beyond what is necessary to correct the market failure. Therefore, it is likely that this information exchange meets the criteria of Article 101(3).



### 3. RESEARCH AND DEVELOPMENT AGREEMENTS

#### 3.1. Definition

111. R&D agreements vary in form and scope. They range from outsourcing certain R&D activities to the joint improvement of existing technologies and co-operation concerning the research, development and marketing of completely new products. They may take the form of a co-operation agreement or of a jointly controlled company. This chapter applies to all forms of R&D agreements, including related agreements concerning the production or commercialisation of the R&D results.

#### 3.2. Relevant markets

112. The key to defining the relevant market when assessing the effects of an R&D agreement is to identify those products, technologies or R&D efforts that will act as the main competitive constraints on the parties. At one end of the spectrum of possible situations, innovation may result in a product (or technology) which competes in an existing product (or technology) market. This is, for example, the case with R&D directed towards slight improvements or variations, such as new models of certain products. Here possible effects concern the market for existing products. At the other end of the spectrum, innovation may result in an entirely new product which creates its own new product market (for example, a new vaccine for a previously incurable disease). However, many cases concern situations in between those two extremes, that is to say, situations in which innovation efforts may create products (or technology) which, over time, replace existing ones (for example, CDs which have replaced records). A careful analysis of those situations may have to cover both existing markets and the impact of the agreement on innovation.

##### *Existing product markets*

113. Where the co-operation concerns R&D for the improvement of existing products, those existing products and their close substitutes form the relevant market concerned by the co-operation <sup>(1)</sup>.
114. If the R&D efforts aim at a significant change of existing products or even at a new product to replace existing ones, substitution with the existing products may be imperfect or long-term. It may be concluded that the old and the potentially emerging new products do not belong to the same relevant market <sup>(2)</sup>. The market for existing products may nevertheless be concerned, if the pooling of R&D efforts is likely to result in the coordination of the parties' behaviour as suppliers of existing products, for instance because of the exchange of competitively sensitive information relating to the market for existing products.
115. If the R&D concerns an important component of a final product, not only the market for that component may be relevant for the assessment, but also the existing market for the final product. For instance, if car manufacturers co-operate in R&D related to a new type of engine, the car market may be affected by that R&D co-operation. The market for final products, however, is only relevant for the assessment if the component at which the R&D is aimed is technically or economically a key element of those final products and if the parties to the R&D agreement have market power with respect to the final products.

##### *Existing technology markets*

116. R&D co-operation may not only concern products but also technology. When intellectual property rights are marketed separately from the products to which they relate, the relevant technology market has to be defined as well. Technology markets consist of the intellectual property that is licensed and its close substitutes, that is to say, other technologies which customers could use as a substitute.

<sup>(1)</sup> For market definition, see the Market Definition Notice.

<sup>(2)</sup> See also Commission Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101, 27.4.2004, p. 2 ('Technology Transfer Guidelines'), paragraph 33.



117. The methodology for defining technology markets follows the same principles as product market definition<sup>(1)</sup>. Starting from the technology which is marketed by the parties, those other technologies to which customers could switch in response to a small but non-transitory increase in relative prices need to be identified. Once those technologies are identified, market shares can be calculated by dividing the licensing income generated by the parties by the total licensing income of all licensors.
118. The parties' position in the market for existing technology is a relevant assessment criterion where the R&D co-operation concerns a significant improvement to an existing technology or a new technology that is likely to replace the existing technology. The parties' market shares can, however, only be taken as a starting point for this analysis. In technology markets, particular emphasis must be placed on potential competition. If companies which do not currently license their technology are potential entrants on the technology market they could constrain the ability of the parties to profitably raise the price for their technology. This aspect of the analysis may also be taken into account directly in the calculation of market shares by basing those on the sales of the products incorporating the licensed technology on downstream product markets (see paragraphs 123 to 126).

***Competition in innovation (R&D efforts)***

119. R&D co-operation may not only affect competition in existing markets, but also competition in innovation and new product markets. This is the case where R&D co-operation concerns the development of new products or technology which either may – if emerging – one day replace existing ones or which are being developed for a new intended use and will therefore not replace existing products but create a completely new demand. The effects on competition in innovation are important in these situations, but can in some cases not be sufficiently assessed by analysing actual or potential competition in existing product/technology markets. In this respect, two scenarios can be distinguished, depending on the nature of the innovative process in a given industry.
120. In the first scenario, which is, for instance, present in the pharmaceutical industry, the process of innovation is structured in such a way that it is possible at an early stage to identify competing R&D poles. Competing R&D poles are R&D efforts directed towards a certain new product or technology, and the substitutes for that R&D, that is to say, R&D aimed at developing substitutable products or technology for those developed by the co-operation and having similar timing. In this case, it can be analysed whether after the agreement there will be a sufficient number of remaining R&D poles. The starting point of the analysis is the R&D of the parties. Then credible competing R&D poles have to be identified. In order to assess the credibility of competing poles, the following aspects have to be taken into account: the nature, scope and size of any other R&D efforts, their access to financial and human resources, know-how/patents, or other specialised assets as well as their timing and their capability to exploit possible results. An R&D pole is not a credible competitor if it cannot be regarded as a close substitute for the parties' R&D effort from the viewpoint of, for instance, access to resources or timing.
121. Besides the direct effect on the innovation itself, the co-operation may also affect a new product market. It will often be difficult to analyse the effects on such a market directly as by its very nature it does not yet exist. The analysis of such markets will therefore often be implicitly incorporated in the analysis of competition in innovation. However, it may be necessary to consider directly the effects on such a market of aspects of the agreement that go beyond the R&D stage. An R&D agreement that includes joint production and commercialisation on the new product market may, for instance, be assessed differently than a pure R&D agreement.
122. In the second scenario, the innovative efforts in an industry are not clearly structured so as to allow the identification of R&D poles. In this situation, in the absence of exceptional circumstances, the Commission would not try to assess the impact of a given R&D co-operation on innovation, but would limit its assessment to existing product and/or technology markets which are related to the R&D co-operation in question.

<sup>(1)</sup> See Market Definition Notice; see also Technology Transfer Guidelines, paragraphs 19 *et seq.*

#### ***Calculation of market shares***

123. The calculation of market shares, both for the purposes of the R&D Block Exemption Regulation and of these guidelines, has to reflect the distinction between existing markets and competition in innovation. At the beginning of an R&D co-operation the reference point is the existing market for products capable of being improved, substituted or replaced by the products under development. If the R&D agreement only aims at improving or refining existing products, that market includes the products directly concerned by the R&D. Market shares can thus be calculated on the basis of the sales value of the existing products.
124. If the R&D aims at replacing an existing product, the new product will, if successful, become a substitute for the existing products. To assess the competitive position of the parties, it is again possible to calculate market shares on the basis of the sales value of the existing products. Consequently, the R&D Block Exemption Regulation bases its exemption of those situations on the market share in the relevant market for the products capable of being improved, substituted or replaced by the contract products<sup>(1)</sup>. To fall under the R&D Block Exemption Regulation, that market share may not exceed 25 %<sup>(2)</sup>.
125. For technology markets one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. However, this may often be a mere theoretical and not very practical way to proceed because of lack of clear information on royalties, the use of royalty free cross-licensing, etc. An alternative approach is to calculate market shares on the technology market on the basis of sales of products or services incorporating the licensed technology on downstream product markets. Under that approach all sales on the relevant product market are taken into account, irrespective of whether the product incorporates a technology that is being licensed<sup>(3)</sup>. Also for that market the share may not exceed 25 % (irrespective of the calculation method used) for the benefits of the R&D Block Exemption Regulation to apply.
126. If the R&D aims at developing a product which will create a completely new demand, market shares based on sales cannot be calculated. Only an analysis of the effects of the agreement on competition in innovation is possible. Consequently, the R&D Block Exemption Regulation treats those agreements as agreements between non-competitors and exempts them irrespective of market share for the duration of the joint R&D and an additional period of seven years after the product is first put on the market<sup>(4)</sup>. However, the benefit of the block exemption may be withdrawn if the agreement eliminated effective competition in innovation<sup>(5)</sup>. After the seven year period, market shares based on sales value can be calculated, and the market share threshold of 25 % applies<sup>(6)</sup>.

### **3.3. Assessment under Article 101(1)**

#### ***3.3.1. Main competition concerns***

127. R&D co-operation can restrict competition in various ways. First, it may reduce or slow down innovation, leading to fewer or worse products coming to the market later than they otherwise would. Secondly, on product or technology markets the R&D co-operation may reduce significantly competition between the parties outside the scope of the agreement or it may make anti-competitive coordination on those markets likely, thereby leading to higher prices. A foreclosure problem may only arise in the context of co-operation involving at least one player with a significant degree of market power (which does not necessarily amount to dominance) for a key technology and the exclusive exploitation of the results.

<sup>(1)</sup> Point (u) of Article 1(1) of the R&D Block Exemption Regulation.

<sup>(2)</sup> Article 4(2) of the R&D Block Exemption Regulation.

<sup>(3)</sup> See also Technology Transfer Guidelines, paragraph 23.

<sup>(4)</sup> Article 4(1) of the R&D Block Exemption Regulation.

<sup>(5)</sup> See recitals 19, 20 and 21 in the preamble to the R&D Block Exemption Regulation.

<sup>(6)</sup> Article 4(3) of the R&D Block Exemption Regulation.

3.3.2. *Restrictions of competition by object*

128. R&D agreements restrict competition by object if they do not truly concern joint R&D, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation. However, an R&D agreement which includes the joint exploitation of possible future results is not necessarily restrictive of competition.

3.3.3. *Restrictive effects on competition*

129. Most R&D agreements do not fall under Article 101(1). First, this can be said for many agreements relating to co-operation in R&D at a rather early stage, far removed from the exploitation of possible results.
130. Moreover, R&D co-operation between non-competitors does generally not give rise to restrictive effects on competition<sup>(1)</sup>. The competitive relationship between the parties has to be analysed in the context of affected existing markets and/or innovation. If, on the basis of objective factors, the parties are not able to carry out the necessary R&D independently, for instance, due to the limited technical capabilities of the parties, the R&D agreement will normally not have any restrictive effects on competition. This can apply, for example, to companies bringing together complementary skills, technologies and other resources. The issue of potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because the co-operation enables them to carry out the R&D activities. The decisive question is whether each party independently has the necessary means as regards assets, know-how and other resources.
131. Outsourcing of previously captive R&D is a specific form of R&D co-operation. In such a scenario, the R&D is often carried out by specialised companies, research institutes or academic bodies, which are not active in the exploitation of the results. Normally, such agreements are combined with a transfer of know-how and/or an exclusive supply clause concerning the possible results, which, due to the complementary nature of the co-operating parties in such a scenario, do not give rise to restrictive effects on competition within the meaning of Article 101(1).
132. R&D co-operation which does not include the joint exploitation of possible results by means of licensing, production and/or marketing rarely gives rise to restrictive effects on competition within the meaning of Article 101(1). Those pure R&D agreements can only cause a competition problem if competition with respect to innovation is appreciably reduced, leaving only a limited number of credible competing R&D poles.
133. R&D agreements are only likely to give rise to restrictive effects on competition where the parties to the co-operation have market power on the existing markets and/or competition with respect to innovation is appreciably reduced.
134. There is no absolute threshold above which it can be presumed that an R&D agreement creates or maintains market power and thus is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, R&D agreements between competitors are covered by the R&D Block Exemption Regulation provided that their combined market share does not exceed 25 % and that the other conditions for the application of the R&D Block Exemption Regulation are fulfilled.
135. Agreements falling outside the R&D Block Exemption Regulation because the combined market share of the parties exceeds 25 % do not necessarily give rise to restrictive effects on competition. However,

<sup>(1)</sup> R&D co-operation between non-competitors can, however, produce foreclosure effects under Article 101(1) if it relates to an exclusive exploitation of results and if it is concluded between companies, one of which has a significant degree of market power (which does not necessarily amount to dominance) with respect to a key technology.

the stronger the combined position of the parties on existing markets and/or the more competition in innovation is restricted, the more likely it is that the R&D agreement can cause restrictive effects on competition <sup>(1)</sup>.

136. If the R&D is directed at the improvement or refinement of existing products or technologies, possible effects concern the relevant market(s) for those existing products or technologies. Effects on prices, output, product quality, product variety or innovation in existing markets are, however, only likely if the parties together have a strong position, entry is difficult and few other innovation activities are identifiable. Furthermore, if the R&D only concerns a relatively minor input of a final product, effects on competition in those final products are, if any, very limited.
137. In general, a distinction has to be made between pure R&D agreements and agreements providing for more comprehensive co-operation involving different stages of the exploitation of results (that is to say, licensing, production or marketing). As set out in paragraph 132, pure R&D agreements will only rarely give rise to restrictive effects on competition within the meaning of Article 101(1). This is in particular true for R&D directed towards a limited improvement of existing products or technologies. If, in such a scenario, the R&D co-operation includes joint exploitation only by means of licensing to third parties, restrictive effects such as foreclosure problems are unlikely. If, however, joint production and/or marketing of the slightly improved products or technologies are included, the effects on competition of the co-operation have to be examined more closely. Restrictive effects on competition in the form of increased prices or reduced output in existing markets are more likely if strong competitors are involved in such a situation.
138. If the R&D is directed at an entirely new product (or technology) which creates its own new market, price and output effects on existing markets are rather unlikely. The analysis has to focus on possible restrictions of innovation concerning, for instance, the quality and variety of possible future products or technologies or the speed of innovation. Those restrictive effects can arise where two or more of the few companies engaged in the development of such a new product start to co-operate at a stage where they are each independently rather near to the launch of the product. Such effects are typically the direct result of the agreement between the parties. Innovation may be restricted even by a pure R&D agreement. In general, however, R&D co-operation concerning entirely new products is unlikely to give rise to restrictive effects on competition unless only a limited number of credible alternative R&D poles exist. This principle does not change significantly if the joint exploitation of the results, even joint marketing, is involved. In those situations the issue of joint exploitation may only give rise to restrictive effects on competition where foreclosure from key technologies plays a role. Those problems would, however, not arise where the parties grant licences that allow third parties to compete effectively.
139. Many R&D agreements will lie somewhere in between the two situations described in paragraphs 137 and 138. They may therefore have effects on innovation as well as repercussions on existing markets. Consequently, both the existing market and the effect on innovation may be of relevance for the assessment with respect to the parties' combined positions, concentration ratios, number of players or innovators and entry conditions. In some cases there can be restrictive effects on competition in the form of increased prices or reduced output, product quality, product variety or innovation in existing markets and in the form of a negative impact on innovation by means of slowing down the development. For instance, if significant competitors on an existing technology market co-operate to develop a new technology which may one day replace existing products that co-operation may slow down the development of the new technology if the parties have market power on the existing market and also a strong position with respect to R&D. A similar effect can occur if the major player in an existing market co-operates with a much smaller or even potential competitor who is just about to emerge with a new product or technology which may endanger the incumbent's position.

<sup>(1)</sup> This is without prejudice to the analysis of potential efficiency gains, including those that regularly exist in publicly co-funded R&D.

140. Agreements may also fall outside the R&D Block Exemption Regulation irrespective of the parties' market power. This applies for instance to agreements which unduly restrict access of a party to the results of the R&D co-operation<sup>(1)</sup>. The R&D Block Exemption Regulation provides for a specific exception to this general rule in the case of academic bodies, research institutes or specialised companies which provide R&D as a service and which are not active in the industrial exploitation of the results of R&D<sup>(2)</sup>. Nevertheless, agreements falling outside the R&D Block Exemption Regulation and containing exclusive access rights for the purposes of exploitation may, where they fall under Article 101(1), fulfil the criteria of Article 101(3), particularly where exclusive access rights are economically indispensable in view of the market, risks and scale of the investment required to exploit the results of the research and development.

### 3.4. Assessment under Article 101(3)

#### 3.4.1. Efficiency gains

141. Many R&D agreements – with or without joint exploitation of possible results – bring about efficiency gains by combining complementary skills and assets, thus resulting in improved or new products and technologies being developed and marketed more rapidly than would otherwise be the case. R&D agreements may also lead to a wider dissemination of knowledge, which may trigger further innovation. R&D agreements may also give rise to cost reductions.

#### 3.4.2. Indispensability

142. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an R&D agreement do not fulfil the criteria of Article 101(3). In particular, the restrictions listed in Article 5 of the R&D Block Exemption Regulation may mean it is less likely that the criteria of Article 101(3) will be found to be met, following an individual assessment. It will therefore generally be necessary for the parties to an R&D agreement to show that such restrictions are indispensable to the co-operation.

#### 3.4.3. Pass-on to consumers

143. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the R&D agreement. For example, the introduction of new or improved products on the market must outweigh any price increases or other restrictive effects on competition. In general, it is more likely that an R&D agreement will bring about efficiency gains that benefit consumers if the R&D agreement results in the combination of complementary skills and assets. The parties to an agreement may, for instance, have different research capabilities. If, on the other hand, the parties' skills and assets are very similar, the most important effect of the R&D agreement may be the elimination of part or all of the R&D of one or more of the parties. This would eliminate (fixed) costs for the parties to the agreement but would be unlikely to lead to benefits which would be passed on to consumers. Moreover, the higher the market power of the parties the less likely they are to pass on the efficiency gains to consumers to an extent that would outweigh the restrictive effects on competition.

#### 3.4.4. No elimination of competition

144. The criteria of Article 101(3) cannot be met if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products (or technologies) in question.

#### 3.4.5. Time of the assessment

145. The assessment of restrictive agreements under Article 101(3) is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 101(3) applies as long as the four conditions of Article 101(3) are fulfilled and ceases to apply when that is no longer the case. When applying Article 101(3) in accordance with those principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints

<sup>(1)</sup> See Article 3(2) of the R&D Block Exemption Regulation.

<sup>(2)</sup> See Article 3(2) of the R&D Block Exemption Regulation.

required to making and recouping an efficiency enhancing investment. Article 101 cannot be applied without taking due account of such *ex ante* investment. The risk facing the parties and the sunk investment that must be made to implement the agreement can thus lead to the agreement falling outside Article 101(1) or fulfilling the conditions of Article 101(3), as the case may be, for the period of time needed to recoup the investment. Should the invention resulting from the investment benefit from any form of exclusivity granted to the parties under rules specific to the protection of intellectual property rights, the recoupment period for such an investment will generally be unlikely to exceed the exclusivity period established under those rules.

146. In some cases the restrictive agreement is an irreversible event. Once the restrictive agreement has been implemented the *ex ante* situation cannot be re-established. In such cases the assessment must be made exclusively on the basis of the facts pertaining at the time of implementation. For instance, in the case of an R&D agreement whereby each party agrees to abandon its respective research project and pool its capabilities with those of another party, it may from an objective point of view be technically and economically impossible to revive a project once it has been abandoned. The assessment of the anti-competitive and pro-competitive effects of the agreement to abandon the individual research projects must therefore be made as of the time of the completion of its implementation. If at that point in time the agreement is compatible with Article 101, for instance because a sufficient number of third parties have competing R&D projects, the parties' agreement to abandon their individual projects remains compatible with Article 101, even if at a later point in time the third party projects fail. However, the prohibition of Article 101 may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. If, for example, in addition to joint R&D, the agreement provides for joint exploitation, Article 101 may apply to that part of the agreement if, due to subsequent market developments, the agreement gives rise to restrictive effects on competition and does not (any longer) satisfy the conditions of Article 101(3) taking due account of *ex ante* sunk investments.

### 3.5. Examples

147. Impact of joint R&D on innovation markets/new product market

#### Example 1

**Situation:** A and B are the two major companies on the Union-wide market for the manufacture of existing electronic components. Both have a market share of 30 %. They have each made significant investments in the R&D necessary to develop miniaturised electronic components and have developed early prototypes. They now agree to pool those R&D efforts by setting up a joint venture to complete the R&D and produce the components, which will be sold back to the parents, who will commercialise them separately. The remainder of the market consists of small companies without sufficient resources to undertake the necessary investments.

**Analysis:** Miniaturised electronic components, while likely to compete with the existing components in some areas, are essentially a new technology and an analysis must be made of the poles of research destined towards that future market. If the joint venture goes ahead then only one route to the necessary manufacturing technology will exist, whereas it would appear likely that A and B could reach the market individually with separate products. The agreement therefore reduces product variety. The joint production is also likely to directly limit competition between the parties to the agreement and lead them to agree on output levels, quality or other competitively important parameters. This would limit competition even though the parties will commercialise the products independently. The parties could, for instance, limit the output of the joint venture compared to what the parties would have brought to the market if they had decided their output on their own. The joint venture could also charge a high transfer price to the parties, thereby increasing the input costs for the parties which could lead to higher downstream prices. The parties have a large combined market share on the existing downstream market and the remainder of that market is fragmented. This situation is likely to become even more pronounced on the new downstream product market since the smaller competitors cannot invest in the new components. It is therefore quite likely that the joint production will restrict competition.

Furthermore, the market for miniaturised electronic components is in the future likely to develop into a duopoly with a high degree of commonality of costs and possible exchange of commercially sensitive information between the parties. There may therefore also be a serious risk of anti-competitive coordination leading to a collusive outcome in the market. The R&D agreement is therefore likely to give rise to restrictive effects on competition within the meaning of Article 101(1). While the agreement could give rise to efficiency gains in the form of bringing a new technology forward quicker, the parties would face no competition at the R&D level, so their incentives to pursue the new technology at a high pace could be severely reduced. Although some of those concerns could be remedied if the parties committed to license key know-how for manufacturing miniature components to third parties on reasonable terms, it seems unlikely that this could remedy all concerns and fulfil the conditions of Article 101(3).

Example 2

**Situation:** A small research company (Company A) which does not have its own marketing organisation has discovered and patented a pharmaceutical substance based on new technology that will revolutionise the treatment of a certain disease. Company A enters into an R&D agreement with a large pharmaceutical producer Company B of products that have so far been used for treating the disease. Company B lacks any similar expertise and R&D programme and would not be able to build such expertise within a relevant timeframe. For the existing products Company B has a market share of around 75 % in all Member States, but the patents will expire over the next five years. There exist two other poles of research with other companies at approximately the same stage of development using the same basic new technology. Company B will provide considerable funding and know-how for product development, as well as future access to the market. Company B is granted a licence for the exclusive production and distribution of the resulting product for the duration of the patent. It is expected that the product could be brought to market in five to seven years.

**Analysis:** The product is likely to belong to a new relevant market. The parties bring complementary resources and skills to the co-operation, and the probability of the product coming to market increases substantially. Although Company B is likely to have considerable market power on the existing market, that market power will be decreasing shortly. The agreement will not lead to a loss in R&D on the part of Company B, as it has no expertise in this area of research, and the existence of other poles of research are likely to eliminate any incentive to reduce R&D efforts. The exploitation rights during the remaining patent period are likely to be necessary for Company B to make the considerable investments needed and Company A has no marketing resources of its own. The agreement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even if there were such effects, it is likely that the conditions of Article 101(3) would be fulfilled.

148. Risk of foreclosure

Example 3

**Situation:** A small research company (Company A) which does not have its own marketing organisation has discovered and patented a new technology that will revolutionise the market for a certain product for which there is a monopoly producer (Company B) worldwide as no competitors can compete with Company B's current technology. There exist two other poles of research with other companies at approximately the same stage of development using the same



basic new technology. Company B will provide considerable funding and know-how for product development, as well as future access to the market. Company B is granted an exclusive licence for the use of the technology for the duration of the patent and commits to funding only the development of Company A's technology.

**Analysis:** The product is likely to belong to a new relevant market. The parties bring complementary resources and skills to the co-operation, and the probability of the product coming to market increases substantially. However, the fact that Company B commits to Company A's new technology may be likely to lead the two competing poles of research to abandon their projects as it could be difficult to receive continued funding once they have lost the most likely potential customer for their technology. In such a situation no potential competitors would be able to challenge Company B's monopoly position in the future. The foreclosure effect of the agreement would then be likely to be considered to give rise to restrictive effects on competition within the meaning of Article 101(1). In order to benefit from Article 101(3) the parties would have to show that the exclusivity granted would be indispensable to bring the new technology to the market.

Example 4

**Situation:** Company A has market power on the market of which its blockbuster medicine forms part. A small company (Company B) which is engaged in pharmaceutical R&D and active pharmaceutical ingredient ('API') production has discovered and filed a patent application for a new process that makes it possible to produce the API of Company A's blockbuster in a more economic fashion and continues to develop the process for industrial production. The compound (API) patent of the blockbuster expires in a little less than three years; thereafter there will remain a number of process patents relating to the medicine. Company B considers that the new process developed by it would not infringe the existing process patents of Company A and would allow the production of a generic version of the blockbuster once the API patent has expired. Company B could either produce the product itself or license the process to interested third parties, for example, generic producers or Company A. Before concluding its research and development in this area, Company B enters into an agreement with Company A, in which Company A makes a financial contribution to the R&D project being carried out by Company B on condition that it acquires an exclusive licence for any of Company B's patents related to the R&D project. There exist two other independent poles of research to develop a non-infringing process for the production of the blockbuster medicine, but it is not yet clear that they will reach industrial production.

**Analysis:** The process covered by Company B's patent application does not allow for the production of a new product. It merely improves an existing production process. Company A has market power on the existing market of which the blockbuster medicine forms part. Whilst that market power would decrease significantly with the actual market entry of generic competitors, the exclusive licence makes the process developed by Company B unavailable to third parties and is thus liable to delay generic entry (not least as the product is still protected by a number of process patents) and, consequently, restricts competition within the meaning of Article 101(1). As Company A and Company B are potential competitors, the R&D Block Exemption Regulation does not apply because Company A's market share on the market of which the blockbuster medicine forms part is above 25 %. The cost savings based on the new production process for Company A are not sufficient to outweigh the restriction of competition. In any event, an exclusive licence is not indispensable to obtain the savings in the production process. Therefore, the agreement is unlikely to fulfil the conditions of Article 101(3).

149. Impact of R&D co-operation on dynamic product and technology markets and the environment

Example 5

**Situation:** Two engineering companies that produce vehicle components agree to set up a joint venture to combine their R&D efforts to improve the production and performance of an existing

component. The production of that component would also have a positive effect on the environment. Vehicles would consume less fuel and therefore emit less CO<sub>2</sub>. The companies pool their existing technology licensing businesses in the area, but will continue to manufacture and sell the components separately. The two companies have market shares in the Union of 15 % and 20 % on the Original Equipment Manufacturer ('OEM') product market. There are two other major competitors together with several in-house research programmes by large vehicle manufacturers. On the world-wide market for the licensing of technology for those products the parties have shares of 20 % and 25 %, measured in terms of revenue generated, and there are two other major technologies. The product life cycle for the component is typically two to three years. In each of the last five years one of the major companies has introduced a new version or upgrade.

**Analysis:** Since neither company's R&D effort is aimed at a completely new product, the markets to consider are those for the existing components and for the licensing of relevant technology. The parties' combined market share on both the OEM market (35 %) and, in particular, on the technology market (45 %) are quite high. However, the parties will continue to manufacture and sell the components separately. In addition, there are several competing technologies, which are regularly improved. Moreover, the vehicle manufacturers who do not currently license their technology are also potential entrants on the technology market and thus constrain the ability of the parties to profitably raise prices. To the extent that the joint venture has restrictive effects on competition within the meaning of Article 101(1), it is likely that it would fulfil the criteria of Article 101(3). For the assessment under Article 101(3) it would be necessary to take into account that consumers will benefit from a lower consumption of fuel.

#### 4. PRODUCTION AGREEMENTS

##### 4.1. Definition and scope

150. Production agreements vary in form and scope. They can provide that production is carried out by only one party or by two or more parties. Companies can produce jointly by way of a joint venture, that is to say, a jointly controlled company operating one or several production facilities or by looser forms of co-operation in production such as subcontracting agreements where one party (the 'contractor') entrusts to another party (the 'subcontractor') the production of a good.
151. There are different types of subcontracting agreements. Horizontal subcontracting agreements are concluded between companies operating in the same product market irrespective of whether they are actual or potential competitors. Vertical subcontracting agreements are concluded between companies operating at different levels of the market.
152. Horizontal subcontracting agreements comprise unilateral and reciprocal specialisation agreements as well as subcontracting agreements with a view to expanding production. Unilateral specialisation agreements are agreements between two parties which are active on the same product market or markets, by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, which agrees to produce and supply the products. Reciprocal specialisation agreements are agreements between two or more parties which are active on the same products market or markets, by virtue of which two or more parties agree, on a reciprocal basis, to fully or partly cease or refrain from producing certain but different products and to purchase those products from the other parties, which agree to produce and supply them. In the case of subcontracting agreements with a view to expanding production the contractor entrusts the subcontractor with the production of a good, while the contractor does not at the same time cease or limit its own production of the good.
153. These guidelines apply to all forms of joint production agreements and horizontal subcontracting agreements. Subject to certain conditions, joint production agreements as well as unilateral and reciprocal specialisation agreements may benefit from the Specialisation Block Exemption Regulation.

154. Vertical subcontracting agreements are not covered by these guidelines. They fall within the scope of the Guidelines on Vertical Restraints and, subject to certain conditions, may benefit from the Block Exemption Regulation on Vertical Restraints. In addition, they may be covered by the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty <sup>(1)</sup> (the Subcontracting Notice).

#### 4.2. Relevant markets

155. In order to assess the competitive relationship between the co-operating parties, it is necessary first to define the relevant market or markets directly concerned by the co-operation in production, that is to say, the markets to which the products manufactured under the production agreement belong.
156. A production agreement can also have spill-over effects in markets neighbouring the market directly concerned by the co-operation, for instance upstream or downstream to the agreement (the so-called 'spill-over markets') <sup>(2)</sup>. The spill-over markets are likely to be relevant if the markets are inter-dependent and the parties are in a strong position on the spill-over market.

#### 4.3. Assessment under Article 101(1)

##### 4.3.1. *Main competition concerns*

157. Production agreements can lead to a direct limitation of competition between the parties. Production agreements, and in particular production joint ventures, may lead the parties to directly align output levels and quality, the price at which the joint venture sells on its products, or other competitively important parameters. This may restrict competition even if the parties market the products independently.
158. Production agreements may also result in the coordination of the parties' competitive behaviour as suppliers leading to higher prices or reduced output, product quality, product variety or innovation, that is to say, a collusive outcome. This can happen, subject to the parties having market power and the existence of market characteristics conducive to such coordination, in particular when the production agreement increases the parties' commonality of costs (that is to say, the proportion of variable costs which the parties have in common) to a degree which enables them to achieve a collusive outcome, or if the agreement involves an exchange of commercially sensitive information that can lead to a collusive outcome.
159. Production agreements may furthermore lead to anti-competitive foreclosure of third parties in a related market (for example, the downstream market relying on inputs from the market in which the production agreement takes place). For instance, by gaining enough market power, parties engaging in joint production in an upstream market may be able to raise the price of a key component for a market downstream. Thereby, they could use the joint production to raise the costs of their rivals downstream and, ultimately, force them off the market. This would, in turn, increase the parties' market power downstream, which could enable them to sustain prices above the competitive level or otherwise harm consumers. Such competition concerns could materialise irrespective of whether the parties to the agreement are competitors on the market in which the co-operation takes place. However, for this kind of foreclosure to have anti-competitive effects, at least one of the parties must have a strong market position in the market where the risks of foreclosure are assessed.

##### 4.3.2. *Restrictions of competition by object*

160. Generally, agreements which involve price-fixing, limiting output or sharing markets or customers restrict competition by object. However, in the context of production agreements, this does not apply where:

<sup>(1)</sup> OJ C 1, 3.1.1979, p. 2.

<sup>(2)</sup> As also referred to in Article 2(4) of the Merger Regulation.

- the parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that the other parameters of competition are not eliminated; or
- a production agreement that also provides for the joint distribution of the jointly manufactured products envisages the joint setting of the sales prices for those products, and only those products, provided that that restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place.

161. In these two cases an assessment is required as to whether the agreement gives rise to likely restrictive effects on competition within the meaning of Article 101(1). In both scenarios the agreement on output or prices will not be assessed separately, but in the light of the overall effects of the entire production agreement on the market.

#### 4.3.3. Restrictive effects on competition

162. Whether the possible competition concerns that production agreements can give rise to are likely to materialise in a given case depends on the characteristics of the market in which the agreement takes place, as well as on the nature and market coverage of the co-operation and the product it concerns. These variables determine the likely effects of a production agreement on competition and thereby the applicability of Article 101(1).

163. Whether a production agreement is likely to give rise to restrictive effects on competition depends on the situation that would prevail in the absence of the agreement with all its alleged restrictions. Consequently, production agreements between companies which compete on markets on which the co-operation occurs are not likely to have restrictive effects on competition if the co-operation gives rise to a new market, that is to say, if the agreement enables the parties to launch a new product or service, which, on the basis of objective factors, the parties would otherwise not have been able to do, for instance, due to the technical capabilities of the parties.

164. In some industries where production is the main economic activity, even a pure production agreement can in itself eliminate key dimensions of competition, thereby directly limiting competition between the parties to the agreements.

165. Alternatively, a production agreement can lead to a collusive outcome or anti-competitive foreclosure by increasing the companies' market power or their commonality of costs or if it involves the exchange of commercially sensitive information. On the other hand, a direct limitation of competition between the parties, a collusive outcome or anti-competitive foreclosure is not likely to occur if the parties to the agreement do not have market power in the market in which the competition concerns are assessed. It is only market power that can enable them to profitably maintain prices above the competitive level, or profitably maintain output, product quality or variety below what would be dictated by competition.

166. In cases where a company with market power in one market co-operates with a potential entrant, for example, with a supplier of the same product in a neighbouring geographic or product market, the agreement can potentially increase the market power of the incumbent. This can lead to restrictive effects on competition if actual competition in the incumbent's market is already weak and the threat of entry is a major source of competitive constraint.

167. Production agreements which also involve commercialisation functions, such as joint distribution or marketing, carry a higher risk of restrictive effects on competition than pure joint production agreements. Joint commercialisation brings the co-operation closer to the consumer and usually involves the joint setting of prices and sales, that is to say, practices that carry the highest risks for competition. However, joint distribution agreements for products which have been jointly produced are generally less likely to restrict competition than stand-alone joint distribution agreements. Also, a joint distribution agreement that is necessary for the joint production agreement to take place in the first place is less likely to restrict competition than if it were not necessary for the joint production.

**Market power**

168. A production agreement is unlikely to lead to restrictive effects on competition if the parties to the agreement do not have market power in the market on which a restriction of competition is assessed. The starting point for the analysis of market power is the market share of the parties. This will normally be followed by the concentration ratio and the number of players in the market as well as by other dynamic factors such as potential entry, and changing market shares.
169. Companies are unlikely to have market power below a certain level of market share. Therefore, unilateral or reciprocal specialisation agreements as well as joint production agreements including certain integrated commercialisation functions such as joint distribution are covered by the Specialisation Block Exemption Regulation if they are concluded between parties with a combined market share not exceeding 20 % in the relevant market or markets, provided that the other conditions for the application of the Specialisation Block Exemption Regulation are fulfilled. Moreover, as regards horizontal subcontracting agreements with a view to expanding production, in most cases it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 20 %. In any event, if the parties' combined market share does not exceed 20 % it is likely that the conditions of Article 101(3) are fulfilled.
170. However, if the parties' combined market share exceeds 20 %, the restrictive effects have to be analysed as the agreement does not fall within the scope of the Specialisation Block Exemption Regulation or the safe harbour for horizontal subcontracting agreements with a view to expanding production referred to in sentences 3 and 4 of paragraph 169. A moderately higher market share than allowed for in the Specialisation Block Exemption Regulation or the safe harbour referred to in sentences 3 and 4 of paragraph 169 does not necessarily imply a highly concentrated market, which is an important factor in the assessment. A combined market share of the parties of slightly more than 20 % may occur in a market with a moderate concentration. Generally, a production agreement is more likely to lead to restrictive effects on competition in a concentrated market than in a market which is not concentrated. Similarly, a production agreement in a concentrated market may increase the risk of a collusive outcome even if the parties only have a moderate combined market share.
171. Even if the market shares of the parties to the agreement and the market concentration are high, the risks of restrictive effects on competition may still be low if the market is dynamic, that is to say, a market in which entry occurs and market positions change frequently.
172. In the analysis of whether the parties to a production agreement have market power, the number and intensity of links (for example, other co-operation agreements) between the competitors in the market are relevant to the assessment.
173. Factors such as whether the parties to the agreement have high market shares, whether they are close competitors, whether the customers have limited possibilities of switching suppliers, whether competitors are unlikely to increase supply if prices increase, and whether one of the parties to the agreement is an important competitive force, are all relevant for the competitive assessment of the agreement.

**Direct limitation of competition between the parties**

174. Competition between the parties to a production agreement can be directly limited in various ways. The parties to a production joint venture could, for instance, limit the output of the joint venture compared to what the parties would have brought to the market if each of them had decided their output on their own. If the main product characteristics are determined by the production agreement this could also eliminate the key dimensions of competition between the parties and, ultimately, lead to restrictive effects on competition. Another example would be a joint venture charging a high transfer price to the parties, thereby increasing the input costs for the parties which could lead to higher downstream prices. Competitors may find it profitable to increase their prices as a response, thereby contributing to price increases in the relevant market.

***Collusive outcome***

175. The likelihood of a collusive outcome depends on the parties' market power as well as the characteristics of the relevant market. A collusive outcome can result in particular (but not only) from commonality of costs or an exchange of information brought about by the production agreement.
176. A production agreement between parties with market power can have restrictive effects on competition if it increases their commonality of costs (that is to say, the proportion of variable costs which the parties have in common) to a level which enables them to collude. The relevant costs are the variable costs of the product with respect to which the parties to the production agreement compete.
177. A production agreement is more likely to lead to a collusive outcome if prior to the agreement the parties already have a high proportion of variable costs in common, as the additional increment (that is to say, the production costs of the product subject to the agreement) can tip the balance towards a collusive outcome. Conversely, if the increment is large, the risk of a collusive outcome may be high even if the initial level of commonality of costs is low.
178. Commonality of costs increases the risk of a collusive outcome only if production costs constitute a large proportion of the variable costs concerned. This is, for instance, not the case where the co-operation concerns products which require costly commercialisation. An example would be new or heterogeneous products requiring expensive marketing or high transport costs.
179. Another scenario where commonality of costs can lead to a collusive outcome could be where the parties agree on the joint production of an intermediate product which accounts for a large proportion of the variable costs of the final product with respect to which the parties compete downstream. The parties could use the production agreement to increase the price of that common important input for their products in the downstream market. This would weaken competition downstream and would be likely to lead to higher final prices. The profit would be shifted from downstream to upstream to be then shared between the parties through the joint venture.
180. Similarly, commonality of costs increases the anti-competitive risks of a horizontal subcontracting agreement where the input which the contractor purchases from the subcontractor accounts for a large proportion of the variable costs of the final product with which the parties compete.
181. Any negative effects arising from the exchange of information will not be assessed separately but in the light of the overall effects of the agreement. A production agreement can give rise to restrictive effects on competition if it involves an exchange of commercially strategic information that can lead to a collusive outcome or anti-competitive foreclosure. Whether the exchange of information in the context of a production agreement is likely to lead to restrictive effects on competition should be assessed according to the guidance given in Chapter 2.
182. If the information exchange does not exceed the sharing of data necessary for the joint production of the goods subject to the production agreement, then even if the information exchange had restrictive effects on competition within the meaning of Article 101(1), the agreement would be more likely to meet the criteria of Article 101(3) than if the exchange went beyond what was necessary for the joint production. In this case the efficiency gains stemming from producing jointly are likely to outweigh the restrictive effects of the coordination of the parties' conduct. Conversely, in the context of a production agreement the sharing of data which is not necessary for producing jointly, for example the exchange of information related to prices and sales, is less likely to fulfil the conditions of Article 101(3).

**4.4. Assessment under Article 101(3)**

**4.4.1. Efficiency gains**

183. Production agreements can be pro-competitive if they provide efficiency gains in the form of cost savings or better production technologies. By producing together companies can save costs that otherwise they would duplicate. They can also produce at lower costs if the co-operation enables them to increase production where marginal costs decline with output, that is to say, by economies of scale. Producing jointly can also help companies to improve product quality if they put together their

complementary skills and know-how. Co-operation can also enable companies to increase product variety, which they could not have afforded, or would not have been able to achieve, otherwise. If joint production allows the parties to increase the number of different types of products, it can also provide cost savings by means of economies of scope.

#### 4.4.2. Indispensability

184. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a production agreement do not fulfil the criteria of Article 101(3). For instance, restrictions imposed in a production agreement on the parties' competitive conduct with regard to output outside the co-operation will normally not be considered to be indispensable. Similarly, setting prices jointly will not be considered indispensable if the production agreement does not also involve joint commercialisation.

#### 4.4.3. Pass-on to consumers

185. Efficiency gains attained by indispensable restrictions need to be passed on to consumers in the form of lower prices or better product quality or variety to an extent that outweighs the restrictive effects on competition. Efficiency gains that only benefit the parties or cost savings that are caused by output reduction or market allocation are not sufficient to meet the criteria of Article 101(3). If the parties to the production agreement achieve savings in their variable costs they are more likely to pass them on to consumers than if they reduce their fixed costs. Moreover, the higher the market power of the parties, the less likely they will pass on the efficiency gains to consumers to an extent that would outweigh the restrictive effects on competition.

#### 4.4.4. No elimination of competition

186. The criteria of Article 101(3) cannot be met if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This has to be analysed in the relevant market to which the products subject to the co-operation belong and in any possible spill-over markets.

### 4.5. Examples

187. Commonality of costs and collusive outcomes

#### Example 1

**Situation:** Companies A and B, two suppliers of a product X decide to close their current old production plants and build a larger, modern and more efficient production plant run by a joint venture, which will have a higher capacity than the total capacity of the old plants of Companies A and B. No other such investments are planned by competitors, which are using their facilities at full capacity. Companies A and B have market shares of 20 % and 25 % respectively. Their products are the closest substitutes in a specific segment of the market, which is concentrated. The market is transparent and rather stagnant, there is no entry and the market shares have been stable over time. Production costs constitute a major part of Company A and Company B's variable costs for product X. Commercialisation is a minor economic activity in terms of costs and strategic importance compared to production: marketing costs are low as product X is homogenous and established and transport is not a key driver of competition.

**Analysis:** If Companies A and B share all or most of their variable costs, this production agreement could lead to a direct limitation of competition between them. It may lead the parties to limit the output of the joint venture compared to what they would have brought to the market if each of them had decided their output on their own. In the light of the capacity constraints of the competitors this reduction output could lead to higher prices.



Even if Companies A and B were not sharing most of their variable costs, but only a significant part thereof, this production agreement could lead to a collusive outcome between Companies A and B, thereby indirectly eliminating competition between the two parties. The likelihood of this depends not only on the issue of commonality of costs (which are high in this case) but also on the characteristics of the relevant market such as, for example, transparency, stability and level of concentration.

In either of the two situations mentioned above, it is likely, in the market configuration of this example, that the production joint venture of Companies A and B would give rise to restrictive effects on competition within the meaning of Article 101(1) on the market of X.

The replacement of two smaller old production plants by the larger, modern and more efficient one may lead the joint venture to increase output at lower prices to the benefits of consumers. However, the production agreement could only meet the criteria of Article 101(3) if the parties provided substantiated evidence that the efficiency gains would be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition.

188. Links between competitors and collusive outcomes

Example 2

**Situation:** Two suppliers, Companies A and B, form a production joint venture with respect to product Y. Companies A and B each have a 15 % market share on the market for Y. There are 3 other players on the market: Company C with a market share of 30 %, Company D with 25 % and Company E with 15 %. Company B already has a joint production plant with Company D.

**Analysis:** The market is characterised by very few players and rather symmetric structures. Co-operation between Companies A and B would add an additional link in the market, *de facto* increasing the concentration in the market, as it would also link Company D to Companies A and B. This co-operation is likely to increase the risk of a collusive outcome and thereby likely to give rise to restrictive effects on competition within the meaning of Article 101(1). The criteria of Article 101(3) could only be fulfilled in the presence of significant efficiency gains which are passed on to consumers to such an extent that they would outweigh the restrictive effects on competition.

189. Anti-competitive foreclosure on a downstream market

Example 3

**Situation:** Companies A and B set up a production joint venture for the intermediate product X which covers their entire production of X. The production costs of X account for 70 % of the variable costs of the final product Y with respect to which Companies A and B compete downstream. Companies A and B each have a share of 20 % on the market for Y, there is limited entry and the market shares have been stable over time. In addition to covering their own demand for X, both Companies A and B each have a market share of 40 % on the market for X. There are high barriers to entry on the market for X and existing producers are operating near full capacity. On the market for Y, there are two other significant suppliers, each with a 15 % market share, and several smaller competitors. This agreement generates economies of scale.

**Analysis:** By virtue of the production joint venture, Companies A and B would be able to largely control supplies of the essential input X to their competitors in the market for Y. This would give Companies A and B the ability to raise their rivals' costs by artificially increasing the price of X, or by reducing the output. This could foreclose the competitors of Companies A and B in market for Y. Because of the likely anti-competitive foreclosure downstream, this agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). The economies of scale generated by the production joint venture are unlikely to outweigh the restrictive effects on competition and therefore this agreement would most likely not meet the criteria of Article 101(3).

190. Specialisation agreement as market allocation

Example 4

**Situation:** Companies A and B each manufacture both products X and Y. Company A's market share of X is 30 % and of Y 10 %. B's market share of X is 10 % and of Y 30 %. To obtain economies of scale they conclude a reciprocal specialisation agreement under which Company A will only produce X and Company B only Y. They do not cross-supply the products to each other so that Company A only sells X and Company B sells only Y. The parties claim that by specialising in this way they save costs due to the economies of scale and by focusing on only one product will improve their production technologies, which will lead to better quality products.

**Analysis:** With regard to its effects on competition in the market, this specialisation agreement is close to a hardcore cartel where parties allocate the market among themselves. Therefore, this agreement restricts competition by object. Because the claimed efficiencies in the form of economies of scale and improving production technology are only linked to the market allocation, they are unlikely to outweigh the restrictive effects, and therefore the agreement would not meet the criteria of Article 101(3). In any event, if Company A or B believes that it would be more efficient to focus on only one product, it can simply take the unilateral decision to only produce X or Y without at the same time agreeing that the other company will focus on producing the respective other product.

The analysis would be different if Companies A and B supplied each other with the product they focus on so that they both continue to sell X and Y. In such a case Companies A and B could still compete on price on both markets, especially if production costs (which become common through the production agreement) did not constitute a major share of the variable costs of their products. The relevant costs in this context are the commercialisation costs. Hence, the specialisation agreement would be unlikely to restrict competition if X and Y were largely heterogeneous products with a very high proportion of marketing and distribution costs (for example, 65–70 % or more of total costs). In such a scenario the risks of a collusive outcome would not be high and the criteria of Article 101(3) may be fulfilled, provided that the efficiency gains would be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition of the agreement.

191. Potential competitors

Example 5

**Situation:** Company A produces final product X and Company B produces final product Y. X and Y constitute two separate product markets, in which Companies A and B respectively have strong market power. Both companies use Z as an input for their production of X and Y and they both produce Z for captive use only. X is a low added value product for which Z is an essential input (X is quite a simple transformation of Z). Y is a high value added product, for which Z is one of many inputs (Z constitutes a small part of variable costs of Y). Companies A and B agree to jointly produce Z, which generates modest economies of scale.

**Analysis:** Companies A and B are not actual competitors with regard to X, Y or Z. However, since X is a simple transformation of input Z, it is likely that Company B could easily enter the market for X and thus challenge Company A's position on that market. The joint production agreement with regard to Z might reduce Company B's incentives to do so as the joint production might be used for side payments and limit the probability of Company B selling product X (as Company A is likely to have control over the quantity of Z purchased by Company B from the joint venture). However, the probability of Company B entering the market for X in the absence of the agreement depends on the expected profitability of the entry. As X is a low added value product, entry might not be profitable and thus entry by Company B could be unlikely in the absence of the agreement. Given that Companies A and B already have market power, the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) if the agreement does indeed

decrease the likelihood of entry of Company B into Company A's market, that is to say, the market for X. The efficiency gains in the form of economies of scale generated by the agreement are modest and therefore unlikely to outweigh the restrictive effects on competition.

192. Information exchange in a production agreement

Example 6

**Situation:** Companies A and B with high market power decide to produce together to become more efficient. In the context of this agreement they secretly exchange information about their future prices. The agreement does not cover joint distribution.

**Analysis:** This information exchange makes a collusive outcome likely and is therefore likely to have as its object the restriction of competition within the meaning of Article 101(1). It would be unlikely to meet the criteria of Article 101(3) because the sharing of information about the parties' future prices is not indispensable for producing jointly and attaining the corresponding cost savings.

193. Swaps and information exchange

Example 7

**Situation:** Companies A and B both produce Z, a commodity chemical. Z is a homogenous product which is manufactured according to a European standard which does not allow for any product variations. Production costs are a significant cost factor regarding Z. Company A has a market share of 20 % and Company B of 25 % on the Union-wide market for Z. There are four other manufacturers on the market for Z, with respective market shares of 20 %, 15 %, 10 % and 10 %. The production plant of Company A is located in Member State X in northern Europe whereas the production plant of Company B is located in Member State Y in southern Europe. Even though the majority of Company A's customers are located in northern Europe, Company A also has a number of customers in southern Europe. The majority of Company B's customers are in southern Europe, although it also has a number of customers located in northern Europe. Currently, Company A provides its southern European customers with Z manufactured in its production plant in Member State X and transports it to southern Europe by truck. Similarly, Company B provides its northern European customers with Z manufactured in Member State Y and transports it to northern Europe by truck. Transport costs are quite high, but not so high as to make the deliveries by Company A to southern Europe and Company B to northern Europe unprofitable. Transport costs from Member State X to southern Europe are lower than from Member State Y to northern Europe.

Companies A and B decide that it would be more efficient if Company A stopped transporting Z from Member State X to southern Europe and if Company B stopped transporting the Z from Member State Y to northern Europe although, at the same time, they are keen on retaining their customers. To do so, Companies A and B intend to enter into a swap agreement which allows them to purchase an agreed annual quantity of Z from the other party's plant with a view to selling the purchased Z to those of their customers which are located closer to the other party's plant. In order to calculate a purchase price which does not favour one party over the other and which takes due account of the parties' different production costs and different savings on transport costs, and in order to ensure that both parties can achieve an appropriate margin, they agree to disclose to each other their main costs with regard to Z (that is to say, production costs and transport costs).

**Analysis:** The fact that Companies A and B – who are competitors – swap parts of their production does not in itself give rise to competition concerns. However, the envisaged swap agreement between Companies A and B provides for the exchange of both parties' production and transport costs with regard to Z. Moreover, Companies A and B have a strong combined market position in a fairly concentrated market for a homogenous commodity product. Therefore, due to the extensive information exchange on a key parameter of competition with regard to Z, it is

likely that the swap agreement between Companies A and B will give rise to restrictive effects on competition within the meaning of Article 101(1) as it can lead to a collusive outcome. Even though the agreement will give rise to significant efficiency gains in the form of cost savings for the parties, the restrictions on competition generated by the agreement are not indispensable for their attainment. The parties could achieve similar cost savings by agreeing on a price formula which does not entail the disclosure of their production and transport costs. Consequently, in its current form the swap agreement does not fulfil the criteria of Article 101(3).

## 5. PURCHASING AGREEMENTS

### 5.1. Definition

194. This chapter focuses on agreements concerning the joint purchase of products. Joint purchasing can be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation (collectively referred to as 'joint purchasing arrangements'). Joint purchasing arrangements usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers. However, buying power may, under certain circumstances, also give rise to competition concerns.
195. Joint purchasing arrangements may involve both horizontal and vertical agreements. In these cases a two-step analysis is necessary. First, the horizontal agreements between the companies engaging in joint purchasing have to be assessed according to the principles described in these guidelines. If that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to competition concerns, a further assessment will be necessary to examine the relevant vertical agreements. The latter assessment will follow the rules of the Block Exemption Regulation on Vertical Restraints and the Guidelines on Vertical Restraints.
196. A common form of joint purchasing arrangement is an 'alliance', that is to say an association of undertakings formed by a group of retailers for the joint purchasing of products. Horizontal agreements concluded between the members of the alliance or decisions adopted by the alliance first have to be assessed as a horizontal co-operation agreement according to these guidelines. Only if that assessment does not reveal any competition concerns does it become relevant to assess the relevant vertical agreements between the alliance and an individual member thereof and between the alliance and suppliers. Those agreements are covered – subject to certain conditions – by the Block Exemption Regulation on Vertical Restraints. Vertical agreements not covered by that Block Exemption Regulation are not presumed to be illegal but require individual examination.

### 5.2. Relevant markets

197. There are two markets which may be affected by joint purchasing arrangements. First, the market or markets with which the joint purchasing arrangement is directly concerned, that is to say, the relevant purchasing market or markets. Secondly, the selling market or markets, that is to say, the market or markets downstream where the parties to the joint purchasing arrangement are active as sellers.
198. The definition of relevant purchasing markets follows the principles described in the Market Definition Notice and is based on the concept of substitutability to identify competitive constraints. The only difference from the definition of 'selling markets' is that substitutability has to be defined from the viewpoint of supply and not from the viewpoint of demand. In other words, the suppliers' alternatives are decisive in identifying the competitive constraints on purchasers. Those alternatives could be analysed, for instance, by examining the suppliers' reaction to a small but non-transitory price decrease. Once the market is defined, the market share can be calculated as the percentage of the purchases by the parties out of the total sales of the purchased product or products in the relevant market.
199. If the parties are, in addition, competitors on one or more selling markets, those markets are also relevant for the assessment. The selling markets have to be defined by applying the methodology described in the Market Definition Notice.

### 5.3. Assessment under Article 101(1)

#### 5.3.1. Main competition concerns

200. Joint purchasing arrangements may lead to restrictive effects on competition on the purchasing and/or downstream selling market or markets, such as increased prices, reduced output, product quality or variety, or innovation, market allocation, or anti-competitive foreclosure of other possible purchasers.
201. If downstream competitors purchase a significant part of their products together, their incentives for price competition on the selling market or markets may be considerably reduced. If the parties have a significant degree of market power (which does not necessarily amount to dominance) on the selling market or markets, the lower purchase prices achieved by the joint purchasing arrangement are likely not to be passed on to consumers.
202. If the parties have a significant degree of market power on the purchasing market (buying power) there is a risk that they may force suppliers to reduce the range or quality of products they produce, which may bring about restrictive effects on competition such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply.
203. Buying power of the parties to the joint purchasing arrangement could be used to foreclose competing purchasers by limiting their access to efficient suppliers. This is most likely if there are a limited number of suppliers and there are barriers to entry on the supply side of the upstream market.
204. In general, however, joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling market or markets.

#### 5.3.2. Restrictions of competition by object

205. Joint purchasing arrangements restrict competition by object if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation.
206. Agreements which involve the fixing of purchase prices can have the object of restricting competition within the meaning of Article 101(1) <sup>(1)</sup>. However, this does not apply where the parties to a joint purchasing arrangement agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products subject to the supply contract. In that case an assessment is required as to whether the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). In both scenarios the agreement on purchase prices will not be assessed separately, but in the light of the overall effects of the purchasing agreement on the market.

#### 5.3.3. Restrictive effects on competition

207. Joint purchasing arrangements which do not have as their object the restriction of competition must be analysed in their legal and economic context with regard to their actual and likely effects on competition. The analysis of the restrictive effects on competition generated by a joint purchasing arrangement must cover the negative effects on both the purchasing and the selling markets.

#### **Market power**

208. There is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, in most cases it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15 % on the purchasing market or markets as well as a combined market share not exceeding 15 % on the selling market or markets. In any event, if the parties' combined market shares do not exceed 15 % on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled.

<sup>(1)</sup> See Article 101(1)(a); Joined Cases T-217/03 and T-245/03, *French Beef*, paragraphs 83 *et seq.*; Case C-8/08, *T-Mobile Netherlands*, paragraph 37.

209. A market share above that threshold in one or both markets does not automatically indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition. A joint purchasing arrangement which does not fall within that safe harbour requires a detailed assessment of its effects on the market involving, but not limited to, factors such as market concentration and possible countervailing power of strong suppliers.
210. Buying power may, under certain circumstances, cause restrictive effects on competition. Anti-competitive buying power is likely to arise if a joint purchasing arrangement accounts for a sufficiently large proportion of the total volume of a purchasing market so that access to the market may be foreclosed to competing purchasers. A high degree of buying power may indirectly affect the output, quality and variety of products on the selling market.
211. In the analysis of whether the parties to a joint purchasing arrangement have buying power, the number and intensity of links (for example, other purchasing agreements) between the competitors in the market are relevant.
212. If, however, competing purchasers co-operate who are not active on the same relevant selling market (for example, retailers which are active in different geographic markets and cannot be regarded as potential competitors), the joint purchasing arrangement is unlikely to have restrictive effects on competition unless the parties have a position in the purchasing markets that is likely to be used to harm the competitive position of other players in their respective selling markets.

#### ***Collusive outcome***

213. Joint purchasing arrangements may lead to a collusive outcome if they facilitate the coordination of the parties' behaviour on the selling market. This can be the case if the parties achieve a high degree of commonality of costs through joint purchasing, provided the parties have market power and the market characteristics are conducive to coordination.
214. Restrictive effects on competition are more likely if the parties to the joint purchasing arrangement have a significant proportion of their variable costs in the relevant downstream market in common. This is, for instance, the case if retailers, which are active in the same relevant retail market or markets, jointly purchase a significant amount of the products they offer for resale. It may also be the case if competing manufacturers and sellers of a final product jointly purchase a high proportion of their input together.
215. The implementation of a joint purchasing arrangement may require the exchange of commercially sensitive information such as purchase prices and volumes. The exchange of such information may facilitate coordination with regard to sales prices and output and thus lead to a collusive outcome on the selling markets. Spill-over effects from the exchange of commercially sensitive information can, for example, be minimised where data is collated by a joint purchasing arrangement which does not pass on the information to the parties thereto.
216. Any negative effects arising from the exchange of information will not be assessed separately but in the light of the overall effects of the agreement. Whether the exchange of information in the context of a joint purchasing arrangement is likely to lead to restrictive effects on competition should be assessed according to the guidance given in Chapter 2. If the information exchange does not exceed the sharing of data necessary for the joint purchasing of the products by the parties to the joint purchasing arrangement, then even if the information exchange has restrictive effects on competition within the meaning of Article 101(1), the agreement is more likely to meet the criteria of Article 101(3) than if the exchange goes beyond what was necessary for the joint purchasing.

### **5.4. Assessment under Article 101(3)**

#### ***5.4.1. Efficiency gains***

217. Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale. Moreover, joint purchasing arrangements may give rise to qualitative efficiency gains by leading suppliers to innovate and introduce new or improved products on the markets.

5.4.2. *Indispensability*

218. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a purchasing agreement do not meet the criteria of Article 101(3). An obligation to purchase exclusively through the co-operation may, in certain cases, be indispensable to achieve the necessary volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case.

5.4.3. *Pass-on to consumers*

219. Efficiency gains, such as cost efficiencies or qualitative efficiencies in the form of the introduction of new or improved products on the market, attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects of competition caused by the joint purchasing arrangement. Hence, cost savings or other efficiencies that only benefit the parties to the joint purchasing arrangement will not suffice. Cost savings need to be passed on to consumers, that is to say, the parties' customers. To take a notable example, this pass-on may occur through lower prices on the selling markets. Lower purchasing prices resulting from the mere exercise of buying power are not likely to be passed on to consumers if the purchasers together have market power on the selling markets, and thus do not meet the criteria of Article 101(3). Moreover, the higher the market power of the parties on the selling market or markets the less likely they will pass on the efficiency gains to consumers to an extent that would outweigh the restrictive effects on competition.

5.4.4. *No elimination of competition*

220. The criteria of Article 101(3) cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. That assessment has to cover both purchasing and selling markets.

5.5. **Examples**

221. Joint purchasing by small companies with moderate combined market shares

Example 1

**Situation:** 150 small retailers conclude an agreement to form a joint purchasing organisation. They are obliged to purchase a minimum volume through the organisation, which accounts for roughly 50 % of each retailer's total costs. The retailers can purchase more than the minimum volume through the organisation, and they may also purchase outside the co-operation. They have a combined market share of 23 % on both the purchasing and the selling markets. Company A and Company B are their two large competitors. Company A has a 25 % share on both the purchasing and selling markets, Company B 35 %. There are no barriers which would prevent the remaining smaller competitors from also forming a purchasing group. The 150 retailers achieve substantial cost savings by virtue of purchasing jointly through the purchasing organisation.

**Analysis:** The retailers have a moderate market position on the purchasing and the selling markets. Furthermore, the co-operation brings about some economies of scale. Even though the retailers achieve a high degree of commonality of costs, they are unlikely to have market power on the selling market due to the market presence of Companies A and B, which are both individually larger than the joint purchasing organisation. Consequently, the retailers are unlikely to coordinate their behaviour and reach a collusive outcome. The formation of the joint purchasing organisation is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1).

222. Commonality of costs and market power on the selling market

Example 2

**Situation:** Two supermarket chains conclude an agreement to jointly purchase products which account for roughly 80 % of their variable costs. On the relevant purchasing markets for the



different categories of products the parties have combined market shares between 25 % and 40 %. On the relevant selling market they have a combined market share of 60 %. There are four other significant retailers each with a 10 % market share. Market entry is not likely.

**Analysis:** It is likely that this purchasing agreement would give the parties the ability to coordinate their behaviour on the selling market, thereby leading to a collusive outcome. The parties have market power on the selling market and the purchasing agreement gives rise to a significant commonality of costs. Moreover, market entry is unlikely. The incentive for the parties to coordinate their behaviour would be reinforced if their cost structures were already similar prior to concluding the agreement. Moreover, similar margins of the parties would further increase the risk of a collusive outcome. This agreement also creates the risk that by the parties' withholding demand and, consequently, as a result of reduced quantity, downstream selling prices would increase. Hence, the purchasing agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even though the agreement is very likely to give rise to efficiency gains in the form of cost savings, due to the parties' significant market power on the selling market, these are unlikely to be passed on to consumers to an extent that would outweigh the restrictive effects on competition. Therefore, the purchasing agreement is unlikely to fulfil the criteria of Article 101(3).

#### 223. Parties active in different geographic markets

##### Example 3

**Situation:** Six large retailers, which are each based in a different Member State, form a purchasing group to buy several branded durum wheat flour-based products jointly. The parties are allowed to purchase other similar branded products outside the co-operation. Moreover, five of them also offer similar private label products. The members of the purchasing group have a combined market share of approximately 22 % on the relevant purchasing market, which is Union-wide. In the purchasing market there are three other large players of similar size. Each of the parties to the purchasing group has a market share between 20 % and 30 % on the national selling markets on which they are active. None of them is active in a Member State where another member of the group is active. The parties are not potential entrants to each other's markets.

**Analysis:** The purchasing group will be able to compete with the other existing major players on the purchasing market. The selling markets are much smaller (in turnover and geographic scope) than the Union-wide purchasing market and in those markets some of the members of the group may have market power. Even if the members of the purchasing group have a combined market share of more than 15 % on the purchasing market, the parties are unlikely to coordinate their conduct and collude on the selling markets since they are neither actual nor potential competitors on the downstream markets. Consequently, the purchasing group is not likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

#### 224. Information exchange

##### Example 4

**Situation:** Three competing manufacturers A, B and C entrust an independent joint purchasing organisation with the purchase of product Z, which is an intermediary product used by the three parties for the production of the final product X. The costs of Z are not a significant cost factor for the production of X. The joint purchasing organisation does not compete with the parties on the selling market for X. All information necessary for the purchases (for example quality specifications, quantities, delivery dates, maximum purchase prices) is only disclosed to the joint purchasing organisation, not to the other parties. The joint purchasing organisation agrees the purchasing prices with the suppliers. A, B and C have a combined market share of 30 % on each of the purchasing and selling markets. They have six competitors in the purchasing and selling markets, two of which have a market share of 20 %.

**Analysis:** Since there is no direct information exchange between the parties, the transfer of the information necessary for the purchases to the joint purchasing organisation is unlikely to lead to a collusive outcome. Consequently, the exchange of information is unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1).

## 6. AGREEMENTS ON COMMERCIALISATION

### 6.1. Definition

225. Commercialisation agreements involve co-operation between competitors in the selling, distribution or promotion of their substitute products. This type of agreement can have widely varying scope, depending on the commercialisation functions which are covered by the co-operation. At one end of the spectrum, joint selling agreements may lead to a joint determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising.
226. An important category of those more limited agreements is distribution agreements. The Block Exemption Regulation on Vertical Restraints and Guidelines on Vertical Restraints generally cover distribution agreements unless the parties to the agreement are actual or potential competitors. If the parties are competitors, the Block Exemption Regulation on Vertical Restraints only covers non-reciprocal vertical agreements between competitors, if (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level or, (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and does not provide competing services at the level of trade where it purchases the contract services <sup>(1)</sup>.
227. If competitors agree to distribute their substitute products on a reciprocal basis (in particular if they do so on different geographic markets) there is a possibility in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to a collusive outcome. The same can be true for non-reciprocal agreements between competitors. Reciprocal agreements and non-reciprocal agreements between competitors thus have first to be assessed according to the principles set out in this Chapter. If that assessment leads to the conclusion that co-operation between competitors in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included in such agreements. That second step of the assessment should be based on the principles set out in the Guidelines on Vertical Restraints.
228. A further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another type of co-operation upstream, such as joint production or joint purchasing. When analysing commercialisation agreements combining different stages of co-operation it is necessary to determine the centre of gravity of the co-operation in accordance with paragraphs 13 and 14.

### 6.2. Relevant markets

229. To assess the competitive relationship between the parties, the relevant product and geographic market or markets directly concerned by the co-operation (that is to say, the market or markets to which the products subject to the agreement belong) have to be defined. As a commercialisation agreement in one market may also affect the competitive behaviour of the parties in a neighbouring market which is closely related to the market directly concerned by the co-operation, any such neighbouring market also needs to be defined. The neighbouring market may be horizontally or vertically related to the market where the co-operation takes place.

<sup>(1)</sup> Article 2(4) of the Block Exemption Regulation on Vertical Restraints.

### 6.3. Assessment under Article 101(1)

#### 6.3.1. Main competition concerns

230. Commercialisation agreements can lead to restrictions of competition in several ways. First, and most obviously, commercialisation agreements may lead to price fixing.
231. Secondly, commercialisation agreements may also facilitate output limitation, because the parties may decide on the volume of products to be put on the market, therefore restricting supply.
232. Thirdly, commercialisation agreements may become a means for the parties to divide the markets or to allocate orders or customers, for example in cases where the parties' production plants are located in different geographic markets or when the agreements are reciprocal.
233. Finally, commercialisation agreements may also lead to an exchange of strategic information relating to aspects within or outside the scope of the co-operation or to commonality of costs – in particular with regard to agreements not encompassing price fixing – which may result in a collusive outcome.

#### 6.3.2. Restrictions of competition by object

234. Price fixing is one of the major competition concerns arising from commercialisation agreements between competitors. Agreements limited to joint selling generally have the object of coordinating the pricing policy of competing manufacturers or service providers. Such agreements may not only eliminate price competition between the parties on substitute products but may also restrict the total volume of products to be delivered by the parties within the framework of a system for allocating orders. Such agreements are therefore likely to restrict competition by object.
235. That assessment does not change if the agreement is non-exclusive (that is to say, where the parties are free to sell individually outside the agreement), as long as it can be concluded that the agreement will lead to an overall coordination of the prices charged by the parties.
236. Another specific competition concern related to distribution arrangements between parties which are active in different geographic markets is that they can be an instrument of market partitioning. If the parties use a reciprocal distribution agreement to distribute each other's products in order to eliminate actual or potential competition between them by deliberately allocating markets or customers, the agreement is likely to have as its object a restriction of competition. If the agreement is not reciprocal, the risk of market partitioning is less pronounced. It is necessary, however, to assess whether the non-reciprocal agreement constitutes the basis for a mutual understanding to avoid entering each other's markets.

#### 6.3.3. Restrictive effects on competition

237. A commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the co-operation, for example, because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually. As the parties to the consortia arrangement are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1).
238. Similarly, not all reciprocal distribution agreements have as their object a restriction of competition. Depending on the facts of the case at hand, some reciprocal distribution agreements may, nevertheless, have restrictive effects on competition. The key issue in assessing an agreement of this type is whether the agreement in question is objectively necessary for the parties to enter each other's markets. If it is,

the agreement does not create competition problems of a horizontal nature. However, if the agreement reduces the decision-making independence of one of the parties with regard to entering the other parties' market or markets by limiting its incentives to do so, it is likely to give rise to restrictive effects on competition. The same reasoning applies to non-reciprocal agreements, where the risk of restrictive effects on competition is, however, less pronounced.

239. Moreover, a distribution agreement can have restrictive effects on competition if it contains vertical restraints, such as restrictions on passive sales, resale price maintenance, etc.

#### ***Market power***

240. Commercialisation agreements between competitors can only have restrictive effects on competition if the parties have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 15 %. In any event, if the parties' combined market share does not exceed 15 % it is likely that the conditions of Article 101(3) are fulfilled.
241. If the parties' combined market share is greater than 15 %, their agreement will fall outside the safe harbour of paragraph 240 and thus the likely impact of the joint commercialisation agreement on the market must be assessed.

#### ***Collusive outcome***

242. A joint commercialisation agreement that does not involve price fixing is also likely to give rise to restrictive effects on competition if it increases the parties' commonality of variable costs to a level which is likely to lead to a collusive outcome. This is likely to be the case for a joint commercialisation agreement if prior to the agreement the parties already have a high proportion of their variable costs in common as the additional increment (that is to say, the commercialisation costs of the product subject to the agreement) can tip the balance towards a collusive outcome. Conversely, if the increment is large, the risk of a collusive outcome may be high even if the initial level of commonality of costs is low.
243. The likelihood of a collusive outcome depends on the parties' market power and the characteristics of the relevant market. Commonality of costs can only increase the risk of a collusive outcome if the parties have market power and if the commercialisation costs constitute a large proportion of the variable costs related to the products concerned. This is, for example, not the case for homogeneous products for which the highest cost factor is production. However, commonality of commercialisation costs increases the risk of a collusive outcome if the commercialisation agreement concerns products which entail costly commercialisation, for example, high distribution or marketing costs. Consequently, joint advertising or joint promotion agreements can also give rise to restrictive effects on competition if those costs constitute a significant cost factor.
244. Joint commercialisation generally involves the exchange of sensitive commercial information, particularly on marketing strategy and pricing. In most commercialisation agreements, some degree of information exchange is required in order to implement the agreement. It is therefore necessary to verify whether the information exchange can give rise to a collusive outcome with regard to the parties' activities within and outside the co-operation. Any negative effects arising from the exchange of information will not be assessed separately but in the light of the overall effects of the agreement.
245. For example, where the parties to a joint advertising agreement exchange pricing information, this may lead to a collusive outcome with regard to the sale of the jointly advertised products. In any event, the exchange of such information in the context of a joint advertising agreement goes beyond what would be necessary to implement that agreement. The likely restrictive effects on competition of information exchange in the context of commercialisation agreements will depend on the characteristics of the market and the data shared, and should be assessed in the light of the guidance given in Chapter 2.

#### 6.4. Assessment under Article 101(3)

##### 6.4.1. Efficiency gains

246. Commercialisation agreements can give rise to significant efficiency gains. The efficiencies to be taken into account when assessing whether a commercialisation agreement fulfils the criteria of Article 101(3) will depend on the nature of the activity and the parties to the co-operation. Price fixing can generally not be justified, unless it is indispensable for the integration of other marketing functions, and this integration will generate substantial efficiencies. Joint distribution can generate significant efficiencies, stemming from economies of scale or scope, especially for smaller producers.
247. In addition, the efficiency gains must not be savings which result only from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. A reduction of transport cost which is only a result of customer allocation without any integration of the logistical system can therefore not be regarded as an efficiency gain within the meaning of Article 101(3).
248. Efficiency gains must be demonstrated by the parties to the agreement. An important element in this respect would be the contribution by the parties of significant capital, technology, or other assets. Cost savings through reduced duplication of resources and facilities can also be accepted. However, if the joint commercialisation represents no more than a sales agency without any investment, it is likely to be a disguised cartel and as such unlikely to fulfil the conditions of Article 101(3).

##### 6.4.2. Indispensability

249. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a commercialisation agreement do not fulfil the criteria of Article 101(3). The question of indispensability is especially important for those agreements involving price fixing or market allocation, which can only under exceptional circumstances be considered indispensable.

##### 6.4.3. Pass-on to consumers

250. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the commercialisation agreement. This can happen in the form of lower prices or better product quality or variety. The higher the market power of the parties, however, the less likely it is that efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition. Where the parties have a combined market share of below 15 %, it is likely that any demonstrated efficiency gains generated by the agreement will be sufficiently passed on to consumers.

##### 6.4.4. No elimination of competition

251. The criteria of Article 101(3) cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This has to be analysed in the relevant market to which the products subject to the co-operation belong and in possible spill-over markets.

#### 6.5. Examples

252. Joint commercialisation necessary to enter a market

##### Example 1

**Situation:** Four companies providing laundry services in a large city close to the border of another Member State, each with a 3 % market share of the overall laundry market in that city, agree to create a joint marketing arm for the selling of laundry services to institutional customers (that is to say, hotels, hospitals and offices), whilst keeping their independence and freedom to compete for local, individual clients. In view of the new segment of demand (the institutional customers) they develop a common brand name, a common price and common standard terms including, inter alia, a maximum period of 24 hours before deliveries and schedules for delivery. They set up a common

call centre where institutional clients can request their collection and/or delivery service. They hire a receptionist (for the call centre) and several drivers. They further invest in vans for dispatching, and in brand promotion, to increase their visibility. The agreement does not fully reduce their individual infrastructure costs (since they are keeping their own premises and still compete with each other for the individual local clients), but it increases their economies of scale and allows them to offer a more comprehensive service to other types of clients, which includes longer opening hours and dispatching to a wider geographic coverage. In order to ensure the viability of the project, it is indispensable that all four of them enter into the agreement. The market is very fragmented, with no individual competitor having more than 15 % market share.

**Analysis:** Although the joint market share of the parties is below 15 %, the fact that the agreement involves price fixing means that Article 101(1) could apply. However, the parties would not have been in a position to enter the market for providing laundry services to institutional customers, either individually or in co-operation with a fewer number of parties than the four currently taking part in the agreement. As such, the agreement would not create competition concerns, irrespective of the price-fixing restriction, which in this case can be considered as indispensable to the promotion of the common brand and the success of the project.

253. Commercialisation agreement by more parties than necessary to enter a market

Example 2

**Situation:** The same facts as in Example 1, paragraph 252, apply with one main difference: in order to ensure the viability of the project, the agreement could have been implemented by only three of the parties (instead of the four actually taking part in the co-operation).

**Analysis:** Although the joint market share of the parties is below 15 %, the fact that the agreement involves price fixing and could have been carried out by fewer than the four parties means that Article 101(1) applies. The agreement thus needs to be assessed under Article 101(3). The agreement gives rise to efficiency gains as the parties are now able to offer improved services for a new category of customers on a larger scale (which they would not otherwise have been able to service individually). In the light of the parties' combined market share of below 15 %, it is likely that they will sufficiently pass-on any efficiency gains to consumers. It is further necessary to consider whether the restrictions imposed by the agreement are indispensable to achieve the efficiencies and whether the agreement eliminates competition. Given that the aim of the agreement is to provide a more comprehensive service (including dispatch, which was not offered before) to an additional category of customers, under a single brand with common standard terms, the price fixing can be considered as indispensable to the promotion of the common brand and, consequently, the success of the project and the resulting efficiencies. Additionally, taking into account the market fragmentation, the agreement will not eliminate competition. The fact that there are four parties to the agreement (instead of the three that would have been strictly necessary) allows for increased capacity and contributes to simultaneously fulfilling the demand of several institutional customers in compliance with the standard terms (that is to say, meeting maximum delivery time terms). As such, the efficiency gains are likely to outweigh the restrictive effects arising from the reduction of competition between the parties and the agreement is likely to fulfil the conditions of Article 101(3).

254. Joint internet platform

Example 3

**Situation:** A number of small specialty shops throughout a Member State join an electronic web-based platform for the promotion, sale and delivery of gift fruit baskets. There are a number of competing web-based platforms. By means of a monthly fee, they share the running costs of the platform and jointly invest in brand promotion. Through the webpage, where a wide range of different types of gift baskets are offered, customers order (and pay for) the type of gift basket they

want to be delivered. The order is then allocated to the specialty shop closest to the address of delivery. The shop individually bears the costs of composing the gift basket and delivering it to the client. It reaps 90 % of the final price, which is set by the web-based platform and uniformly applies to all participating specialty shops, whilst the remaining 10 % is used for the common promotion and the running costs of the web-based platform. Apart from the payment of the monthly fee, there are no further restrictions for specialty shops to join the platform, throughout the national territory. Moreover, specialty shops having their own company website are also able to (and in some cases do) sell gift fruit baskets on the internet under their own name and thus can still compete among themselves outside the co-operation. Customers purchasing over the web-based platform are guaranteed same day delivery of the fruit baskets and they can also choose a delivery time convenient to them.

**Analysis:** Although the agreement is of a limited nature, since it only covers the joint selling of a particular type of product through a specific marketing channel (the web-based platform), since it involves price-fixing, it is likely to restrict competition by object. The agreement therefore needs to be assessed under Article 101(3). The agreement gives rise to efficiency gains such as greater choice and higher quality service and the reduction of search costs, which benefit consumers and are likely to outweigh the restrictive effects on competition the agreement brings about. Given that the specialty stores taking part in the co-operation are still able to operate individually and to compete one with another, both through their shops and the internet, the price-fixing restriction could be considered as indispensable for the promotion of the product (since when buying through the web-based platform consumers do not know where they are buying the gift basket from and do not want to deal with a multitude of different prices) and the ensuing efficiency gains. In the absence of other restrictions, the agreement fulfils the criteria of Article 101(3). Moreover, as other competing web-based platforms exist and the parties continue to compete with each other, through their shops or over the internet, competition will not be eliminated.

#### 255. Sales joint venture

##### Example 4

**Situation:** Companies A and B, located in two different Member States, produce bicycle tyres. They have a combined market share of 14 % on the Union-wide market for bicycle tyres. They decide to set up a (non full-function) sales joint venture for marketing the tyres to bicycle producers and agree to sell all their production through the joint venture. The production and transport infrastructure remains separate within each party. The parties claim considerable efficiency gains stem from the agreement. Such gains mainly relate to increased economies of scale, being able to fulfil the demands of their existing and potential new customers and better competing with imported tyres produced in third countries. The joint venture negotiates the prices and allocates orders to the closest production plant, as a way to rationalise transport costs when further delivering to the customer.

**Analysis:** Even though the combined market share of the parties is below 15 %, the agreement falls under Article 101(1). It restricts competition by object since it involves customer allocation and the setting of prices by the joint venture. The claimed efficiencies deriving from the agreement do not result from the integration of economic activities or from common investment. The joint venture would have a very limited scope and would only serve as an interface for allocating orders to the production plants. It is therefore unlikely that any efficiency gains would be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition brought about by the agreement. Thus, the conditions of Article 101(3) would not be fulfilled.



256. Non-poaching clause in agreement on outsourcing of services

Example 5

**Situation:** Companies A and B are competing providers of cleaning services for commercial premises. Both have a market share of 15 %. There are several other competitors with market shares between 10 and 15 %. A has taken the (unilateral) decision to only focus on large customers in the future as servicing large and small customers has proved to require a somewhat different organisation of the work. Consequently, Company A has decided to no longer enter into contracts with new small customers. In addition, Companies A and B enter into an outsourcing agreement whereby Company B would directly provide cleaning services to Company A's existing small customers (which represent 1/3 of its customer base). At the same time, Company A is keen not to lose the customer relationship with those small customers. Hence, Company A will continue to keep its contractual relationships with the small customers but the direct provision of the cleaning services will be done by Company B. In order to implement the outsourcing agreement, Company A will necessarily need to provide Company B with the identities of Company A's small customers which are subject to the agreement. As Company A is afraid that Company B may try to poach those customers by offering cheaper direct services (thereby bypassing Company A), Company A insists that the outsourcing agreement contain a 'non-poaching clause'. According to that clause, Company B may not contact the small customers falling under the outsourcing agreements with a view to providing direct services to them. In addition, Companies A and B agree that Company B may not even provide direct services to those customers if Company B is approached by them. Without the 'non-poaching clause' Company A would not enter into an outsourcing agreement with Company B or any other company.

**Analysis:** The outsourcing agreement removes Company B as an independent supplier of cleaning services for Company A's small customers as they will no longer be able to enter into a direct contractual relationship with Company B. However, those customers only represent 1/3 of Company A's customer base, that is to say, 5 % of the market. They will still be able to turn to Company A and Company B's competitors, which represent 70 % of the market. Hence, the outsourcing agreement will not enable Company A to profitably raise the prices charged to the customers subject to the outsourcing agreement. In addition, the outsourcing agreement is not likely to give rise to a collusive outcome as Companies A and B only have a combined market share of 30 % and they are faced with several competitors that have market shares similar to Company A's and Company B's individual market shares. Moreover, the fact that servicing large and small customers is somewhat different minimises the risk of spill-over effects from the outsourcing agreement to Company A's and Company B's behaviour when competing for large customers. Consequently, the outsourcing agreement is not likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

## 7. STANDARDISATION AGREEMENTS

### 7.1. Definition

#### *Standardisation agreements*

257. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply<sup>(1)</sup>. Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in product or services markets where compatibility and interoperability with other products or systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard. Agreements setting out standards on the environmental performance of products or production processes are also covered by this chapter.

<sup>(1)</sup> Standardisation can take different forms, ranging from the adoption of consensus based standards by the recognised European or national standards bodies, through consortia and fora, to agreements between independent companies.

258. The preparation and production of technical standards as part of the execution of public powers are not covered by these guidelines <sup>(1)</sup>. The European standardisation bodies recognised under Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and on rules on Information Society services <sup>(2)</sup> are subject to competition law to the extent that they can be considered to be an undertaking or an association of undertakings within the meaning of Articles 101 and 102 <sup>(3)</sup>. Standards related to the provision of professional services, such as rules of admission to a liberal profession, are not covered by these guidelines.

#### **Standard terms**

259. In certain industries companies use standard terms and conditions of sale or purchase elaborated by a trade association or directly by the competing companies ('standard terms') <sup>(4)</sup>. Such standard terms are covered by these guidelines to the extent that they establish standard conditions of sale or purchase of goods or services between competitors and consumers (and not the conditions of sale or purchase between competitors) for substitute products. When such standard terms are widely used within an industry, the conditions of purchase or sale used in the industry may become *de facto* aligned <sup>(5)</sup>. Examples of industries in which standard terms play an important role are the banking (for example, bank account terms) and insurance sectors.
260. Standard terms elaborated individually by a company solely for its own use when contracting with its suppliers or customers are not horizontal agreements and are therefore not covered by these guidelines.

### **7.2. Relevant markets**

261. Standardisation agreements may produce their effects on four possible markets, which will be defined according to the Market Definition Notice. First, standard-setting may have an impact on the product or service market or markets to which the standard or standards relates. Second, where the standard-setting involves the selection of technology and where the rights to intellectual property are marketed separately from the products to which they relate, the standard can have effects on the relevant technology market <sup>(6)</sup>. Third, the market for standard-setting may be affected if different standard-setting bodies or agreements exist. Fourth, where relevant, a distinct market for testing and certification may be affected by standard-setting.
262. As regards standard terms, the effects are, in general, felt on the downstream market where the companies using the standard terms compete by selling their product to their customers.

### **7.3. Assessment under Article 101(1)**

#### **7.3.1. Main competition concerns**

##### **Standardisation agreements**

263. Standardisation agreements usually produce significant positive economic effects <sup>(7)</sup>, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally

<sup>(1)</sup> See Case C-113/07, *SELEX*, [2009] ECR I-2207, paragraph 92.

<sup>(2)</sup> OJ L 204, 21.7.1998, p. 37.

<sup>(3)</sup> See judgment of 12 May 2010 in Case T-432/05, *EMC Development AB v. Commission*, not yet reported.

<sup>(4)</sup> Such standard terms might cover only a very small part of the clauses contained in the final contract or a large part thereof.

<sup>(5)</sup> This refers to a situation where (legally non-binding) standard terms in practice are used by most of the industry and/or for most aspects of the product/service thus leading to a limitation or even lack of consumer choice.

<sup>(6)</sup> See Chapter 3 on R&D agreements.

<sup>(7)</sup> See also paragraph 308.

increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers).

264. Standard-setting can, however, in specific circumstances, also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard.
265. First, if companies were to engage in anti-competitive discussions in the context of standard-setting, this could reduce or eliminate price competition in the markets concerned, thereby facilitating a collusive outcome on the market <sup>(1)</sup>.
266. Second, standards that set detailed technical specifications for a product or service may limit technical development and innovation. While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen and the standard has been set, competing technologies and companies may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring that a particular technology is used exclusively for a standard or preventing the development of other technologies by obliging the members of the standard-setting organisation to exclusively use a particular standard, may lead to the same effect. The risk of limitation of innovation is increased if one or more companies are unjustifiably excluded from the standard-setting process.
267. In the context of standards involving intellectual property rights ('IPR') <sup>(2)</sup>, three main groups of companies with different interests in standard-setting can be distinguished in the abstract <sup>(3)</sup>. First, there are upstream-only companies that solely develop and market technologies. Their only source of income is licensing revenue and their incentive is to maximise their royalties. Secondly, there are downstream-only companies that solely manufacture products or offer services based on technologies developed by others and do not hold relevant IPR. Royalties represent a cost for them, and not a source of revenue, and their incentive is to reduce or avoid royalties. Finally, there are vertically integrated companies that both develop technology and sell products. They have mixed incentives. On the one hand, they can draw licensing revenue from their IPR. On the other hand, they may have to pay royalties to other companies holding IPR essential to the standard. They might therefore cross-license their own essential IPR in exchange for essential IPR held by other companies.
268. Third, standardisation may lead to anti-competitive results by preventing certain companies from obtaining effective access to the results of the standard-setting process (that is to say, the specification and/or the essential IPR for implementing the standard). If a company is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect. A system where potentially relevant IPR is disclosed up-front may increase the likelihood of effective access being granted to the standard since it allows the participants to identify which technologies are covered by IPR and which are not. This enables the participants to both factor in the potential effect on the final price of the result of the standard (for example choosing a technology without IPR is likely to have a positive effect on the final price) and to verify with the IPR holder whether they would be willing to license if their technology is included in the standard.

<sup>(1)</sup> Depending on the circle of participants in the standard-setting process, restrictions can occur either on the supplier or on the purchaser side of the market for the standardised product.

<sup>(2)</sup> In the context of this chapter IPR in particular refers to patent(s) (excluding non-published patent applications). However, in case any other type of IPR in practice gives the IPR holder control over the use of the standard the same principles should be applied.

<sup>(3)</sup> In practice, many companies use a mix of these business models.

269. Intellectual property laws and competition laws share the same objectives <sup>(1)</sup> of promoting innovation and enhancing consumer welfare. IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro-competitive. However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard-setting, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the company could thereby control the product or service market to which the standard relates. This in turn could allow companies to behave in anti-competitive ways, for example by 'holding-up' users after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive <sup>(2)</sup> royalty fees thereby preventing effective access to the standard. However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis.

#### **Standard terms**

270. Standard terms can give rise to restrictive effects on competition by limiting product choice and innovation. If a large part of an industry adopts the standard terms and chooses not to deviate from them in individual cases (or only deviates from them in exceptional cases of strong buyer-power), customers might have no option other than to accept the conditions in the standard terms. However, the risk of limiting choice and innovation is only likely in cases where the standard terms define the scope of the end-product. As regards classical consumer goods, standard terms of sale generally do not limit innovation of the actual product or product quality and variety.
271. In addition, depending on their content, standard terms might risk affecting the commercial conditions of the final product. In particular, there is a serious risk that standard terms relating to price would restrict price competition.
272. Moreover, if the standard terms become industry practice, access to them might be vital for entry into the market. In such cases, refusing access to the standard terms could risk causing anti-competitive foreclosure. As long as the standard terms remain effectively open for use for anyone that wishes to have access to them, they are unlikely to give rise to anti-competitive foreclosure.

#### **7.3.2. Restrictions of competition by object**

##### **Standardisation agreements**

273. Agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. For instance, an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard or where the producers of the incumbent product collude to exclude new technology from an already existing standard <sup>(3)</sup> would fall into this category.

<sup>(1)</sup> See Technology Transfer Guidelines, paragraph 7.

<sup>(2)</sup> High royalty fees can only be qualified as excessive if the conditions for an abuse of a dominant position as set out in Article 102 of the Treaty and the case-law of the Court of Justice of the European Union are fulfilled. See for example Case 27/76, *United Brands*, [1978] ECR 207.

<sup>(3)</sup> See for example Commission Decision in Case IV/35.691, *Pre-insulated pipes*, OJ L 24, 30.1.1999, p. 1, where part of the infringement of Article 101 consisted in 'using norms and standards in order to prevent or delay the introduction of new technology which would result in price reductions' (paragraph 147).

274. Any agreements to reduce competition by using the disclosure of most restrictive licensing terms prior to the adoption of a standard as a cover to jointly fix prices either of downstream products or of substitute IPR or technology will constitute restrictions of competition by object <sup>(1)</sup>.

#### **Standard terms**

275. Agreements that use standard terms as part of a broader restrictive agreement aimed at excluding actual or potential competitors also restrict competition by object. An example would be where a trade association does not allow a new entrant access to its standards terms, the use of which is vital to ensure entry to the market.
276. Any standard terms containing provisions which directly influence the prices charged to customers (that is to say, recommended prices, rebates, etc.) would constitute a restriction of competition by object.

#### *7.3.3. Restrictive effects on competition*

##### **Standardisation agreements**

##### **Agreements normally not restrictive of competition**

277. Standardisation agreements which do not restrict competition by object must be analysed in their legal and economic context with regard to their actual and likely effect on competition. In the absence of market power <sup>(2)</sup>, a standardisation agreement is not capable of producing restrictive effects on competition. Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards.
278. For those standard-setting agreements which risk creating market power, paragraphs 280 to 286 set out the conditions under which such agreements would normally fall outside the scope of Article 101(1).
279. The non-fulfilment of any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101(1). However, it will necessitate a self-assessment to establish whether the agreement falls under Article 101(1) and, if so, if the conditions of Article 101(3) are fulfilled. In this context, it is recognised that there exist different models for standard-setting and that competition within and between those models is a positive aspect of a market economy. Therefore, standard-setting organisations remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 280 to 286.
280. Where participation in standard-setting is **unrestricted** and the procedure for adopting the standard in question is **transparent**, standardisation agreements which contain **no obligation to comply** <sup>(3)</sup> with the standard and provide **access to the standard on fair, reasonable and non-discriminatory terms** will normally not restrict competition within the meaning of Article 101(1).
281. In particular, to ensure **unrestricted participation** the rules of the standard-setting organisation would need to guarantee that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard. The standard-setting organisations would also need to have objective and non-discriminatory procedures for allocating voting rights as well as, if relevant, objective criteria for selecting the technology to be included in the standard.

<sup>(1)</sup> This paragraph should not prevent unilateral ex ante disclosures of most restrictive licensing terms as described in paragraph 299. It also does not prevent patent pools created in accordance with the principles set out in the Technology Transfer Guidelines or the decision to license IPR essential to a standard on royalty-free terms as set out in this Chapter.

<sup>(2)</sup> See by analogy paragraph 39 *et seq.* As regards market shares see also paragraph 296.

<sup>(3)</sup> See also paragraph 293 in this regard.

282. With respect to **transparency**, the relevant standard-setting organisation would need to have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.
283. Furthermore, the standard-setting organisation's rules would need to ensure effective **access to the standard on fair, reasonable and non discriminatory terms** <sup>(1)</sup>.
284. In the case of a standard involving IPR, **a clear and balanced IPR policy** <sup>(2)</sup>, **adapted to the particular industry** and the needs of the standard-setting organisation in question, increases the likelihood that the implementers of the standard will be granted effective access to the standards elaborated by that standard-setting organisation.
285. In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('**FRAND commitment**') <sup>(3)</sup>. That commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any company to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller.
286. Moreover, the IPR policy would need to require **good faith disclosure**, by participants, of their IPR that might be essential for the implementation of the standard under development. This would enable the industry to make an informed choice of technology and thereby assist in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on ongoing disclosure as the standard develops and on reasonable endeavours to identify IPR reading on the potential standard <sup>(4)</sup>. It is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology (without identifying specific IPR claims or applications for IPR). Since the risks with regard to effective access are not the same in the case of a standard-setting organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.

#### **FRAND Commitments**

287. FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees.
288. Compliance with Article 101 by the standard-setting organisation does not require the standard-setting organisation to verify whether licensing terms of participants fulfil the FRAND commitment. Participants will have to assess for themselves whether the licensing terms and in particular the fees they charge fulfil the FRAND commitment. Therefore, when deciding whether to commit to FRAND for a particular IPR, participants will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees.

<sup>(1)</sup> For example effective access should be granted to the specification of the standard.

<sup>(2)</sup> As specified in paragraphs 285 and 286.

<sup>(3)</sup> It should be noted that FRAND can also cover royalty-free licensing.

<sup>(4)</sup> To obtain the sought after result a good faith disclosure does not need to go as far as to require participants to compare their IPR against the potential standard and issue a statement positively concluding that they have no IPR reading on the potential standard.

289. In case of a dispute, the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR <sup>(1)</sup>. In general, there are various methods available to make this assessment. In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents. Instead, it may be possible to compare the licensing fees charged by the company in question for the relevant patents in a competitive environment before the industry has been locked into the standard (*ex ante*) with those charged after the industry has been locked in (*ex post*). This assumes that the comparison can be made in a consistent and reliable manner <sup>(2)</sup>.
290. Another method could be to obtain an independent expert assessment of the objective centrality and essentiality to the standard at issue of the relevant IPR portfolio. In an appropriate case, it may also be possible to refer to *ex ante* disclosures of licensing terms in the context of a specific standard-setting process. This also assumes that the comparison can be made in a consistent and reliable manner. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive.
291. However, it should be emphasised that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts.

#### ***Effects based assessment for standardisation agreements***

292. The assessment of each standardisation agreement must take into account the likely effects of the standard on the markets concerned. The following considerations apply to all standardisation agreements that depart from the principles as set out in paragraphs 280 to 286.
293. Whether standardisation agreements may give rise to restrictive effects on competition may depend on whether the members of a standard-setting organisation remain **free to develop alternative standards or products** that do not comply with the agreed standard <sup>(3)</sup>. For example, if the standard-setting agreement binds the members to only produce products in compliance with the standard, the risk of a likely negative effect on competition is significantly increased and could in certain circumstances give rise to a restriction of competition by object <sup>(4)</sup>. In the same vein, standards only covering minor aspects or parts of the end-product are less likely to lead to competition concerns than more comprehensive standards.
294. The assessment whether the agreement restricts competition will also focus on **access to the standard**. Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible, or only accessible on discriminatory terms, for members or third parties (that is to say, non-members of the relevant standard-setting organisation) this may discriminate or foreclose or segment markets according to their geographic scope of application and thereby is likely to restrict competition. However, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition.

<sup>(1)</sup> See Case 27/76, *United Brands*, paragraph 250; see also Case C-385/07 P, *Der Grüne Punkt – Duales System Deutschland GmbH*, [2009] ECR I-6155, paragraph 142.

<sup>(2)</sup> See Case 395/87, *Ministère public v Jean-Louis Tournier*, [1989] ECR 2521, paragraph 38; Joined Cases 110/88, 241/88 and 242/88, *Francois Lucazeau v SACEM*, [1989] ECR 2811, paragraph 33.

<sup>(3)</sup> See Commission Decision in Case IV/29/151, *Philips/VCR*, OJ L 47, 18.2.1978, p. 42, paragraph 23: 'As these standards were for the manufacture of VCR equipment, the parties were obliged to manufacture and distribute only cassettes and recorders conforming to the VCR system licensed by Philips. They were prohibited from changing to manufacturing and distributing other video cassette systems ... This constituted a restriction of competition under Article 85(1)(b)'.

<sup>(4)</sup> See Commission Decision in Case IV/29/151, *Philips/VCR*, paragraph 23.



295. If **participation in the standard-setting process** is open in the sense that it allows all competitors (and/or stakeholders) in the market affected by the standard to take part in choosing and elaborating the standard, this will lower the risks of a likely restrictive effect on competition by not excluding certain companies from the ability to influence the choice and elaboration of the standard <sup>(1)</sup>. The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard-setting process. However, if the facts at hand show that there is competition between several such standards and standard-setting organisations (and it is not necessary that the whole industry applies the same standards) there may be no restrictive effects on competition. Also, if in the absence of a limitation on the number of participants it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on competition under Article 101(1) <sup>(2)</sup>. In certain situations the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are **kept informed and consulted** on the work in progress <sup>(3)</sup>. The more transparent the procedure for adopting the standard, the more likely it is that the adopted standard will take into account the interests of all stakeholders.
296. To assess the effects of a standard-setting agreement, the **market shares of the goods or services based on the standard** should be taken into account. It might not always be possible to assess with any certainty at an early stage whether the standard will in practice be adopted by a large part of the industry or whether it will only be a standard used by a marginal part of the relevant industry. In many cases the relevant market shares of the companies having participated in developing the standard could be used as a proxy for estimating the likely market share of the standard (since the companies participating in setting the standard would in most cases have an interest in implementing the standard) <sup>(4)</sup>. However, as the effectiveness of standardisation agreements is often proportional to the share of the industry involved in setting and/or applying the standard, high market shares held by the parties in the market or markets affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition.
297. Any standard-setting agreement which clearly **discriminates** against any of the participating or potential members could lead to a restriction of competition. For example, if a standard-setting organisation explicitly excludes upstream only companies (that is to say, companies not active on the downstream production market), this could lead to an exclusion of potentially better technologies.
298. As regards standard-setting agreements with **different types of IPR disclosure models** from the ones described in paragraph 286, it would have to be assessed on a case by case basis whether the disclosure model in question (for example a disclosure model not requiring but only encouraging IPR disclosure) guarantees effective access to the standard. In other words, it needs to be assessed whether, in the specific context, an informed choice between technologies and associated IPR is in practice not prevented by the IPR disclosure model.
299. Finally, standard-setting agreements providing for **ex ante disclosures of most restrictive licensing terms**, will not, in principle, restrict competition within the meaning of Article 101(1). In that regard, it is important that parties involved in the selection of a standard be fully informed not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR. Therefore, should a standard-setting organisation's IPR policy choose to provide for IPR holders to individually

<sup>(1)</sup> In Commission Decision in Case IV/31.458, *X/Open Group*, OJ L 35, 6.2.1987, p. 36, the Commission considered that even if the standards adopted were made public, the restricted membership policy had the effect of preventing non-members from influencing the results of the work of the group and from getting the know-how and technical understanding relating to the standards which the members were likely to acquire. In addition, non-members could not, in contrast to the members, implement the standard before it was adopted (see paragraph 32). The agreement was therefore in these circumstances seen to constitute a restriction under Article 101(1).

<sup>(2)</sup> Or if the adoption of the standard would have been heavily delayed by an inefficient process, any initial restriction could be outweighed by efficiencies to be considered under Article 101(3).

<sup>(3)</sup> See Commission Decision of 14 October 2009 in Case 39.416, *Ship Classification*. The Decision can be found at: [http://ec.europa.eu/competition/antitrust/cases/index/by\\_nr\\_78.html#i39\\_416](http://ec.europa.eu/competition/antitrust/cases/index/by_nr_78.html#i39_416)

<sup>(4)</sup> See paragraph 261.

disclose their most restrictive licensing terms, including the maximum royalty rates they would charge, prior to the adoption of the standard, this will normally not lead to a restriction of competition within the meaning of Article 101(1) <sup>(1)</sup>. Such unilateral ex ante disclosures of most restrictive licensing terms would be one way to enable the standard-setting organisation to take an informed decision based on the disadvantages and advantages of different alternative technologies, not only from a technical perspective but also from a pricing perspective.

#### **Standard terms**

300. The establishment and use of standard terms must be assessed in the appropriate economic context and in the light of the situation on the relevant market in order to determine whether the standard terms at issue are likely to give rise to restrictive effects on competition.
301. As long as participation in the actual establishment of standard terms is **unrestricted** for the competitors in the relevant market (either by participation in the trade association or directly), and the established standard terms are **non-binding** and **effectively accessible** for anyone, such agreements are not likely to give rise to restrictive effects on competition (subject to the caveats set out in paragraphs 303, 304, 305 and 307).
302. Effectively accessible and non-binding standard terms for the sale of consumer goods or services (on the presumption that they have no effect on price) thus generally do not have any restrictive effect on competition since they are unlikely to lead to any negative effect on product quality, product variety or innovation. There are, however, two general exceptions where a more in-depth assessment would be required.
303. Firstly, standard terms for the sale of consumer goods or services where the standard terms define the scope of the product sold to the customer, and where therefore the risk of limiting product choice is more significant, could give rise to restrictive effects on competition within the meaning of Article 101(1) where their common application is likely to result in a *de facto* alignment. This could be the case when the widespread use of the standard terms *de facto* leads to a limitation of innovation and product variety. For instance, this may arise where standard terms in insurance contracts limit the customer's practical choice of key elements of the contract, such as the standard risks covered. Even if the use of the standard terms is not compulsory, they might undermine the incentives of the competitors to compete on product diversification.
304. When assessing whether there is a risk that the standard terms are likely to have restrictive effects by way of a limitation of product choice, factors such as existing competition on the market should be taken into account. For example if there is a large number of smaller competitors, the risk of a limitation of product choice would seem to be less than if there are only a few bigger competitors <sup>(2)</sup>. The market shares of the companies participating in the establishment of the standard terms might also give a certain indication of the likelihood of uptake of the standard terms or of the likelihood that the standard terms will be used by a large part of the market. However, in this respect, it is not only relevant to analyse whether the standard terms elaborated are likely to be used by a large part of the market, but also whether the standard terms only cover part of the product or the whole product (the less extensive the standard terms, the less likely that they will lead, overall, to a limitation of product choice). Moreover, in cases where in the absence of the establishment of the standard terms it would not have been possible to offer a certain product, there would not be likely to be any restrictive effect on competition within the meaning of Article 101(1). In that scenario, product choice is increased rather than decreased by the establishment of the standard terms.

<sup>(1)</sup> Any unilateral ex ante disclosures of most restrictive licensing terms should not serve as a cover to jointly fix prices either of downstream products or of substitute IPR/technologies which is, as outlined in paragraph 274, a restriction of competition by object.

<sup>(2)</sup> If previous experience with standard terms on the relevant market shows that the standard terms did not lead to lessened competition on product differentiation, this might also be an indication that the same type of standard terms elaborated for a neighbouring product will not lead to a restrictive effect on competition.

305. Secondly, even if the standard terms do not define the actual scope of the end-product they might be a decisive part of the transaction with the customer for other reasons. An example would be online shopping where customer confidence is essential (for example, in the use of safe payment systems, a proper description of the products, clear and transparent pricing rules, flexibility of the return policy, etc). As it is difficult for customers to make a clear assessment of all those elements, they tend to favour widespread practices and standard terms regarding those elements could therefore become a *de facto* standard with which companies would need to comply to sell in the market. Even though non-binding, those standard terms would become a *de facto* standard, the effects of which are very close to a binding standard and need to be analysed accordingly.
306. If the use of standard terms is binding, there is a need to assess their impact on product quality, product variety and innovation (in particular if the standard terms are binding on the entire market).
307. Moreover, should the standard terms (binding or non-binding) contain any terms which are likely to have a negative effect on competition relating to prices (for example terms defining the type of rebates to be given), they would be likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

#### 7.4. Assessment under Article 101(3)

##### 7.4.1. Efficiency gains

##### **Standardisation agreements**

308. Standardisation agreements frequently give rise to significant efficiency gains. For example, Union wide standards may facilitate market integration and allow companies to market their goods and services in all Member States, leading to increased consumer choice and decreasing prices. Standards which establish technical interoperability and compatibility often encourage competition on the merits between technologies from different companies and help prevent lock-in to one particular supplier. Furthermore, standards may reduce transaction costs for sellers and buyers. Standards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality. Standards also play an important role for innovation. They can reduce the time it takes to bring a new technology to the market and facilitate innovation by allowing companies to build on top of agreed solutions.
309. To achieve those efficiency gains in the case of standardisation agreements, the information necessary to apply the standard must be effectively available to those wishing to enter the market <sup>(1)</sup>.
310. Dissemination of a standard can be enhanced by marks or logos certifying compliance thereby providing certainty to customers. Agreements for testing and certification go beyond the primary objective of defining the standard and would normally constitute a distinct agreement and market.
311. While the effects on innovation must be analysed on a case-by-case basis, standards creating compatibility on a horizontal level between different technology platforms are considered to be likely to give rise to efficiency gains.

##### **Standard terms**

312. The use of standard terms can entail economic benefits such as making it easier for customers to compare the conditions offered and thus facilitate switching between companies. Standard terms might also lead to efficiency gains in the form of savings in transaction costs and, in certain sectors (in particular where the contracts are of a complex legal structure), facilitate entry. Standard terms may also increase legal certainty for the contract parties.
313. The higher the number of competitors on the market, the greater the efficiency gain of facilitating the comparison of conditions offered.

<sup>(1)</sup> See Commission Decision in Case IV/31.458, *X/Open Group*, paragraph 42: 'The Commission considers that the willingness of the Group to make available the results as quickly as possible is an essential element in its decision to grant an exemption'.

7.4.2. Indispensability

314. Restrictions that go beyond what is necessary to achieve the efficiency gains that can be generated by a standardisation agreement or standard terms do not fulfil the criteria of Article 101(3).

**Standardisation agreements**

315. The assessment of each standardisation agreement must take into account its likely effect on the markets concerned, on the one hand, and the scope of restrictions that possibly go beyond the objective of achieving efficiencies, on the other <sup>(1)</sup>.
316. Participation in standard-setting should normally be open to all competitors in the market or markets affected by the standard unless the parties demonstrate significant inefficiencies of such participation or recognised procedures are foreseen for the collective representation of interests <sup>(2)</sup>.
317. As a general rule standardisation agreements should cover no more than what is necessary to ensure their aims, whether this is technical interoperability and compatibility or a certain level of quality. In cases where having only one technological solution would benefit consumers or the economy at large that standard should, be set on a non-discriminatory basis. Technology neutral standards can, in certain circumstances, lead to larger efficiency gains. Including substitute IPR <sup>(3)</sup> as essential parts of a standard while at the same time forcing the users of the standard to pay for more IPR than technically necessary would go beyond what is necessary to achieve any identified efficiency gains. In the same vein, including substitute IPR as essential parts of a standard and limiting the use of that technology to that particular standard (that is to say, exclusive use) could limit inter-technology competition and would not be necessary to achieve the efficiencies identified.
318. Restrictions in a standardisation agreement making a standard binding and obligatory for the industry are in principle not indispensable.
319. In a similar vein, standardisation agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. The exclusivity can, however, be justified for a certain period of time, for example by the need to recoup significant start-up costs <sup>(4)</sup>. The standardisation agreement should in that case include adequate safeguards to mitigate possible risks to competition resulting from exclusivity. This concerns, inter alia, the certification fee which needs to be reasonable and proportionate to the cost of the compliance testing.

<sup>(1)</sup> In Case IV/29/151, *Philips/VCR*, compliance with the VCR standards led to the exclusion of other, perhaps better systems. Such exclusion was particularly serious in view of the pre-eminent market position enjoyed by Philips '... [R]estrictions were imposed upon the parties which were not indispensable to the attainment of these improvements. The compatibility of VCR video cassettes with the machines made by other manufacturers would have been ensured even if the latter had to accept no more than an obligation to observe the VCR standards when manufacturing VCR equipment' (paragraph 31).

<sup>(2)</sup> See Commission Decision in Case IV/31.458, *X/Open Group*, paragraph 45: '[T]he aims of the Group could not be achieved if any company willing to commit itself to the Group objectives had a right to become a member. This would create practical and logistical difficulties for the management of the work and possibly prevent appropriate proposals being passed.' See also Commission Decision of 14 October 2009 in Case 39.416, *Ship Classification*, paragraph 36: 'the Commitments strike an appropriate balance between maintaining demanding criteria for membership of IACS on the one hand, and removing unnecessary barriers to membership of IACS on the other hand. The new criteria will ensure that only technically competent CSs are eligible to become member of IACS, thus preventing that the efficiency and quality of IACS' work is unduly impaired by too lenient requirements for participation in IACS. At the same time, the new criteria will not hinder CSs, who are technically competent and willing to do so from joining IACS'.

<sup>(3)</sup> Technology which is regarded by users or licensees as interchangeable with or substitutable for another technology, by reason of the characteristics and intended use of the technologies.

<sup>(4)</sup> In this context see Commission Decision in Cases IV/34.179, 34.202, 216, *Dutch Cranes (SCK and FNK)*, OJ L 312, 23.12.1995, p. 79, paragraph 23: 'The ban on calling on firms not certified by SCK as sub-contractors restricts the freedom of action of certified firms. Whether a ban can be regarded as preventing, restricting or distorting competition within the meaning of Article 85(1) must be judged in the legal and economic context. If such a ban is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services'.

#### **Standard terms**

320. It is generally not justified to make standard terms binding and obligatory for the industry or the members of the trade association that established them. The possibility cannot, however, be ruled out that making standard terms binding may, in a specific case, be indispensable to the attainment of the efficiency gains generated by them.

#### **7.4.3. Pass-on to consumers**

##### **Standardisation agreements**

321. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by a standardisation agreement or by standard terms. A relevant part of the analysis of likely pass-on to consumers is which procedures are used to guarantee that the interests of the users of standards and end consumers are protected. Where standards facilitate technical interoperability and compatibility or competition between new and already existing products, services and processes, it can be presumed that the standard will benefit consumers.

#### **Standard terms**

322. Both the risk of restrictive effects on competition and the likelihood of efficiency gains increase with the companies' market shares and the extent to which the standard terms are used. Hence, it is not possible to provide any general 'safe harbour' within which there is no risk of restrictive effects on competition or which would allow the presumption that efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition.
323. However, certain efficiency gains generated by standard terms, such as increased comparability of the offers on the market, facilitated switching between providers, and legal certainty of the clauses set out in the standard terms, are necessarily beneficial for the consumers. As regards other possible efficiency gains, such as lower transaction costs, it is necessary to make an assessment on a case-by-case basis and in the relevant economic context whether these are likely to be passed on to consumers.

#### **7.4.4. No elimination of competition**

324. Whether a standardisation agreement affords the parties the possibility of eliminating competition depends on the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint. While market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a *de facto* industry standard<sup>(1)</sup>. In the latter case competition may be eliminated if third parties are foreclosed from effective access to the standard. Standard terms used by a majority of the industry might create a *de facto* industry standard and thus raise the same concerns. However, if the standard or the standard terms only concern a limited part of the product or service, competition is not likely to be eliminated.

### **7.5. Examples**

325. Setting standards competitors cannot satisfy

#### **Example 1**

**Situation:** A standard-setting organisation sets and publishes safety standards that are widely used by the relevant industry. Most competitors of the industry take part in the setting of the standard. Prior to the adoption of the standard, a new entrant has developed a product which is technically equivalent in terms of the performance and functional requirements and which is recognised by the technical committee of the standard-setting organisation. However, the technical specifications of the safety standard are, without any objective justification, drawn up in such a way as to not allow for this or other new products to comply with the standard.

<sup>(1)</sup> *De facto* standardisation refers to a situation where a (legally non-binding) standard, is, in practice, used by most of the industry.

**Analysis:** This standardisation agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) and is unlikely to meet the criteria of Article 101(3). The members of the standards development organisation have, without any objective justification, set the standard in such a way that products of their competitors which are based on other technological solutions cannot satisfy it, even though they have equivalent performance. Hence, this standard, which has not been set on a non-discriminatory basis, will reduce or prevent innovation and product variety. It is unlikely that the way the standard is drafted will lead to greater efficiency gains than a neutral one.

326. Non-binding and transparent standard covering a large part of the market

Example 2

**Situation:** A number of consumer electronics manufacturers with substantial market shares agree to develop a new standard for a product to follow up the DVD.

**Analysis:** Provided that (a) the manufacturers remain free to produce other new products which do not conform to the new standard, (b) participation in the standard-setting is unrestricted and transparent, and (c) the standardisation agreement does not otherwise restrict competition, Article 101(1) is not likely to be infringed. If the parties agreed to only manufacture products which conform to the new standard, the agreement would limit technical development, reduce innovation and prevent the parties from selling different products, thereby creating restrictive effects on competition within the meaning of Article 101(1).

327. Standardisation agreement without IPR disclosure

Example 3

**Situation:** A private standard-setting organisation active in standardisation in the ICT (information and communication technology) sector has an IPR policy which neither requires nor encourages disclosures of IPR which could be essential for the future standard. The standard-setting organisation took the conscious decision not to include such an obligation in particular considering that in general all technologies potentially relevant for the future standard are covered by many IPR. Therefore the standard-setting organisation considered that an IPR disclosure obligation would, on the one hand, not lead to the benefit of enabling the participants to choose a solution with no or little IPR and, on the other, would lead to additional costs in analysing whether the IPR would be potentially essential for the future standard. However, the IPR policy of the standard-setting organisation requires all participants to make a commitment to license any IPR that might read on the future standard on FRAND terms. The IPR policy allows for opt-outs if there is specific IPR that an IPR holder wishes to put outside the blanket licensing commitment. In this particular industry there are several competing private standard-setting organisations. Participation in the standard-setting organisation is open to anyone active in the industry.

**Analysis:** In many cases an IPR disclosure obligation would be pro-competitive by increasing competition between technologies ex ante. In general, such an obligation allows the members of a standard-setting organisation to factor in the amount of IPR reading on a particular technology when deciding between competing technologies (or even to, if possible, choose a technology which is not covered by IPR). The amount of IPR reading on a technology will often have a direct impact on the cost of access to the standard. However, in this particular context, all available technologies seem to be covered by IPR, and even many IPR. Therefore, any IPR disclosure would not have the positive effect of enabling the members to factor in the amount of IPR when choosing technology since regardless of what technology is chosen, it can be presumed that there is IPR reading on that

technology. IPR disclosure would be unlikely to contribute to guaranteeing effective access to the standard which in this scenario is sufficiently guaranteed by the blanket commitment to license any IPR that might read on the future standard on FRAND terms. On the contrary, an IPR disclosure obligation might in this context lead to additional costs for the participants. The absence of IPR disclosure might also, in those circumstances, lead to a quicker adoption of the standard which might be important if there are several competing standard-setting organisations. It follows that the agreement is unlikely to give rise to any negative effects on competition within the meaning of Article 101(1).

328. Standards in the insurance sector

Example 4

**Situation:** A group of insurance companies comes together to agree non-binding standards for the installation of certain security devices (that is to say, components and equipment designed for loss prevention and reduction and systems formed from such elements). The non-binding standards set by the insurance companies (a) are agreed in order to address a specific need and to assist insurers to manage risk and offer risk-appropriate premiums; (b) are discussed with the installers (or their representatives) and their views are taken on board prior to finalisation of the standards; (c) are published by the relevant insurance association on a dedicated section of its website so that any installer or other interested party can access them easily.

**Analysis:** The process for setting these standards is transparent and allows for the participation of interested parties. In addition, the result is easily accessible on a reasonable and non-discriminatory basis for anyone that wishes to have access to it. Provided that the standard does not have negative effects on the downstream market (for example by excluding certain installers through very specific and unjustified requirements for installations) it is not likely to lead to restrictive effects on competition. However, even if the standards led to restrictive effects on competition, the conditions set out in Article 101(3) would seem to be fulfilled. The standards would assist insurers in analysing to what extent such installation systems reduce relevant risk and prevent losses so that they can manage risks and offer risk-appropriate premiums. Subject to the caveat regarding the downstream market, they would also be more efficient for installers, allowing them to comply with one set of standards for all insurance companies rather than be tested by every insurance company separately. They could also make it easier for consumers to switch between insurers. In addition, they could be beneficial for smaller insurers who may not have the capacity to test separately. As regards the other conditions of Article 101(3), it seems that the non-binding standards do not go beyond what is necessary to achieve the efficiencies in question, that benefits would be passed on to the consumers (some would even be directly beneficial for the consumers) and that the restrictions would not lead to an elimination of competition.

329. Environmental standards

Example 5

**Situation:** Almost all producers of washing machines agree, with the encouragement of a public body, to no longer manufacture products which do not comply with certain environmental criteria (for example, energy efficiency). Together, the parties hold 90 % of the market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced by more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (for example, electric utilities and suppliers of components incorporated in the products phased out). Without the agreement, the parties would not have shifted their production and marketing efforts to the more environmentally friendly products.

**Analysis:** The agreement grants the parties control of individual production and concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Product variety, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). The involvement of the public



authority is irrelevant for that assessment. However, newer, more environmentally friendly products are more technically advanced, offering qualitative efficiencies in the form of more washing machine programmes which can be used by consumers. Furthermore, there are cost efficiencies for the purchasers of the washing machines resulting from lower running costs in the form of reduced consumption of water, electricity and soap. Those cost efficiencies are realised on markets which are different from the relevant market of the agreement. Nevertheless, those efficiencies may be taken into account as the markets on which the restrictive effects on competition and the efficiency gains arise are related and the group of consumers affected by the restriction and the efficiency gains is substantially the same. The efficiency gains outweigh the restrictive effects on competition in the form of increased costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Various technical means are economically available to the parties in order to manufacture washing machines which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the criteria of Article 101(3) would appear to be fulfilled.

330. Government encouraged standardisation

Example 6

**Situation:** In response to the findings of research into the recommended levels of fat in certain processed food conducted by a government-funded think tank in one Member State, several major manufacturers of the processed foods in the same Member State agree, through formal discussions at an industry trade association, to set recommended fat levels for the products. Together, the parties represent 70 % of sales of the products within the Member State. The parties' initiative will be supported by a national advertising campaign funded by the think tank highlighting the dangers of a high fat content in processed foods.

**Analysis:** Although the fat levels are recommendations and therefore voluntary, as a result of the wide publicity resulting from the national advertising campaign, the recommended fat levels are likely to be implemented by all manufacturers of the processed foods in the Member State. It is therefore likely to become a *de facto* maximum fat level in the processed foods. Consumer choice across the product markets could therefore be reduced. However, the parties will be able to continue to compete with regard to a number of other characteristics of the products, such as price, product size, quality, taste, other nutritional and salt content, balance of ingredients, and branding. Moreover, competition regarding the fat levels in the product offering may increase where parties seek to offer products with the lowest levels. The agreement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1).

331. Open standardisation of product packaging

Example 7

**Situation:** The major manufacturers of a fast-moving consumer product in a competitive market in a Member State – as well as manufacturers and distributors in other Member States who sell the product into the Member State ('importers') – agree with the major packaging suppliers to develop and implement a voluntary initiative to standardise the size and shape of the packaging of the product sold in that Member State. There is currently a wide variation in packaging sizes and materials within and across the Member States. This reflects the fact that the packaging does not represent a high proportion of total production costs and that switching costs for packaging producers are not significant. There is no actual or pending European standard for the packaging. The agreement has been entered into by the parties voluntarily in response to pressure from the Member State's government to meet environmental targets. Together, the manufacturers and importers represent 85 % of sales of the product within the Member State. The voluntary initiative will give rise to a uniform-sized product for sale within the Member State that uses less packaging material, occupies less shelf space, has lower transport and packaging costs, and is more environmentally friendly through reduced packaging waste. It also reduces the recycling costs of producers.

The standard does not specify that particular types of packaging materials must be used. The specifications of the standard have been agreed between manufacturers and importers in an open and transparent manner, with the draft specifications having been published for open consultation on an industry website in a timely manner prior to adoption. The final specifications adopted are also published on an industry trade association website that is freely accessible to any potential entrants, even if they are not members of the trade association.

**Analysis:** Although the agreement is voluntary, the standard is likely to become a *de facto* industry practice because the parties together represent a high proportion of the market for the product in the Member State and retailers are also being encouraged by the government to reduce packaging waste. As such, the agreement could in theory create barriers to entry and give rise to potential anti-competitive foreclosure effects in the Member State market. This would in particular be a risk for importers of the product in question who may need to repackage the product to meet the *de facto* standard in order to sell in the Member State if the pack size used in other Member States does not meet the standard. However, significant barriers to entry and foreclosure are unlikely to occur in practice because (a) the agreement is voluntary, (b) the standard has been agreed with major importers in an open and transparent manner, (c) switching costs are low, and (d) the technical details of the standard are accessible to new entrants, importers and all packaging suppliers. In particular, importers will have been aware of potential changes to packaging at an early stage of development and will have had the opportunity through the open consultation on the draft standards to put forward their views before the standard was eventually adopted. The agreement therefore may not give rise to restrictive effects on competition within the meaning of Article 101(1).

In any event, it is likely that the conditions of Article 101(3) will be fulfilled in this case: (i) the agreement will give rise to quantitative efficiencies through lower transport and packaging costs, (ii) the prevailing conditions of competition on the market are such that these costs reductions are likely to be passed on to consumers, (iii) the agreement includes only the minimum restrictions necessary to achieve the packaging standard and is unlikely to result in significant foreclosure effects and (iv) competition will not be eliminated in a substantial part of the products in question.

### 332. Closed standardisation of product packaging

#### Example 8

**Situation:** The situation is the same as in Example 7, paragraph 331, except the standard is agreed only between manufacturers of the fast-moving consumer product located within the Member State (who represent 65 % of the sales of the product in the Member State), there was no open consultation on the specifications adopted (which include detailed standards on the type of packaging material that must be used) and the specifications of the voluntary standard are not published. This resulted in higher switching costs for producers in other Member States than for domestic producers.

**Analysis:** Similar to Example 7, paragraph 331, although the agreement is voluntary, it is very likely to become *de facto* standard industry practice since retailers are also being encouraged by the government to reduce packaging waste and the domestic manufacturers account for 65 % of sales of the product within the Member State. The fact that relevant producers in other Member States were not consulted resulted in the adoption of a standard which imposes higher switching costs on them compared to domestic producers. The agreement may therefore create barriers to entry and give rise to potential anti-competitive foreclosure effects on packaging suppliers, new entrants and importers – all of whom were not involved in the standard-setting process – as they may need to repackage the product to meet the *de facto* standard in order to sell in the Member State if the pack size used in other Member States does not meet the standard.

Unlike in Example 7, paragraph 331, the standardisation process has not been carried out in an open and transparent manner. In particular, new entrants, importers and packaging suppliers have not been given the opportunity to comment on the proposed standard and may not even be aware of it until a late stage, creating the possibility that they may not be able to change their production methods or switch suppliers quickly and effectively. Moreover, new entrants, importers and

packaging suppliers may not be able to compete if the standard is unknown or difficult to comply with. Of particular relevance here is the fact that the standard includes detailed specifications on the packaging materials to be used which, because of the closed nature of the consultation and the standard, importers and new entrants will struggle to comply with. The agreement may therefore restrict competition within the meaning of Article 101(1). This conclusion is not affected by the fact the agreement has been entered into in order to meet underlying environmental targets agreed with the Member State's government.

It is unlikely that the conditions of Article 101(3) will be fulfilled in this case. Although the agreement will give rise to similar quantitative efficiencies as arise under Example 7, paragraph 331, the closed and private nature of the standardisation agreement and the non-published detailed standard on the type of packaging material that must be used are unlikely to be indispensable to achieving the efficiencies under the agreement.

333. Non-binding and open standard terms used for contracts with end-users

Example 9

**Situation:** A trade association for electricity distributors establishes non-binding standard terms for the supply of electricity to end-users. The establishment of the standard terms is made in a transparent and non-discriminatory manner. The standard terms cover issues such as the specification of the point of consumption, the location of the connection point and the connection voltage, provisions on service reliability as well as the procedure for settling the accounts between the parties to the contract (for example, what happens if the customer does not provide the supplier with the readings of the measurement devices). The standard terms do not cover any issues relating to prices, that is to say, they contain no recommended prices or other clauses related to price. Any company active within the sector is free to use the standard terms as it sees fit. About 80 % of the contracts concluded with end-users in the relevant market are based on these standard terms.

**Analysis:** These standard terms are not likely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even if they have become industry practice, they do not seem to have any appreciable negative impact on prices, product quality or variety.

334. Standard terms used for contracts between companies

Example 10

**Situation:** Construction companies in a certain Member State come together to establish non-binding and open standard terms and conditions for use by a contractor when submitting a quotation for construction work to a client. A form of quotation is included together with terms and conditions suitable for building or construction. Together, the documents create the construction contract. Clauses cover such matters as contract formation, general obligations of the contractor and the client and non-price related payment conditions (for example, a provision specifying the contractor's right to give notice to suspend the work for non-payment), insurance, duration, handover and defects, limitation of liability, termination, etc. In contrast to Example 9, paragraph 333, these standard terms would often be used between companies, one active upstream and one active downstream.

**Analysis:** These standard terms are not likely to have restrictive effects on competition within the meaning of Article 101(1). There would normally not be any significant limitation in the customer's choice of the end-product, namely the construction work. Other restrictive effects on competition do not seem likely. Indeed, several of the clauses above (handover and defects, termination, etc.) would often be regulated by law.

335. Standard terms facilitating the comparison of different companies' products

Example 11

**Situation:** A national association for the insurance sector distributes non-binding standard policy conditions for house insurance contracts. The conditions give no indication of the level of insurance premiums, the amount of the cover or the excesses payable by the insured. They do not impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed and do not require the policyholders to obtain cover from the same insurer for different risks. While the majority of insurance companies use standard policy conditions, not all their contracts contain the same conditions as they are adapted to each client's individual needs and therefore there is no *de facto* standardisation of insurance products offered to consumers. The standard policy conditions enable consumers and consumer organisations to compare the policies offered by the different insurers. A consumer association is involved in the process of laying down the standard policy conditions. They are also available for use by new entrants, on a non-discriminatory basis.

**Analysis:** These standard policy conditions relate to the composition of the final insurance product. If the market conditions and other factors would show that there might be a risk of limitation in product variety as a result of insurance companies using such standard policy conditions, it is likely that such possible limitation would be outweighed by efficiencies such as facilitation of comparison by consumers of conditions offered by insurance companies. Those comparisons in turn facilitate switching between insurance companies and thus enhance competition. Furthermore the switching of providers, as well as market entry by competitors, constitutes an advantage for consumers. The fact that the consumer association has participated in the process could, in certain instances, increase the likelihood of those efficiencies which do not automatically benefit the consumers being passed on. The standard policy conditions are also likely to reduce transaction costs and facilitate entry for insurers on a different geographic and/or product markets. Moreover, the restrictions do not seem to go beyond what is necessary to achieve the identified efficiencies and competition would not be eliminated. Consequently, the criteria of Article 101(3) are likely to be fulfilled.

### **iii. Technology transfer agreements**

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





6. Commission Regulation 772/2004/EC of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L 123/11  
+ Corrigenda OJ 2004 L 127/158

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





**Corrigendum to Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements**

*(Official Journal of the European Union L 123 of 27 April 2004)*

In the contents on the cover, on page 11 in the title and on page 17 in the signature:

for: '27 April 2004',

read: '7 April 2004'.

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**Corrigendum to Commission Regulation (EC) No 1943/2003 of 3 November 2003 laying down rules for the application of Council Regulation (EC) No 2200/96 as regards aid to producer groups granted preliminary recognition**

*(Official Journal of the European Union L 286 of 4 November 2003)*

On page 7, in the third line of Article 5(1):

for: '... each annual period as referred ...',

read: '... each annual or semestral period as referred ...'.

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**COMMISSION REGULATION (EC) No 772/2004**

**of 27 April 2004**

**on the application of Article 81(3) of the Treaty to categories of technology transfer agreements**

**(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices <sup>(1)</sup>, and in particular Article 1 thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of technology transfer agreements and corresponding concerted practices to which only two undertakings are party which fall within Article 81(1).

(2) Pursuant to Regulation No 19/65/EEC, the Commission has, in particular, adopted Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements <sup>(3)</sup>.

(3) On 20 December 2001 the Commission published an evaluation report on the transfer of technology block exemption Regulation (EC) No 240/96 <sup>(4)</sup>. This generated a public debate on the application of Regulation (EC) No 240/96 and on the application in general of Article 81(1) and (3) of the Treaty to technology transfer agreements. The response to the evaluation report from Member States and third parties has been generally in favour of reform of Community competition policy on technology transfer agreements. It is therefore appropriate to repeal Regulation (EC) No 240/96.

(4) This Regulation should meet the two requirements of ensuring effective competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify the regulatory framework and its application. It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics-based approach which assesses the impact of agreements on the relevant market. It is also consistent with such an approach to make a distinction between agreements between competitors and agreements between non-competitors.

(5) Technology transfer agreements concern the licensing of technology. Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.

(6) The likelihood that such efficiency-enhancing and pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in technology transfer agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from undertakings owning substitute technologies or undertakings producing substitute products.

(7) This Regulation should only deal with agreements where the licensor permits the licensee to exploit the licensed technology, possibly after further research and development by the licensee, for the production of goods or services. It should not deal with licensing agreements for the purpose of subcontracting research and development. It should also not deal with licensing agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing the created package of intellectual property rights to third parties.

<sup>(1)</sup> OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

<sup>(2)</sup> OJ C 235, 1.10.2003, p. 10.

<sup>(3)</sup> OJ L 31, 9.2.1996, p. 2. Regulation as amended by the 2003 Act of Accession.

<sup>(4)</sup> COM(2001) 786 final.

- (8) For the application of Article 81(3) by regulation, it is not necessary to define those technology transfer agreements that are capable of falling within Article 81(1). In the individual assessment of agreements pursuant to Article 81(1), account has to be taken of several factors, and in particular the structure and the dynamics of the relevant technology and product markets.
- (9) The benefit of the block exemption established by this Regulation should be limited to those agreements which can be assumed with sufficient certainty to satisfy the conditions of Article 81(3). In order to attain the benefits and objectives of technology transfer, the benefit of this Regulation should also apply to provisions contained in technology transfer agreements that do not constitute the primary object of such agreements, but are directly related to the application of the licensed technology.
- (10) For technology transfer agreements between competitors it can be presumed that, where the combined share of the relevant markets accounted for by the parties does not exceed 20 % and the agreements do not contain certain severely anti-competitive restraints, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (11) For technology transfer agreements between non-competitors it can be presumed that, where the individual share of the relevant markets accounted for by each of the parties does not exceed 30 % and the agreements do not contain certain severely anti-competitive restraints, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (12) There can be no presumption that above these market-share thresholds technology transfer agreements do fall within the scope of Article 81(1). For instance, an exclusive licensing agreement between non-competing undertakings does often not fall within the scope of Article 81(1). There can also be no presumption that, above these market-share thresholds, technology transfer agreements falling within the scope of Article 81(1) will not satisfy the conditions for exemption. However, it can also not be presumed that they will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.
- (13) This Regulation should not exempt technology transfer agreements containing restrictions which are not indispensable to the improvement of production or distribution. In particular, technology transfer agreements containing certain severely anti-competitive restraints such as the fixing of prices charged to third parties should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market shares of the undertakings concerned. In the case of such hardcore restrictions the whole agreement should be excluded from the benefit of the block exemption.
- (14) In order to protect incentives to innovate and the appropriate application of intellectual property rights, certain restrictions should be excluded from the block exemption. In particular exclusive grant back obligations for severable improvements should be excluded. Where such a restriction is included in a licence agreement only the restriction in question should be excluded from the benefit of the block exemption.
- (15) The market-share thresholds, the non-exemption of technology transfer agreements containing severely anti-competitive restraints and the excluded restrictions provided for in this Regulation will normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.
- (16) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission should be able to withdraw the benefit of the block exemption. This may occur in particular where the incentives to innovate are reduced or where access to markets is hindered.
- (17) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>(1)</sup> empowers the competent authorities of Member States to withdraw the benefit of the block exemption in respect of technology transfer agreements having effects incompatible with Article 81(3), where such effects are felt in their respective territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market. Member States must ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.
- (18) In order to strengthen supervision of parallel networks of technology transfer agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission should be able to declare this Regulation inapplicable to technology transfer agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81 to such agreements.
- <sup>(1)</sup> OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

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(19) This Regulation should cover only technology transfer agreements between a licensor and a licensee. It should cover such agreements even if conditions are stipulated for more than one level of trade, by, for instance, requiring the licensee to set up a particular distribution system and specifying the obligations the licensee must or may impose on resellers of the products produced under the licence. However, such conditions and obligations should comply with the competition rules applicable to supply and distribution agreements. Supply and distribution agreements concluded between a licensee and its buyers should not be exempted by this Regulation.

(20) This Regulation is without prejudice to the application of Article 82 of the Treaty,

HAS ADOPTED THIS REGULATION:

#### Article 1

#### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'agreement' means an agreement, a decision of an association of undertakings or a concerted practice;
- (b) 'technology transfer agreement' means a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, know-how or software copyright licensing agreement, including any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights or the assignment of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products; assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the exploitation of the technology remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology, shall also be deemed to be technology transfer agreements;
- (c) 'reciprocal agreement' means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a patent licence, a know-how

licence, a software copyright licence or a mixed patent, know-how or software copyright licence and where these licences concern competing technologies or can be used for the production of competing products;

(d) 'non-reciprocal agreement' means a technology transfer agreement where one undertaking grants another undertaking a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence, or where two undertakings grant each other such a licence but where these licences do not concern competing technologies and cannot be used for the production of competing products;

(e) 'product' means a good or a service, including both intermediary goods and services and final goods and services;

(f) 'contract products' means products produced with the licensed technology;

(g) 'intellectual property rights' includes industrial property rights, know-how, copyright and neighbouring rights;

(h) 'patents' means patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates;

(i) 'know-how' means a package of non-patented practical information, resulting from experience and testing, which is:

(i) secret, that is to say, not generally known or easily accessible,

(ii) substantial, that is to say, significant and useful for the production of the contract products, and

(iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(j) 'competing undertakings' means undertakings which compete on the relevant technology market and/or the relevant product market, that is to say:

(i) competing undertakings on the relevant technology market, being undertakings which license out competing technologies without infringing each others' intellectual property rights (actual competitors on the technology market); the relevant technology market includes technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use,

- (ii) competing undertakings on the relevant product market, being undertakings which, in the absence of the technology transfer agreement, are both active on the relevant product and geographic market(s) on which the contract products are sold without infringing each others' intellectual property rights (actual competitors on the product market) or would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each others' intellectual property rights, the(se) relevant product and geographic market(s) in response to a small and permanent increase in relative prices (potential competitors on the product market); the relevant product market comprises products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use;
- (k) 'selective distribution system' means a distribution system where the licensor undertakes to license the production of the contract products only to licensees selected on the basis of specified criteria and where these licensees undertake not to sell the contract products to unauthorised distributors;
- (l) 'exclusive territory' means a territory in which only one undertaking is allowed to produce the contract products with the licensed technology, without prejudice to the possibility of allowing within that territory another licensee to produce the contract products only for a particular customer where this second licence was granted in order to create an alternative source of supply for that customer;
- (m) 'exclusive customer group' means a group of customers to which only one undertaking is allowed actively to sell the contract products produced with the licensed technology;
- (n) 'severable improvement' means an improvement that can be exploited without infringing the licensed technology.

2. The terms 'undertaking', 'licensor' and 'licensee' shall include their respective connected undertakings.

'Connected undertakings' means:

- (a) undertakings in which a party to the agreement, directly or indirectly:
  - (i) has the power to exercise more than half the voting rights, or
  - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
  - (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
- (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
- (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
  - (i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
  - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

#### Article 2

#### Exemption

Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to technology transfer agreements entered into between two undertakings permitting the production of contract products.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1). The exemption shall apply for as long as the intellectual property right in the licensed technology has not expired, lapsed or been declared invalid or, in the case of know-how, for as long as the know-how remains secret, except in the event where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement.

#### Article 3

#### Market-share thresholds

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on the affected relevant technology and product market.
2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall apply on condition that the market share of each of the parties does not exceed 30 % on the affected relevant technology and product market.
3. For the purposes of paragraphs 1 and 2, the market share of a party on the relevant technology market(s) is defined in terms of the presence of the licensed technology on the relevant product market(s). A licensor's market share on the relevant technology market shall be the combined market share on the relevant product market of the contract products produced by the licensor and its licensees.

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Article 4

**Hardcore restrictions**

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties;
- (b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;
- (c) the allocation of markets or customers except:
  - (i) the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets,
  - (ii) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party,
  - (iii) the obligation on the licensor not to license the technology to another licensee in a particular territory,
  - (iv) the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party,
  - (v) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence,
  - (vi) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,
  - (vii) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

(d) the restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:
  - (i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor,
  - (ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group,
  - (iii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,
  - (iv) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer,
  - (v) the restriction of sales to end-users by a licensee operating at the wholesale level of trade,
  - (vi) the restriction of sales to unauthorised distributors by the members of a selective distribution system;
- (c) the restriction of active or passive sales to end-users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

3. Where the undertakings party to the agreement are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, paragraph 2 and not paragraph 1 shall apply for the full life of the agreement unless the agreement is subsequently amended in any material respect.



*Article 5*

**Excluded restrictions**

1. The exemption provided for in Article 2 shall not apply to any of the following obligations contained in technology transfer agreements:

- (a) any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own severable improvements to or its own new applications of the licensed technology;
- (b) any direct or indirect obligation on the licensee to assign, in whole or in part, to the licensor or to a third party designated by the licensor, rights to its own severable improvements to or its own new applications of the licensed technology;
- (c) any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights which the licensor holds in the common market, without prejudice to the possibility of providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of one or more of the licensed intellectual property rights.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to any direct or indirect obligation limiting the licensee's ability to exploit its own technology or limiting the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

*Article 6*

**Withdrawal in individual cases**

1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Regulation (EC) No 1/2003, where it finds in any particular case that a technology transfer agreement to which the exemption provided for in Article 2 applies nevertheless has effects which are incompatible with Article 81(3) of the Treaty, and in particular where:

- (a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies;
- (b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensors from licensing to other licensees;
- (c) without any objectively valid reason, the parties do not exploit the licensed technology.

2. Where, in any particular case, a technology transfer agreement to which the exemption provided for in Article 2 applies has effects which are incompatible with Article 81(3) of the

Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of this Regulation, pursuant to Article 29(2) of Regulation (EC) No 1/2003, in respect of that territory, under the same circumstances as those set out in paragraph 1 of this Article.

*Article 7*

**Non-application of this Regulation**

1. Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market, this Regulation is not to apply to technology transfer agreements containing specific restraints relating to that market.

2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

*Article 8*

**Application of the market-share thresholds**

1. For the purposes of applying the market-share thresholds provided for in Article 3 the rules set out in this paragraph shall apply.

The market share shall be calculated on the basis of market sales value data. If market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned.

The market share shall be calculated on the basis of data relating to the preceding calendar year.

The market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

2. If the market share referred to in Article 3(1) or (2) is initially not more than 20 % respectively 30 % but subsequently rises above those levels, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold or 30 % threshold was first exceeded.

*Article 9*

**Repeal**

Regulation (EC) No 240/96 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation.



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*Article 10*

**Transitional period**

The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 May 2004 to 31 March 2006 in respect of agreements already in force on 30 April 2004 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 30 April 2004, satisfied the conditions for exemption provided for in Regulation (EC) No 240/96.

*Article 11*

**Period of validity**

This Regulation shall enter into force on 1 May 2004.

It shall expire on 30 April 2014.

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

Done at Brussels, 27 April 2004.

*For the Commission*

Mario MONTI

*Member of the Commission*

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7. Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ 2004 C 101/2

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



## COMMISSION NOTICE

### Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements

(2004/C 101/02)

(Text with EEA relevance)

#### I. INTRODUCTION

1. These guidelines set out the principles for the assessment of technology transfer agreements under Article 81 of the Treaty. Technology transfer agreements concern the licensing of technology where the licensor permits the licensee to exploit the licensed technology for the production of goods or services, as defined in Article 1(1)(b) of Commission Regulation (EC) No 773/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (the TTBER) <sup>(1)</sup>.
2. The purpose of the guidelines is to provide guidance on the application of the TTBER as well as on the application of Article 81 to technology transfer agreements that fall outside the scope of the TTBER. The TTBER and the guidelines are without prejudice to the possible parallel application of Article 82 of the Treaty to licensing agreements <sup>(2)</sup>.
3. The standards set forth in these guidelines must be applied in light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own facts and the guidelines must be applied reasonably and flexibly. Examples given serve as illustrations only and are not intended to be exhaustive. The Commission will keep under review the functioning of the TTBER and the guidelines in the new enforcement system created by Regulation 1/2003 <sup>(3)</sup> to consider whether changes need to be made.
4. The present guidelines are without prejudice to the interpretation of Article 81 and the TTBER that may be given by the Court of Justice and the Court of First Instance.

#### II. GENERAL PRINCIPLES

##### 1. Article 81 and intellectual property rights

5. The aim of Article 81 as a whole is to protect competition on the market with a view to promoting consumer welfare and an efficient allocation of resources. Article 81(1) prohibits all agreements and concerted practices between undertakings and decisions by associations of undertakings <sup>(4)</sup> which may affect trade between Member States <sup>(5)</sup> and which have as their object or effect the prevention, restriction or distortion of competition <sup>(6)</sup>. As an exception to this rule Article 81(3) provides that the prohibition contained in Article

81(1) may be declared inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

6. Intellectual property laws confer exclusive rights on holders of patents, copyright, design rights, trademarks and other legally protected rights. The owner of intellectual property is entitled under intellectual property laws to prevent unauthorised use of his intellectual property and to exploit it, *inter alia*, by licensing it to third parties. Once a product incorporating an intellectual property right has been put on the market inside the EEA by the holder or with his consent, the intellectual property right is exhausted in the sense that the holder can no longer use it to control the sale of the product <sup>(7)</sup> (principle of Community exhaustion). The right holder has no right under intellectual property laws to prevent sales by licensees or buyers of such products incorporating the licensed technology <sup>(8)</sup>. The principle of Community exhaustion is in line with the essential function of intellectual property rights, which is to grant the holder the right to exclude others from exploiting his intellectual property without his consent.
7. The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Articles 81 and 82 are in particular applicable to agreements whereby the holder licenses another undertaking to exploit his intellectual property rights <sup>(9)</sup>. Nor does it imply that there is an inherent conflict between intellectual property rights and the Community competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.

8. In the assessment of licence agreements under Article 81 it must be kept in mind that the creation of intellectual property rights often entails substantial investment and that it is often a risky endeavour. In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. For these reasons the innovator should normally be free to seek compensation for successful projects that is sufficient to maintain investment incentives, taking failed projects into account. Technology licensing may also require the licensee to make significant sunk investments in the licensed technology and production assets necessary to exploit it. Article 81 cannot be applied without considering such *ex ante* investments made by the parties and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed may thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.

9. In assessing licensing agreements under Article 81, the existing analytical framework is sufficiently flexible to take due account of the dynamic aspects of technology licensing. There is no presumption that intellectual property rights and licence agreements as such give rise to competition concerns. Most licence agreements do not restrict competition and create pro-competitive efficiencies. Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation. In addition, even licence agreements that do restrict competition may often give rise to pro-competitive efficiencies, which must be considered under Article 81(3) and balanced against the negative effects on competition<sup>(10)</sup>. The great majority of licence agreements are therefore compatible with Article 81.

## 2. The general framework for applying Article 81

10. Article 81(1) prohibits agreements which have as their object or effect the restriction of competition. Article 81(1) applies both to restrictions of competition between the parties to an agreement and to restrictions of competition between any of the parties and third parties.

11. The assessment of whether a licence agreement restricts competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions<sup>(11)</sup>. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-technology competition (i.e. competition between undertakings using competing technologies) and on intra-technology competition (i.e. competition between undertakings using the same technology)<sup>(12)</sup>. Article 81(1) prohibits restrictions of both inter-technology competition and intra-technology competition. It is therefore necessary to assess to what extent the agreement affects or is likely to affect these two aspects of competition on the market.

12. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-technology competition while the second question relates to the impact of the agreement on intra-technology competition. As restraints may be capable of affecting both inter-technology competition and intra-technology competition at the same time, it may be necessary to analyse a restraint in the light of both questions before it can be concluded whether or not competition within the meaning of Article 81(1) is restricted:

(a) Does the licence agreement restrict actual or potential competition that would have existed without the contemplated agreement? If so, the agreement may be caught by Article 81(1). In making this assessment it is necessary to take into account competition between the parties and competition from third parties. For instance, where two undertakings established in different Member States cross licence competing technologies and undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a licensor imposes obligations on his licensees not to use competing technologies and these obligations foreclose third party technologies, actual or potential competition that would have existed in the absence of the agreement is restricted.

(b) Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). For instance, where a licensor restricts its licensees from competing with each other, (potential) competition that could have existed between the licensees absent the restraints is restricted. Such restrictions include vertical price fixing and territorial or customer sales restrictions between licensees. However, certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature<sup>(13)</sup>. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether, given the nature of the agreement and the characteristics of the market, a less restrictive agreement would not have been concluded by undertakings in a similar setting. For instance, territorial restraints in an agreement between non-competitors may fall outside Article 81(1) for a certain duration if the restraints are objectively necessary for a licensee to penetrate a new market. Similarly, a prohibition imposed on all licensees not to sell to certain categories of end users may not be restrictive of competition if such a restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question.

Claims that in the absence of a restraint the supplier would have resorted to vertical integration are not sufficient. Decisions on whether or not to vertically integrate depend on a broad range of complex economic factors, a number of which are internal to the undertaking concerned.

13. In the application of the analytical framework set out in the previous paragraph it must be taken into account that Article 81(1) distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 81(1) if its object or effect is to restrict inter-technology competition and/or intra-technology competition.
14. Restrictions of competition by object are those that by their very nature restrict competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential for negative effects on competition that it is not necessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market<sup>(14)</sup>. Moreover, the conditions of Article 81(3) are unlikely to be fulfilled in the case of restrictions by object. The assessment of whether or not an agreement has as its object a restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied or the actual conduct and behaviour of the parties on the market<sup>(15)</sup>. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a hardcore restriction of competition. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition. For licence agreements, the Commission considers that the restrictions covered by the list of hardcore restrictions of competition contained in Article 4 of the TTBER are restrictive by their very object.
15. If an agreement is not restrictive of competition by object it is necessary to examine whether it has restrictive effects on competition. Account must be taken of both actual and potential effects<sup>(16)</sup>. In other words the agreement must have likely anti-competitive effects. For licence agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable<sup>(17)</sup>. Appreciable anti-competitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 81(1) is less than the degree of market power required for a finding of dominance under Article 82.
16. For the purposes of analysing restrictions of competition by effect it is normally necessary to define the relevant market and to examine and assess, *inter alia*, the nature of the products and technologies concerned, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers. In some cases, however, it may be possible to show anti-competitive effects directly by analysing the conduct of the parties to the agreement on the market. It may for example be possible to ascertain that an agreement has led to price increases.
17. Licence agreements, however, also have substantial pro-competitive potential. Indeed, the vast majority of licence agreements are pro-competitive. Licence agreements may promote innovation by allowing innovators to earn returns to cover at least part of their research and development costs. Licence agreements also lead to a dissemination of technologies, which may create value by reducing the production costs of the licensee or by enabling him to produce new or improved products. Efficiencies at the level of the licensee often stem from a combination of the licensor's technology with the assets and technologies of the licensee. Such integration of complementary assets and technologies may lead to a cost/output configuration that would not otherwise be possible. For instance, the combination of an improved technology of the licensor with more efficient production or distribution assets of the licensee may reduce production costs or lead to the production of a higher quality product. Licensing may also serve the pro-competitive purpose of removing obstacles to the development and exploitation of the licensee's own technology. In particular in sectors where large numbers of patents are prevalent licensing often occurs in order to create design freedom by removing the risk of infringement claims by the licensor. When the licensor agrees not to invoke his intellectual property rights to prevent the sale of the licensee's products, the agreement removes an obstacle to the sale of the licensee's product and thus generally promotes competition.

18. In cases where a licence agreement is caught by Article 81(1) the pro-competitive effects of the agreement must be balanced against its restrictive effects in the context of Article 81(3). When all four conditions of Article 81(3) are satisfied, the restrictive licence agreement in question is valid and enforceable, no prior decision to that effect being required<sup>(18)</sup>. Hardcore restrictions of competition only fulfil the conditions of Article 81(3) in exceptional circumstances. Such agreements generally fail (at least) one of the first two conditions of Article 81(3). They generally do not create objective economic benefits or benefits for consumers. Moreover, these types of agreements generally also fail the indispensability test under the third condition. For example, if the parties fix the price at which the products produced under the licence must be sold, this will generally lead to a lower output and a misallocation of resources and higher prices for consumers. The price restriction is also not indispensable to achieve the possible efficiencies resulting from the availability to both competitors of the two technologies.

### 3. Market definition

19. The Commission's approach to defining the relevant market is laid down in its market definition guidelines<sup>(19)</sup>. The present guidelines only address aspects of market definition that are of particular importance in the field of technology licensing.

20. Technology is an input, which is integrated either into a product or a production process. Technology licensing can therefore affect competition both in input markets and in output markets. For instance, an agreement between two parties which sell competing products and which cross license technologies relating to the production of these products may restrict competition on the product market concerned. It may also restrict competition on the market for technology and possibly also on other input markets. For the purposes of assessing the competitive effects of licence agreements it may therefore be necessary to define relevant goods and service markets (product markets) as well as technology markets<sup>(20)</sup>. The term 'product market' used in Article 3 of the TTBER refers to relevant goods and service markets in both their geographic and product dimension. As is clear from Article 1(1)(j) of the TTBER, the term is used merely to distinguish relevant goods and service markets from relevant technology markets.

21. The TTBER and these guidelines are concerned with effects both on product markets for final products and on product markets for intermediate products. The relevant product market includes products which are regarded by the buyers as interchangeable with or substitutable for the contract products incorporating the

licensed technology, by reason of the products' characteristics, their prices and their intended use.

22. Technology markets consist of the licensed technology and its substitutes, i.e. other technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use. The methodology for defining technology markets follows the same principles as the definition of product markets. Starting from the technology which is marketed by the licensor, one needs to identify those other technologies to which licensees could switch in response to a small but permanent increase in relative prices, i.e. the royalties. An alternative approach is to look at the market for products incorporating the licensed technology (cf. paragraph below).

23. Once relevant markets have been defined, market shares can be assigned to the various sources of competition in the market and used as an indication of the relative strength of market players. In the case of technology markets one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. However, this may often be a mere theoretical and not a practical way to proceed because of lack of clear information on royalties etc. An alternative approach, which is the one used in Article 3(3) of the TTBER, is to calculate market shares on the technology market on the basis of sales of products incorporating the licensed technology on downstream product markets (see paragraph 70 below). Under this approach all sales on the relevant product market are taken into account, irrespective of whether the product incorporates a technology that is being licensed. In the case of technology markets the approach of Article 3(3) to take into account technologies that are (only) being used in-house, is justified. Indeed, this approach is in general a good indicator of the strength of the technology. First, it captures any potential competition from undertakings that are producing with their own technology and that are likely to start licensing in the event of a small but permanent increase in the price for licenses. Secondly, even where it is unlikely that other technology owners would start licensing, the licensor does not necessarily have market power on the technology market even if he has a high share of licensing income. If the downstream product market is competitive, competition at this level may effectively constrain the licensor. An increase in royalties upstream affects the costs of the licensee, making him less competitive, causing him to lose sales. A technology's market share on the product market also captures this element and is thus normally a good indicator of licensor market power. In individual cases outside the safe harbour of the TTBER it may be necessary, where practically possible, to apply both of the described approaches in order to assess more accurately the market strength of the licensor.



24. Moreover, outside the safe harbour of the TTBER it must also be taken into account that market share may not always be a good indication of the relative strength of available technologies. The Commission will therefore, *inter alia*, also have regard to the number of independently controlled technologies available in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user (see paragraph 131 below).
25. Some licence agreements may affect innovation markets. In analysing such effects, however, the Commission will normally confine itself to examining the impact of the agreement on competition within existing product and technology markets <sup>(21)</sup>. Competition on such markets may be affected by agreements that delay the introduction of improved products or new products that over time will replace existing products. In such cases innovation is a source of potential competition which must be taken into account when assessing the impact of the agreement on product markets and technology markets. In a limited number of cases, however, it may be useful and necessary to also define innovation markets. This is particularly the case where the agreement affects innovation aiming at creating new products and where it is possible at an early stage to identify research and development poles <sup>(22)</sup>. In such cases it can be analysed whether after the agreement there will be a sufficient number of competing research and development poles left for effective competition in innovation to be maintained.
- 4. The distinction between competitors and non-competitors**
26. In general, agreements between competitors pose a greater risk to competition than agreements between non-competitors. However, competition between undertakings that use the same technology (intra-technology competition between licensees) constitutes an important complement to competition between undertakings that use competing technologies (inter-technology competition). For instance, intra-technology competition may lead to lower prices for the products incorporating the technology in question, which may not only produce direct and immediate benefits for consumers of these products, but also spur further competition between undertakings that use competing technologies. In the context of licensing it must also be taken into account that licensees are selling their own product. They are not re-selling a product supplied by another undertaking. There may thus be greater scope for product differentiation and quality-based competition between licensees than in the case of vertical agreements for the resale of products.
27. In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.
28. Where the licensor and the licensee are both active on the same product market or the same technology market without one or both parties infringing the intellectual property rights of the other party, they are actual competitors on the market concerned. The parties are deemed to be actual competitors on the technology market if the licensee is already licensing out his technology and the licensor enters the technology market by granting a license for a competing technology to the licensee.
29. The parties are considered to be potential competitors on the product market if in the absence of the agreement and without infringing the intellectual property rights of the other party it is likely that they would have undertaken the necessary additional investment to enter the relevant market in response to a small but permanent increase in product prices. In order to constitute a realistic competitive constraint entry has to be likely to occur within a short period. Normally a period of one to two years is appropriate. However, in individual cases longer periods can be taken into account. The period of time needed for undertakings already on the market to adjust their capacities can be used as a yardstick to determine this period. For instance, the parties are likely to be considered potential competitors on the product market where the licensee produces on the basis of its own technology in one geographic market and starts producing in another geographic market on the basis of a licensed competing technology. In such circumstances, it is likely that the licensee would have been able to enter the second geographic market on the basis of its own technology, unless such entry is precluded by objective factors, including the existence of blocking patents (see paragraph 32 below).
30. The parties are considered to be potential competitors on the technology market where they own substitutable technologies if in the specific case the licensee is not licensing his own technology, provided that he would be likely to do so in the event of a small but permanent increase in technology prices. However, for the application of the TTBER potential competition on the technology market is not taken into account (see paragraph 66 below).

31. In some cases the parties may become competitors subsequent to the conclusion of the agreement because the licensee develops and starts exploiting a competing technology. In such cases it must be taken into account that the parties were non-competitors at the time of conclusion of the agreement and that the agreement was concluded in that context. The Commission will therefore mainly focus on the impact of the agreement on the licensee's ability to exploit his own (competing) technology. In particular, the list of hardcore restrictions applying to agreements between competitors will not be applied to such agreements unless the agreement is subsequently amended in any material respect after the parties have become competitors (cf. Article 4(3) of the TTBER). The undertakings party to an agreement may also become competitors subsequent to the conclusion of the agreement where the licensee was already active on the product market prior to the licence and where the licensor subsequently enters the product market either on the basis of the licensed technology or a new technology. Also in this case the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect (cf. article 4(3) of the TTBER).

32. If the parties own technologies that are in a one-way or two-way blocking position, the parties are considered to be non-competitors on the technology market. A one-way blocking position exists when a technology cannot be exploited without infringing upon another technology. This is for instance the case where one patent covers an improvement of a technology covered by another patent. In that case the exploitation of the improvement patent pre-supposes that the holder obtains a licence to the basic patent. A two-way blocking position exists where neither technology can be exploited without infringing upon the other technology and where the holders thus need to obtain a licence or a waiver from each other. In assessing whether a blocking position exists the Commission will rely on objective factors as opposed to the subjective views of the parties. Particularly convincing evidence of the existence of a blocking position is required where the parties may have a common interest in claiming the existence of a blocking position in order to be qualified as non-competitors, for instance where the claimed two-way blocking position concerns technologies that are technological substitutes. Relevant evidence includes court decisions including injunctions and opinions of independent experts. In the latter case the Commission will, in particular, closely examine how the expert has been selected. However, also other convincing evidence, including expert evidence from the parties that they have or had good and valid reasons to believe that a blocking position exists or existed, can be relevant to substantiate the existence of a blocking position.

33. In some cases it may also be possible to conclude that while the licensor and the licensee produce competing products, they are non-competitors on the relevant

product market and the relevant technology market because the licensed technology represents such a drastic innovation that the technology of the licensee has become obsolete or uncompetitive. In such cases the licensor's technology either creates a new market or excludes the licensee's technology from the market. Often, however, it is not possible to come to this conclusion at the time the agreement is concluded. It is usually only when the technology or the products incorporating it have been available to consumers for some time that it becomes apparent that the older technology has become obsolete or uncompetitive. For instance, when CD technology was developed and players and discs were put on the market, it was not obvious that this new technology would replace LP technology. This only became apparent some years later. The parties will therefore be considered to be competitors if at the time of the conclusion of the agreement it is not obvious that the licensee's technology is obsolete or uncompetitive. However, given that both Articles 81(1) and Article 81(3) must be applied in light of the actual context in which the agreement occurs, the assessment is sensitive to material changes in the facts. The classification of the relationship between the parties will therefore change into a relationship of non-competitors, if at a later point in time the licensee's technology becomes obsolete or uncompetitive on the market.

### III. APPLICATION OF THE BLOCK EXEMPTION REGULATION

#### 1. The effects of the Block Exemption Regulation

34. Technology transfer agreements that fulfil the conditions set out in the TTBER are block exempted from the prohibition rule contained in Article 81(1). Block exempted agreements are legally valid and enforceable. Such agreements can only be prohibited for the future and only upon withdrawal of the block exemption by the Commission or a Member State competition authority. Block exempted agreements cannot be prohibited under Article 81 by national courts in the context of private litigation.

35. Block exemption of categories of technology transfer agreements is based on the presumption that such agreements — to the extent that they are caught by Article 81(1) — fulfil the four conditions laid down in Article 81(3). It is thus presumed that the agreements give rise to economic efficiencies, that the restrictions contained in the agreements are indispensable to the attainment of these efficiencies, that consumers within the affected markets receive a fair share of the efficiency gains and that the agreements do not afford the undertakings concerned the possibility of eliminating

competition in respect of a substantial part of the products in question. The market share thresholds (Article 3), the hardcore list (Article 4) and the excluded restrictions (Article 5) set out in the TTBER aim at ensuring that only restrictive agreements that can reasonably be presumed to fulfil the four conditions of Article 81(3) are block exempted.

36. As set out in section IV below, many licence agreements fall outside Article 81(1), either because they do not restrict competition at all or because the restriction of competition is not appreciable<sup>(23)</sup>. To the extent that such agreements would anyhow fall within the scope of the TTBER, there is no need to determine whether they are caught by Article 81(1)<sup>(24)</sup>.

37. Outside the scope of the block exemption it is relevant to examine whether in the individual case the agreement is caught by Article 81(1) and if so whether the conditions of Article 81(3) are satisfied. There is no presumption that technology transfer agreements falling outside the block exemption are caught by Article 81(1) or fail to satisfy the conditions of Article 81(3). In particular, the mere fact that the market shares of the parties exceed the market share thresholds set out in Article 3 of the TTBER is not a sufficient basis for finding that the agreement is caught by Article 81(1). Individual assessment of the likely effects of the agreement is required. It is only when agreements contain hardcore restrictions of competition that it can normally be presumed that they are prohibited by Article 81.

## 2. Scope and duration of the Block Exemption Regulation

### 2.1. Agreements between two parties

38. According to Article 2(1) of the TTBER, the Regulation covers technology transfer agreements 'between two undertakings'. Technology transfer agreements between more than two undertakings are not covered by the TTBER<sup>(25)</sup>. The decisive factor in terms of distinguishing between agreements between two undertakings and multiparty agreements is whether the agreement in question is concluded between more than two undertakings.

39. Agreements concluded by two undertakings fall within the scope of the TTBER even if the agreement stipulates conditions for more than one level of trade. For instance, the TTBER applies to a licence agreement concerning not only the production stage but also the distribution stage, stipulating the obligations that the licensee must or may impose on resellers of the products produced under the licence<sup>(26)</sup>.

40. Licence agreements concluded between more than two undertakings often give rise to the same issues as licence agreements of the same nature concluded between two undertakings. In its individual assessment of licence agreements which are of the same nature as those covered by the block exemption but which are concluded between more than two undertakings, the Commission will apply by analogy the principles set out in the TTBER.

### 2.2. Agreements for the production of contract products

41. It follows from Article 2 that for licence agreements to be covered by the TTBER they must concern 'the production of contract products', i.e. products incorporating or produced with the licensed technology. In other words, to be covered by the TTBER the licence must permit the licensee to exploit the licensed technology for production of goods or services (see recital 7 of the TTBER). The TTBER does not cover technology pools. The notion of technology pools covers agreements whereby two or more parties agree to pool their respective technologies and license them as a package. The notion of technology pools also covers arrangements whereby two or more undertakings agree to license a third party and authorise him to license on the package of technologies. Technology pools are dealt with in section IV.4 below.

42. The TTBER applies to licence agreements for the production of contract products whereby the licensee is also permitted to sublicense the licensed technology to third parties provided, however, that the production of contract products constitutes the primary object of the agreement. Conversely, the TTBER does not apply to agreements that have sublicensing as their primary object. However, the Commission will apply by analogy the principles set out in the TTBER and these guidelines to such 'master licensing' agreements between licensor and licensee. Agreements between the licensee and sub-licensees are covered by the TTBER.

43. The term 'contract products' encompasses goods and services produced with the licensed technology. This is the case both where the licensed technology is used in the production process and where it is incorporated into the product itself. In these guidelines the term 'products incorporating the licensed technology' covers both situations. The TTBER applies in all cases where technology is licensed for the purposes of producing goods and services. It is sufficient in this respect that the licensor undertakes not to exercise his intellectual property rights against the licensee. Indeed, the essence of a pure patent licence is the right to operate inside the scope of the exclusive right of the patent. It follows that the TTBER also covers so-called non-assertion agreements and settlement agreements whereby the licensor permits the licensee to produce within the scope of the patent.

44. The TTBER covers 'subcontracting' whereby the licensor licenses technology to the licensee who undertakes to produce certain products on the basis thereof exclusively for the licensor. Subcontracting may also involve the supply of equipment by the licensor to be used in the production of the goods and services covered by the agreement. For the latter type of subcontracting to be covered by the TTBER, the licensed technology and not the supplied equipment must constitute the primary object of the agreement. Subcontracting is also covered by the Commission's Notice concerning the assessment of certain subcontracting agreements in relation to Article 81(1) of the Treaty <sup>(27)</sup>. According to this notice, which remains applicable, subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside Article 81(1). However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit his own research and development may be caught by Article 81 <sup>(28)</sup>.

45. The TTBER also applies to agreements whereby the licensee must carry out development work before obtaining a product or a process that is ready for commercial exploitation, provided that a contract product has been identified. Even if such further work and investment is required, the object of the agreement is the production of an identified contract product. On the other hand, the TTBER and the guidelines do not cover agreements whereby a technology is licensed for the purpose of enabling the licensee to carry out further research and development in various fields. For instance, the TTBER and the guidelines do not cover the licensing of a technological research tool used in the process of further research activity. The framework of the TTBER and the guidelines is based on the premise that there is a direct link between the licensed technology and an identified contract product. In cases where no such link exists the main object of the agreement is research and development as opposed to bringing a particular product to the market; in that case the analytical framework of the TTBER and the guidelines may not be appropriate. For the same reasons the TTBER and the guidelines do not cover research and development sub-contracting whereby the licensee undertakes to carry out research and development in the field of the licensed technology and to hand back the improved technology package to the licensor. The main object of such agreements is the provision of research and development services aimed at improving the technology as opposed to the production of goods and services on the basis of the licensed technology.

### 2.3. The concept of technology transfer agreements

46. The TTBER and these guidelines cover agreements for the transfer of technology. According to Article 1(1)(b) and (h) of the TTBER the concept of 'technology' covers patents and patent applications, utility models and

applications for utility models, design rights, plant breeders rights, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, software copyright, and know-how. The licensed technology should allow the licensee with or without other inputs to produce the contract products.

47. Know-how is defined in Article 1(1)(i) as a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified. 'Secret' means that the know-how is not generally known or easily accessible. 'Substantial' means that the know-how includes information which is significant and useful for the production of the products covered by the licence agreement or the application of the process covered by the licence agreement. In other words, the information must significantly contribute to or facilitate the production of the contract products. In cases where the licensed know-how relates to a product as opposed to a process, this condition implies that the know-how is useful for the production of the contract product. This condition is not satisfied where the contract product can be produced on the basis of freely available technology. However, the condition does not require that the contract product is of higher value than products produced with freely available technology. In the case of process technologies, this condition implies that the know-how is useful in the sense that it can reasonably be expected at the date of conclusion of the agreement to be capable of significantly improving the competitive position of the licensee, for instance by reducing his production costs. 'Identified' means that it is possible to verify that the licensed know-how fulfils the criteria of secrecy and substantiality. This condition is satisfied where the licensed know-how is described in manuals or other written form. However, in some cases this may not be reasonably possible. The licensed know-how may consist of practical knowledge possessed by the licensor's employees. For instance, the licensor's employees may possess secret and substantial knowledge about a certain production process which is passed on to the licensee in the form of training of the licensee's employees. In such cases it is sufficient to describe in the agreement the general nature of the know-how and to list the employees that will be or have been involved in passing it on to the licensee.

48. The concept of 'transfer' implies that technology must flow from one undertaking to another. Such transfers normally take the form of licensing whereby the licensor grants the licensee the right to use his technology against payment of royalties. It can also take the form of sub-licensing, whereby a licensee, having been authorised to do so by the licensor, grants licenses to third parties (sub-licensees) for the exploitation of the technology.

49. The TTBER only applies to agreements that have as their primary object the transfer of technology as defined in that Regulation as opposed to the purchase of goods and services or the licensing of other types of intellectual property. Agreements containing provisions relating to the purchase and sale of products are only covered by the TTBER to the extent that those provisions do not constitute the primary object of the agreement and are directly related to the application of the licensed technology. This is likely to be the case where the tied products take the form of equipment or process input which is specifically tailored to efficiently exploit the licensed technology. If, on the other hand, the product is simply another input into the final product, it must be carefully examined whether the licensed technology constitutes the primary object of the agreement. For instance, in cases where the licensee is already manufacturing a final product on the basis of another technology, the licence must lead to a significant improvement of the licensee's production process, exceeding the value of the product purchased from the licensor. The requirement that the tied products must be related to the licensing of technology implies that the TTBER does not cover the purchase of products that have no relation with the products incorporating the licensed technology. This is for example the case where the tied product is not intended to be used with the licensed product, but relates to an activity on a separate product market.
50. The TTBER only covers the licensing of other types of intellectual property such as trademarks and copyright, other than software copyright, to the extent that they are directly related to the exploitation of the licensed technology and do not constitute the primary object of the agreement. This condition ensures that agreements covering other types of intellectual property rights are only block exempted to the extent that these other intellectual property rights serve to enable the licensee to better exploit the licensed technology. The licensor may for instance authorise the licensee to use his trademark on the products incorporating the licensed technology. The trademark licence may allow the licensee to better exploit the licensed technology by allowing consumers to make an immediate link between the product and the characteristics imputed to it by the licensed technology. An obligation on the licensee to use the licensor's trademark may also promote the dissemination of technology by allowing the licensor to identify himself as the source of the underlying technology. However, where the value of the licensed technology to the licensee is limited because he already employs an identical or very similar technology and the main object of the agreement is the trademark, the TTBER does not apply<sup>(29)</sup>.
51. The licensing of copyright for the purpose of reproduction and distribution of the protected work, i.e. the production of copies for resale, is considered to be similar to technology licensing. Since such licence agreements relate to the production and sale of products on the basis of an intellectual property right, they are considered to be of a similar nature as technology transfer agreements and normally raise comparable issues. Although the TTBER does not cover copyright other than software copyright, the Commission will as a general rule apply the principles set out in the TTBER and these guidelines when assessing such licensing of copyright under Article 81.
52. On the other hand, the licensing of rights in performances and other rights related to copyright is considered to raise particular issues and it may not be warranted to assess such licensing on the basis of the principles developed in these guidelines. In the case of the various rights related to performances value is created not by the reproduction and sale of copies of a product but by each individual performance of the protected work. Such exploitation can take various forms including the performance, showing or the renting of protected material such as films, music or sporting events. In the application of Article 81 the specificities of the work and the way in which it is exploited must be taken into account<sup>(30)</sup>. For instance, resale restrictions may give rise to less competition concerns whereas particular concerns may arise where licensors impose on their licensees to extend to each of the licensors more favourable conditions obtained by one of them. The Commission will therefore not apply the TTBER and the present guidelines by way of analogy to the licensing of these other rights.
53. The Commission will also not extend the principles developed in the TTBER and these guidelines to trademark licensing. Trademark licensing often occurs in the context of distribution and resale of goods and services and is generally more akin to distribution agreements than technology licensing. Where a trademark licence is directly related to the use, sale or resale of goods and services and does not constitute the primary object of the agreement, the licence agreement is covered by Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices<sup>(31)</sup>.
- ## 2.4. Duration
54. Subject to the duration of the TTBER, the block exemption applies for as long as the licensed property right has not lapsed, expired or been declared invalid. In the case of know-how the block exemption applies as long as the licensed know-how remains secret, except where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement (cf. Article 2 of the TTBER).

55. The block exemption applies to each licensed property right covered by the agreement and ceases to apply on the date of expiry, invalidity or the coming into the public domain of the last intellectual property right which constitutes 'technology' within the meaning of the TTBER (cf. paragraph above).

joint team, organisation or undertakings, jointly entrusted to a third party or allocated between the parties by way of specialisation in research, development, production and distribution, including licensing.

## 2.5. Relationship with other block exemption regulations

56. The TTBER covers agreements between two undertakings concerning the licensing of technology for the purpose of the production of contract products. However, technology can also be an element of other types of agreements. In addition, the products incorporating the licensed technology are subsequently sold on the market. It is therefore necessary to address the interface between the TTBER and Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements <sup>(32)</sup>, Commission Regulation 2659/2000 on the application of Article 81(3) to categories of research and development agreements <sup>(33)</sup> and Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices <sup>(34)</sup>.

60. It follows that Regulation 2659/2000 covers licensing between the parties and by the parties to a joint entity in the context of a research and development agreement. In the context of such agreements the parties can also determine the conditions for licensing the fruits of the research and development agreement to third parties. However, since third party licensees are not party to the research and development agreement, the individual licence agreement concluded with third parties is not covered by Regulation 2659/2000. Such licence agreements are block exempted by the TTBER where they fulfil the conditions of that Regulation.

### 2.5.1. The Block Exemption Regulations on specialisation and R&D agreements

57. According to Article 1(1)(c) of Regulation 2658/2000 on specialisation agreements, that Regulation covers, *inter alia*, joint production agreements by virtue of which two or more undertakings agree to produce certain products jointly. The Regulation extends to provisions concerning the assignment or use of intellectual property rights, provided that they do not constitute the primary object of the agreement, but are directly related to and necessary for its implementation.

### 2.5.2. The Block Exemption Regulation on vertical agreements

61. Commission Regulation (EC) No 2790/1999 on vertical agreements covers agreements entered into between two or more undertakings each operating, for the purposes of the agreement, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. It thus covers supply and distribution agreements <sup>(35)</sup>.

58. Where undertakings establish a production joint venture and license the joint venture to exploit technology, which is used in the production of the products produced by the joint venture, such licensing is subject to Regulation 2658/2000 and not the TTBER. Accordingly, licensing in the context of a production joint venture normally falls to be considered under Regulation 2658/2000. However, where the joint venture engages in licensing of the technology to third parties, the activity is not linked to production by the joint venture and therefore not covered by that Regulation. Such licensing arrangements, which bring together the technologies of the parties, constitute technology pools, which are dealt with in section IV.4 below.

62. Given that the TTBER only covers agreements between two parties and that a licensee, selling products incorporating the licensed technology, is a supplier for the purposes of Regulation 2790/1999, these two block exemption regulations are closely related. The agreement between licensor and licensee is subject to the TTBER whereas agreements concluded between a licensee and buyers are subject to Regulation 2790/1999 and the Guidelines on Vertical Restraints <sup>(36)</sup>.

59. Regulation 2659/2000 on research and development agreements covers agreements whereby two or more undertakings agree to jointly carry out research and development and to jointly exploit the results thereof. According to Article 2(11), research and development and the exploitation of the results are carried out jointly where the work involved is carried out by a

63. The TTBER also block exempts agreements between the licensor and the licensee where the agreement imposes obligations on the licensee as to the way in which he must sell the products incorporating the licensed technology. In particular, the licensee can be obliged to establish a certain type of distribution system such as exclusive distribution or selective distribution. However, the distribution agreements concluded for the purposes of implementing such obligations must, in order to be

block exempted, comply with Regulation 2790/1999. For instance, the licensor can oblige the licensee to establish a system based on exclusive distribution in accordance with specified rules. However, it follows from Article 4(b) of Regulation 2790/1999 that distributors must be free to make passive sales into the territories of other exclusive distributors.

64. Furthermore, distributors must in principle be free to sell both actively and passively into territories covered by the distribution systems of other licensees producing their own products on the basis of the licensed technology. This is because for the purposes of Regulation 2790/1999 each licensee is a separate supplier. However, the reasons underlying the block exemption contained in that Regulation may also apply where the products incorporating the licensed technology are sold by the licensees under a common brand belonging to the licensor. When the products incorporating the licensed technology are sold under a common brand identity there may be the same efficiency reasons for applying the same types of restraints between licensees' distribution systems as within a single vertical distribution system. In such cases the Commission would be unlikely to challenge restraints where by analogy the requirements of Regulation 2790/1999 are fulfilled. For a common brand identity to exist the products must be sold and marketed under a common brand, which is predominant in terms of conveying quality and other relevant information to the consumer. It does not suffice that in addition to the licensees' brands the product carries the licensor's brand, which identifies him as the source of the licensed technology.

### 3. The safe harbour established by the Block Exemption Regulation

65. According to Article 3 of the TTBER the block exemption of restrictive agreements is subject to market share thresholds, confining the scope of the block exemption to agreements that although they may be restrictive of competition can generally be presumed to fulfil the conditions of Article 81(3). Outside the safe harbour created by the market share thresholds individual assessment is required. The fact that market shares exceed the thresholds does not give rise to any presumption either that the agreement is caught by Article 81(1) or that the agreement does not fulfil the conditions of Article 81(3). In the absence of hardcore restrictions, market analysis is required.
66. The market share threshold to be applied for the purpose of the safe harbour of the TTBER depends on whether the agreement is concluded between competitors or non-competitors. For the purposes of the TTBER undertakings are competitors on the relevant technology market when they license competing technologies. Potential competition on the technology market is not

taken into account for the application of the market share threshold or the hardcore list. Outside the safe harbour of the TTBER potential competition on the technology market is taken into account but does not lead to the application of the hardcore list relating to agreements between competitors (see also paragraph 31 above).

67. Undertakings are competitors on the relevant product market where both undertakings are active on the same product and geographic market(s) on which the products incorporating the licensed technology are sold (actual competitors). They are also considered competitors where they would be likely, on realistic grounds, to undertake the necessary additional investments or other necessary switching costs to enter the relevant product and geographic market(s) within a reasonably short period of time<sup>(37)</sup> in response to a small and permanent increase in relative prices (potential competitors).
68. It follows from paragraphs 66 and 67 that two undertakings are not competitors for the purposes of the TTBER where the licensor is neither an actual nor a potential supplier of products on the relevant market and the licensee, already present on the product market, is not licensing out a competing technology even if he owns a competing technology and produces on the basis of that technology. However, the parties become competitors if at a later point in time the licensee starts licensing out his technology or the licensor becomes an actual or potential supplier of products on the relevant market. In that case the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect, see Article 4(3) of the TTBER and paragraph 31 above.
69. In the case of agreements between competitors the market share threshold is 20 % and in the case of agreements between non-competitors it is 30 % (cf. Article 3(1) and (2) of the TTBER). Where the undertakings party to the licensing agreement are not competitors the agreement is covered if the market share of neither party exceeds 30 % on the affected relevant technology and product markets. Where the undertakings party to the licensing agreement are competitors the agreement is covered if the combined market shares of the parties do not exceed 20 % on the relevant technology and product markets. The market share thresholds apply both to technology markets and markets for products incorporating the licensed technology. If the applicable market share threshold is exceeded on an affected relevant market, the block exemption does not apply to the agreement for that relevant market. For instance, if the licence agreement concerns two separate product markets or two separate geographic markets, the block exemption may apply to one of the markets and not to the other.



70. In the case of technology markets, it follows from Article 3(3) of the TTBER that the licensor's market share is to be calculated on the basis of the sales of the licensor and all his licensees of products incorporating the licensed technology and this for each relevant market separately <sup>(38)</sup>. Where the parties are competitors on the technology market, sales of products incorporating the licensee's own technology must be combined with the sales of the products incorporating the licensed technology. In the case of new technologies that have not yet generated any sales, a zero market share is assigned. When sales commence the technology will start accumulating market share.

71. In the case of product markets, the licensee's market share is to be calculated on the basis of the licensee's sales of products incorporating the licensor's technology and competing products, i.e. the total sales of the licensee on the product market in question. Where the licensor is also a supplier of products on the relevant market, the licensor's sales on the product market in question must also be taken into account. In the calculation of market shares for product markets, however, sales made by other licensees are not taken into account when calculating the licensee's and/or licensor's market share.

72. Market shares should be calculated on the basis of sales value data where such data are available. Such data normally provide a more accurate indication of the strength of a technology than volume data. However, where value based data are not available, estimates based on other reliable market information may be used, including market sales volume data.

73. The principles set out above can be illustrated by the following examples:

*Licensing between non-competitors*

Example 1

Company A is specialised in developing bio-technological products and techniques and has developed a new product Xeran. It is not active as a producer of Xeran, for which it has neither the production nor the distribution facilities. Company B is one of the producers of competing products, produced with freely available non-proprietary technologies. In year 1, B was selling EUR 25 million worth of products produced with the freely available technologies. In year 2, A gives a licence to B to produce Xeran. In that year B sells EUR 15 million produced with the help of the freely available technologies and EUR 15 million of Xeran. In year 3 and the following years B produces and sells only Xeran worth EUR 40 million annually. In addition in year 2, A is also licensing to C. C was not active on that product market before. C produces and sells only Xeran, EUR 10 million in year 2 and EUR 15 million in year 3 and thereafter. It is established that the total market of Xeran and its substitutes where B and C are active is worth EUR 200 million in each year.

In year 2, the year the licence agreement is concluded, A's market share on the technology market is 0 % as its market share has to be calculated on the basis of the total sales of Xeran in the preceding year. In year 3 A's market share on the technology market is 12,5 %, reflecting the value of Xeran produced by B and C in the preceding year 2. In year 4 and thereafter A's market share on the technology market is 27,5 %, reflecting the value of Xeran produced by B and C in the preceding year.

In year 2 B's market share on the product market is 12,5 %, reflecting B's EUR 25 million sales in year 1. In year 3 B's market share is 15 % because its sales have increased to EUR 30 million in year 2. In year 4 and thereafter B's market share is 20 % as its sales are EUR 40 million annually. C's market share on the product market is 0 % in year 1 and 2, 5 % in year 3 and 7, 5 % thereafter.

As the licence agreements are between non-competitors and the individual market shares of A, B and C are below 30 % each year, the agreements fall within the safe harbour of the TTBER.

#### Example 2

The situation is the same as in example 1, however now B and C are operating in different geographic markets. It is established that the total market of Xeran and its substitutes is worth EUR 100 million annually in each geographic market.

In this case, A's market share on the technology market has to be calculated for each of the two geographic markets. In the market where B is active A's market share depends on the sale of Xeran by B. As in this example the total market is assumed to be EUR 100 million, i.e. half the size of the market in example 1, the market share of A is 0 % in year 2, 15 % in year 3 and 40 % thereafter. B's market share is 25 % in year 2, 30 % in year 3 and 40 % thereafter. In year 2 and 3 both A's and B's market share does not exceed the 30 % threshold. The threshold is however exceeded from year 4 and this means that, in line with Article 8(2) of the TTBER, after year 6 the licence agreement between A and B can no longer benefit from the safe harbour but has to be assessed on an individual basis.

In the market where C is active A's market share depends on the sale of Xeran by C. A's market share on the technology market, based on C's sales in the previous year, is therefore 0 % in year 2, 10 % in year 3 and 15 % thereafter. The market share of C on the product market is the same: 0 % in year 2, 10 % in year 3 and 15 % thereafter. The licence agreement between A and C therefore falls within the safe harbour for the whole period.

#### *Licensing between competitors*

#### Example 3

Companies A and B are active on the same relevant product and geographic market for a certain chemical product. They also each own a patent on different technologies used to produce this product. In year 1 A and B sign a cross licence agreement licensing each other to use their respective technologies. In year 1 A and B produce only with their own technology and A sells EUR 15 million of the product and B sells EUR 20 million of the product. From year 2 they both use their own and the other's technology. From that year onward A sells EUR 10 million of the product produced with its own technology and EUR 10 million of the product produced with B's technology. B sells from year 2 EUR 15 million of the product produced with its own technology and EUR 10 million of the product produced with A's technology. It is established that the total market of the product and its substitutes is worth EUR 100 million in each year.

To assess the licence agreement under the TTBER, the market shares of A and B have to be calculated both on the technology market and the product market. The market share of A on the technology market depends on the amount of the product sold in the preceding year that was produced, by both A and B, with A's technology. In year 2 the market share of A on the technology market is therefore 15 %, reflecting its own production and sales of EUR 15 million in year 1. From year 3 A's market share on the technology market is 20 %, reflecting the EUR 20 million sale of the product produced with A's technology and produced and sold by A and B (EUR 10 million each). Similarly, in year 2 B's market share on the technology market is 20 % and thereafter 25 %.

The market shares of A and B on the product market depend on their respective sales of the product in the previous year, irrespective of the technology used. The market share of A on the product market is 15 % in year 2 and 20 % thereafter. The market share of B on the product market is 20 % in year 2 and 25 % thereafter.

As the agreement is between competitors, their combined market share, both on the technology and on the product market, has to be below the 20 % market share threshold in order to benefit from the safe harbour. It is clear that this is not the case here. The combined market share on the technology market and on the product market is 35 % in year 2 and 45 % thereafter. This agreement between competitors will therefore have to be assessed on an individual basis.

#### **4. Hardcore restrictions of competition under the Block Exemption Regulation**

##### **4.1. General principles**

74. Article 4 of the TTBER contains a list of hardcore restrictions of competition. The classification of a restraint as a hardcore restriction of competition is based on the nature of the restriction and experience showing that such restrictions are almost always anti-competitive. In line with the case law of the Community Courts<sup>(39)</sup> such a restriction may result from the clear objective of the agreement or from the circumstances of the individual case (cf. paragraph 14 above).

75. When a technology transfer agreement contains a hardcore restriction of competition, it follows from Article 4(1) and 4(2) of the TTBER that the agreement as a whole falls outside the scope of the block exemption. For the purposes of the TTBER hardcore restrictions cannot be severed from the rest of the agreement. Moreover, the Commission considers that in the context of individual assessment hardcore restrictions of competition will only in exceptional circumstances fulfil the four conditions of Article 81(3) (cf. paragraph 18 above).

76. Article 4 of the TTBER distinguishes between agreements between competitors and agreements between non-competitors.

#### 4.2. Agreements between competitors

77. Article 4(1) lists the hardcore restrictions for licensing between competitors. According to Article 4(1), the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) The restriction of a party's ability to determine its prices when selling products to third parties;

(b) The limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;

(c) The allocation of markets or customers except

(i) the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets;

(ii) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party;

(iii) the obligation on the licensor not to license the technology to another licensee in a particular territory;

(iv) the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or

the licensor into the exclusive territory or to the exclusive customer group reserved for the other party;

(v) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided that the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence;

(vi) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;

(vii) the obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

(d) The restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

78. For a number of hardcore restrictions the TTBER makes a distinction between reciprocal and non-reciprocal agreements. The hardcore list is stricter for reciprocal agreements than for non-reciprocal agreements between competitors. Reciprocal agreements are cross-licensing agreements where the licensed technologies are competing technologies or can be used for the production of competing products. A non-reciprocal agreement is an agreement where only one of the parties is licensing its technology to the other party or where in case of cross-licensing the licensed technologies are not competing technologies and cannot be used for the production of competing products. An agreement is not reciprocal merely because the agreement contains a grant back obligation or because the licensee licenses back own improvements of the licensed technology. In case at a later point in time a non-reciprocal agreement becomes a reciprocal agreement due to the conclusion of a second licence between the same parties, they may have to revise the first licence in order to avoid that the agreement contains a hardcore restriction. In the assessment of the individual case the Commission will take into account the time lapsed between the conclusion of the first and the second licence.

79. The hardcore restriction of competition contained in Article 4(1)(a) concerns agreements between competitors that have as their object the fixing of prices for products sold to third parties, including the products incorporating the licensed technology. Price fixing between competitors constitutes a restriction of competition by its very object. Price fixing can for instance take the form of a direct agreement on the exact price to be charged or on a price list with certain allowed maximum rebates. It is immaterial whether the agreement concerns fixed, minimum, maximum or recommended prices. Price fixing can also be implemented indirectly by applying disincentives to deviate from an agreed price level, for example, by providing that the royalty rate will increase if product prices are reduced below a certain level. However, an obligation on the licensee to pay a certain minimum royalty does not in itself amount to price fixing.
80. When royalties are calculated on the basis of individual product sales, the amount of the royalty has a direct impact on the marginal cost of the product and thus a direct impact on product prices<sup>(40)</sup>. Competitors can therefore use cross licensing with reciprocal running royalties as a means of co-ordinating prices on downstream product markets<sup>(41)</sup>. However, the Commission will only treat cross licences with reciprocal running royalties as price fixing where the agreement is devoid of any pro-competitive purpose and therefore does not constitute a bona fide licensing arrangement. In such cases where the agreement does not create any value and therefore has no valid business justification, the arrangement is a sham and amounts to a cartel.
81. The hardcore restriction contained in Article 4(1)(a) also covers agreements whereby royalties are calculated on the basis of all product sales irrespective of whether the licensed technology is being used. Such agreements are also caught by Article 4(1)(d) according to which the licensee must not be restricted in his ability to use his own technology (see paragraph 95 below). In general such agreements restrict competition since the agreement raises the cost of using the licensee's own competing technology and restricts competition that existed in the absence of the agreement<sup>(42)</sup>. This is so both in the case of reciprocal and non-reciprocal arrangements. Exceptionally, however, an agreement whereby royalties are calculated on the basis of all product sales may fulfil the conditions of Article 81(3) in an individual case where on the basis of objective factors it can be concluded that the restriction is indispensable for pro-competitive licensing to occur. This may be the case where in the absence of the restraint it would be impossible or unduly difficult to calculate and monitor the royalty payable by the licensee, for instance because the licensor's technology leaves no visible trace on the final product and practicable alternative monitoring methods are unavailable.
82. The hardcore restriction of competition set out in Article 4(1)(b) concerns reciprocal output restrictions on the parties. An output restriction is a limitation on how much a party may produce and sell. Article 4(1)(b) does not cover output limitations on the licensee in a non-reciprocal agreement or output limitations on one of the licensees in a reciprocal agreement provided that the output limitation only concerns products produced with the licensed technology. Article 4(1)(b) thus identifies as hardcore restrictions reciprocal output restrictions on the parties and output restrictions on the licensor in respect of his own technology. When competitors agree to impose reciprocal output limitations, the object and likely effect of the agreement is to reduce output in the market. The same is true of agreements that reduce the incentive of the parties to expand output, for example by obliging each other to make payments if a certain level of output is exceeded.
83. The more favourable treatment of non-reciprocal quantity limitations is based on the consideration that a one-way restriction does not necessarily lead to a lower output on the market while also the risk that the agreement is not a bona fide licensing arrangement is less when the restriction is non-reciprocal. When a licensee is willing to accept a one-way restriction, it is likely that the agreement leads to a real integration of complementary technologies or an efficiency enhancing integration of the licensor's superior technology with the licensee's productive assets. In a reciprocal agreement an output restriction on one of the licensees is likely to reflect the higher value of the technology licensed by one of the parties and may serve to promote pro-competitive licensing.
84. The hardcore restriction of competition set out in Article 4(1)(c) concerns the allocation of markets and customers. Agreements whereby competitors share markets and customers have as their object the restriction of competition. It is a hardcore restriction where competitors in a reciprocal agreement agree not to produce in certain territories or not to sell actively and/or passively into certain territories or to certain customers reserved for the other party.
85. Article 4(1)(c) applies irrespective of whether the licensee remains free to use his own technology. Once the licensee has tooled up to use the licensor's technology to produce a given product, it may be costly to maintain a separate production line using another technology in order to serve customers covered by the restrictions. Moreover, given the anti-competitive potential of the restraint the licensee may have little incentive to produce under his own technology. Such restrictions are also highly unlikely to be indispensable for pro-competitive licensing to occur.

86. Under Article 4(1)(c)(ii) it is not a hardcore restriction for the licensor in a non-reciprocal agreement to grant the licensee an exclusive licence to produce on the basis of the licensed technology in a particular territory and thus agree not to produce himself the contract products in or provide the contract products from that territory. Such exclusive licences are block exempted irrespective of the scope of the territory. If the licence is world-wide, the exclusivity implies that the licensor abstains from entering or remaining on the market. The block exemption also applies where the licence is limited to one or more technical fields of use or one or more product markets. The purpose of agreements covered by Article 4(1)(c)(ii) may be to give the licensee an incentive to invest in and develop the licensed technology. The object of the agreement is therefore not necessarily to share markets.
87. According to Article 4(1)(c)(iv) and for the same reason, the block exemption also applies to non-reciprocal agreements whereby the parties agree not to sell actively or passively<sup>(43)</sup> into an exclusive territory or to an exclusive customer group reserved for the other party.
88. According to Article 4(1)(c)(iii) it is also not a hardcore restriction if the licensor appoints the licensee as his sole licensee in a particular territory, implying that third parties will not be licensed to produce on the basis of the licensor's technology in the territory in question. In the case of such sole licences the block exemption applies irrespective of whether the agreement is reciprocal or not given that the agreement does not affect the ability of the parties to fully exploit their own technology in the respective territories.
89. Article 4(1)(c)(v) excludes from the hardcore list and thus block exempts up to the market share threshold restrictions in a non-reciprocal agreement on active sales by a licensee into the territory or to the customer group allocated by the licensor to another licensee. It is a condition, however, that the protected licensee was not a competitor of the licensor when the agreement was concluded. It is not warranted to hardcore such restrictions. By allowing the licensor to grant a licensee, who was not already on the market, protection against active sales by licensees which are competitors of the licensor and which for that reason are already established on the market, such restrictions are likely to induce the licensee to exploit the licensed technology more efficiently. On the other hand, if the licensees agree between themselves not to sell actively or passively into certain territories or to certain customer groups, the agreement amounts to a cartel amongst the licensees. Given that such agreements do not involve any transfer of technology they fall outside the scope of the TTBER.
90. According to Article 4(1)(c)(i) restrictions in agreements between competitors that limit the licence to one or more product markets or technical fields of use<sup>(44)</sup> are not hardcore restrictions. Such restrictions are block exempted up to the market share threshold of 20 % irrespective of whether the agreement is reciprocal or not. It is a condition for the application of the block exemption, however, that the field of use restrictions do not go beyond the scope of the licensed technologies. It is also a condition that licensees are not limited in the use of their own technology (see Article 4(1)(d)). Where licensees are limited in the use of their own technology the agreement amounts to market sharing.
91. The block exemption applies irrespective of whether the field of use restriction is symmetrical or asymmetrical. An asymmetrical field of use restriction in a reciprocal licence agreement implies that both parties are allowed to use the respective technologies that they license in only within different fields of use. As long as the parties are unrestricted in the use of their own technologies, it is not assumed that the agreement leads the parties to abandon or refrain from entering the field(s) covered by the licence to the other party. Even if the licensees tool up to use the licensed technology within the licensed field of use, there may be no impact on assets used to produce outside the scope of the licence. It is important in this regard that the restriction relates to distinct product markets or fields of use and not to customers, allocated by territory or by group, who purchase products falling within the same product market or technical field of use. The risk of market sharing is considered substantially greater in the latter case (see paragraph 85 above). In addition, field of use restrictions may be necessary to promote pro-competitive licensing (see paragraph 182 below).
92. Article 4(1)(c)(vi) contains a further exception, namely captive use restrictions, i.e. a requirement whereby the licensee may produce the products incorporating the licensed technology only for his own use. Where the contract product is a component the licensee can thus be obliged to produce that component only for incorporation into his own products and can be obliged not to sell the components to other producers. The licensee must be able, however, to sell the components as spare parts for his own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions as defined may be necessary to encourage the dissemination of technology, particularly between competitors, and are covered by the block exemption. Such restrictions are also dealt with in section IV.2.5 below.

93. Finally, Article 4(1)(c)(vii) excludes from the hardcore list an obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer with a view to creating an alternative source of supply for that customer. It is thus a condition for the application of Article 4(1)(c)(vii) that the licence is limited to creating an alternative source of supply for that particular customer. It is not a condition, however, that only one such licence is granted. Article 4(1)(c)(vii) also covers situations where more than one undertaking is licensed to supply the same specified customer. The potential of such agreements to share markets is limited where the licence is granted only for the purpose of supplying a particular customer. In particular, in such circumstances it cannot be assumed that the agreement will cause the licensee to cease exploiting his own technology.

94. The hardcore restriction of competition set out in Article 4(1)(d) covers firstly restrictions on any of the parties' ability to carry out research and development. Both parties must be free to carry out independent research and development. This rule applies irrespective of whether the restriction applies to a field covered by the licence or to other fields. However, the mere fact that the parties agree to provide each other with future improvements of their respective technologies does not amount to a restriction on independent research and development. The effect on competition of such agreements must be assessed in light of the circumstances of the individual case. Article 4(1)(d) also does not extend to restrictions on a party to carry out research and development with third parties, where such restriction is necessary to protect the licensor's know-how against disclosure. In order to be covered by the exception, the restrictions imposed to protect the licensor's know-how against disclosure must be necessary and proportionate to ensure such protection. For instance, where the agreement designates particular employees of the licensee to be trained in and responsible for the use of the licensed know-how, it may be sufficient to oblige the licensee not to allow those employees to be involved in research and development with third parties. Other safeguards may be equally appropriate.

95. According to Article 4(1)(d) the licensee must also be unrestricted in the use of his own competing technology provided that in so doing he does not make use of the technology licensed from the licensor. In relation to his own technology the licensee must not be subject to limitations in terms of where he produces or sells, how much he produces or sells and at what price he sells. He must also not be obliged to pay royalties on products produced on the basis of his own technology (cf. paragraph 81 above). Moreover, the licensee must not be restricted in licensing his own technology to third parties. When

restrictions are imposed on the licensee's use of his own technology or to carry out research and development, the competitiveness of the licensee's technology is reduced. The effect of this is to reduce competition on existing product and technology markets and to reduce the licensee's incentive to invest in the development and improvement of his technology.

#### 4.3. Agreements between non-competitors

96. Article 4(2) lists the hardcore restrictions for licensing between non-competitors. According to this provision, the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility to impose a maximum sale price or recommend a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:
  - (i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor;
  - (ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group;
  - (iii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
  - (iv) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

- (v) the restriction of sales to end users by a licensee operating at the wholesale level of trade;
- (vi) the restriction of sales to unauthorised distributors by the members of a selective distribution system;
- (c) the restriction of active or passive sales to end users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.
97. The hardcore restriction of competition set out in Article 4(2)(a) concerns the fixing of prices charged when selling products to third parties. More specifically, this provision covers restrictions which have as their direct or indirect object the establishment of a fixed or a minimum selling price or a fixed or minimum price level to be observed by the licensor or the licensee when selling products to third parties. In the case of agreements that directly establish the selling price, the restriction is clear-cut. However, the fixing of selling prices can also be achieved through indirect means. Examples of the latter are agreements fixing the margin, fixing the maximum level of discounts, linking the sales price to the sales prices of competitors, threats, intimidation, warnings, penalties, or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting, such as the implementation of a price monitoring system, or the obligation on licensees to report price deviations. Similarly, direct or indirect price fixing can be made more effective when combined with measures that reduce the licensee's incentive to lower his selling price, such as the licensor obliging the licensee to apply a most-favoured-customer clause, i.e. an obligation to grant to a customer any more favourable terms granted to any other customer. The same means can be used to make maximum or recommended prices work as fixed or minimum selling prices. However, the provision of a list of recommended prices to or the imposition of a maximum price on the licensee by the licensor is not considered in itself as leading to fixed or minimum selling prices.
98. Article 4(2)(b) identifies as hardcore restrictions of competition agreements or concerted practices that have as their direct or indirect object the restriction of passive sales by licensees of products incorporating the licensed technology<sup>(45)</sup>. Passive sales restrictions on the licensee may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other licensees. It may also result from indirect measures aimed at inducing the licensee to refrain from making such sales, such as financial incentives and the implementation of a monitoring system aimed at verifying the effective destination of the licensed products. Quantity limitations may be an indirect means to restrict passive sales. The Commission will not assume that quantity limitations as such serve this purpose. However, it will be otherwise where quantity limitations are used to implement an underlying market partitioning agreement. Indications thereof include the adjustment of quantities over time to cover only local demand, the combination of quantity limitations and an obligation to sell minimum quantities in the territory, minimum royalty obligations linked to sales in the territory, differentiated royalty rates depending on the destination of the products and the monitoring of the destination of products sold by individual licensees. The general hardcore restriction covering passive sales by licensees is subject to a number of exceptions, which are dealt with below.
99. Article 4(2)(b) does not cover sales restrictions on the licensor. All sales restrictions on the licensor are block exempted up to the market share threshold of 30 %. The same applies to all restrictions on active sales by the licensee, with the exception of what is said on active selling in paragraphs 105 and 106 below. The block exemption of restrictions on active selling is based on the assumption that such restrictions promote investments, non-price competition and improvements in the quality of services provided by the licensees by solving free rider problems and hold-up problems. In the case of restrictions of active sales between licensees' territories or customer groups, it is not a condition that the protected licensee has been granted an exclusive territory or an exclusive customer group. The block exemption also applies to active sales restrictions where more than one licensee has been appointed for a particular territory or customer group. Efficiency enhancing investment is likely to be promoted where a licensee can be ensured that he will only face active sales competition from a limited number of licensees inside the territory and not also from licensees outside the territory.
100. Restrictions on active and passive sales by licensees into an exclusive territory or to an exclusive customer group reserved for the licensor do not constitute hardcore restrictions of competition (cf. Article 4(2)(b)(i)). Indeed, they are block exempted. It is presumed that up to the market share threshold such restraints, where restrictive of competition, promote pro-competitive dissemination of technology and integration of such technology into the production assets of the licensee. For a territory or customer group to be reserved for the licensor, it is not required that the licensor is actually producing with the licensed technology in the territory or for the customer group in question. A territory or customer group can also be reserved by the licensor for later exploitation.



101. Restrictions on passive sales by licensees into an exclusive territory or customer group allocated to another licensee are block exempted for two years calculated from the date on which the protected licensee first markets the products incorporating the licensed technology inside his exclusive territory or to his exclusive customer group (cf. Article 4(2)(b)(ii)). Licensees often have to commit substantial investments in production assets and promotional activities in order to start up and develop a new territory. The risks facing the new licensee are therefore likely to be substantial, in particular since promotional expenses and investment in assets required to produce on the basis of a particular technology are often sunk, i.e. they cannot be recovered if the licensee exits the market. In such circumstances, it is often the case that licensees would not enter into the licence agreement without protection for a certain period of time against (active and) passive sales into their territory by other licensees. Restrictions on passive sales into the exclusive territory of a licensee by other licensees therefore often fall outside Article 81(1) for a period of up to two years from the date on which the product incorporating the licensed technology was first put on the market in the exclusive territory by the licensee in question. However, to the extent that in individual cases such restrictions are caught by Article 81(1) they are block exempted. After the expiry of this two-year period restrictions on passive sales between licensees constitute hardcore restrictions. Such restrictions are generally caught by Article 81(1) and are unlikely to fulfil the conditions of Article 81(3). In particular, passive sales restrictions are unlikely to be indispensable for the attainment of efficiencies <sup>(46)</sup>.
102. Article 4(2)(b)(iii) brings under the block exemption a restriction whereby the licensee is obliged to produce products incorporating the licensed technology only for his own (captive) use. Where the contract product is a component the licensee can thus be obliged to use that product only for incorporation into his own products and can be obliged not to sell the product to other producers. The licensee must however be able to actively and passively sell the products as spare parts for his own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions are also dealt with in section IV.2.5 below.
103. As in the case of agreements between competitors (cf. paragraph 93 above) the block exemption also applies to agreements whereby the licensee is obliged to produce the contract products only for a particular customer in order to provide that customer with an alternative source of supply (cf. Article 4(2)(b)(iv)). In the case of agreements between non-competitors, such restrictions are unlikely to be caught by Article 81(1).
104. Article 4(2)(b)(v) brings under the block exemption an obligation on the licensee not to sell to end users and thus only to sell to retailers. Such an obligation allows the licensor to assign the wholesale distribution function to the licensee and normally falls outside Article 81(1) <sup>(47)</sup>.
105. Finally Article 4(2)(b)(vi) brings under the block exemption a restriction on the licensee not to sell to unauthorised distributors. This exception allows the licensor to impose on the licensee an obligation to form part of a selective distribution system. In that case, however, the licensee must according to Article 4(2)(c) be permitted to sell both actively and passively to end users, without prejudice to the possibility to restrict the licensee to a wholesale function as foreseen in Article 4(2)(b)(v) (cf. the previous paragraph).
106. It is recalled (cf. paragraph 39 above) that the block exemption covers licence agreements whereby the licensor imposes obligations which the licensee must or may impose on his buyers, including distributors. However, these obligations must comply with the competition rules applicable to supply and distribution agreements. Since the TTBER is limited to agreements between two parties the agreements concluded between the licensee and his buyers implementing such obligations are not covered by the TTBER. Such agreements are only block exempted when they comply with Regulation 2790/1999 (cf. section 2.5.2 above).
- ### 5. Excluded restrictions
107. Article 5 of the TTBER lists four types of restrictions that are not block exempted and which thus require individual assessment of their anti-competitive and pro-competitive effects. It follows from Article 5 that the inclusion in a licence agreement of any of the restrictions contained in these provisions does not prevent the application of the block exemption to the rest of the agreement. It is only the individual restriction in question that is not block exempted, implying that individual assessment is required. Accordingly, the rule of severability applies to the restrictions set out in Article 5.
108. Article 5(1) provides that the block exemption shall not apply to the following three obligations:
- (a) Any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own severable improvements to or its new applications of the licensed technology.

- (b) Any direct or indirect obligation on the licensee to assign to the licensor or to a third party designated by the licensor rights to severable improvements to or new applications of the licensed technology.
- (c) Any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights held by the licensor in the common market. However, the TTBER does cover the possibility for the licensor to terminate the licence agreement in the event that the licensee challenges the validity of the licensed technology.

The purpose of Article 5(1)(a), (b) and (c) is to avoid block exemption of agreements that may reduce the incentive of licensees to innovate.

109. Article 5(1)(a) and 5(1)(b) concerns exclusive grant backs or assignments to the licensor of severable improvements of the licensed technology. An improvement is severable if it can be exploited without infringing upon the licensed technology. An obligation to grant the licensor an exclusive licence to severable improvements of the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee in exploiting his improvements, including by way of licensing to third parties. This is the case both where the severable improvement concerns the same application as the licensed technology and where the licensee develops new applications of the licensed technology. According to Article 5(1)(a) and (b) such obligations are not block exempted. However, the block exemption does cover non-exclusive grant back obligations in respect of severable improvements. This is so even where the grant back obligation is non-reciprocal, i.e. only imposed on the licensee, and where under the agreement the licensor is entitled to feed-on the severable improvements to other licensees. A non-reciprocal grant back obligation may promote innovation and the dissemination of new technology by permitting the licensor to freely determine whether and to what extent to pass on his own improvements to his licensees. A feed-on clause may also promote the dissemination of technology because each licensee knows at the time of contracting that he will be on an equal footing with other licensees in terms of the technology on the basis of which he is producing. Exclusive grant backs and obligations to assign non-severable improvements are not restrictive of competition within the meaning of Article 81(1) since non-severable improvements cannot be exploited by the licensee without the licensor's permission.

110. The application of Article 5(1)(a) and (b) does not depend on whether or not the licensor pays consideration in

return for acquiring the improvement or for obtaining an exclusive licence. However, the existence and level of such consideration may be a relevant factor in the context of an individual assessment under Article 81. When grant backs are made against consideration it is less likely that the obligation creates a disincentive for the licensee to innovate. In the assessment of exclusive grant backs outside the scope of the block exemption the market position of the licensor on the technology market is also a relevant factor. The stronger the position of the licensor, the more likely it is that exclusive grant back obligations will have restrictive effects on competition in innovation. The stronger the position of the licensor's technology the more likely it is that the licensee will be an important source of innovation and future competition. The negative impact of grant back obligations can also be increased in case of parallel networks of licence agreements containing such obligations. When available technologies are controlled by a limited number of licensors that impose exclusive grant back obligations on licensees, the risk of anti-competitive effects is greater than where there are a number of technologies only some of which are licensed on exclusive grant back terms.

111. The risk of negative effects on innovation is higher in the case of cross licensing between competitors where a grant back obligation on both parties is combined with an obligation on both parties to share with the other party improvements of his own technology. The sharing of all improvements between competitors may prevent each competitor from gaining a competitive lead over the other (see also paragraph 208 below). However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to permit them to develop their respective technologies and where the licence does not lead them to use the same technological base in the design of their products. This is the case where the purpose of the licence is to create design freedom rather than to improve the technological base of the licensee.

112. The excluded restriction set out in Article 5(1)(c) concerns non-challenge clauses, i.e. obligations not to challenge the validity of the licensor's intellectual property. The reason for excluding non-challenge clauses from the scope of the block exemption is the fact that licensees are normally in the best position to determine whether or not an intellectual property right is invalid. In the interest of undistorted competition and in conformity with the principles underlying the protection of intellectual property, invalid intellectual property rights should be eliminated. Invalid intellectual property stifles innovation rather than promoting it. Article 81(1) is likely to apply to non-challenge clauses where the licensed technology is valuable and therefore creates a competitive disadvantage for undertakings that are

prevented from using it or are only able to use it against payment of royalties <sup>(48)</sup>. In such cases the conditions of Article 81(3) are unlikely to be fulfilled <sup>(49)</sup>. However, the Commission takes a favourable view of non-challenge clauses relating to know-how where once disclosed it is likely to be impossible or very difficult to recover the licensed know-how. In such cases, an obligation on the licensee not to challenge the licensed know-how promotes dissemination of new technology, in particular by allowing weaker licensors to license stronger licensees without fear of a challenge once the know-how has been absorbed by the licensee.

113. The TTBER covers the possibility for the licensor to terminate the licence agreement in the event of a challenge of the licensed technology. Accordingly, the licensor is not forced to continue dealing with a licensee that challenges the very subject matter of the licence agreement, implying that upon termination any further use by the licensee of the challenged technology is at the challenger's own risk. Article 5(1)(c) ensures, however, that the TTBER does not cover contractual obligations obliging the licensee not to challenge the licensed technology, which would permit the licensor to sue the licensee for breach of contract and thereby create a further disincentive for the licensee to challenge the validity of the licensor's technology. The provision thereby ensures that the licensee is in the same position as third parties.

114. Article 5(2) excludes from the scope of the block exemption, in the case of agreements between non-competitors, any direct or indirect obligation limiting the licensee's ability to exploit his own technology or limiting the ability of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of licensed know-how to third parties. The content of this condition is the same as that of Article 4(1)(d) of the hardcore list concerning agreements between competitors, which is dealt with in paragraphs 94 and 95 above. However, in the case of agreements between non-competitors it cannot be considered that such restrictions generally have negative effects on competition or that the conditions of Article 81(3) are generally not satisfied <sup>(50)</sup>. Individual assessment is required.

115. In the case of agreements between non-competitors, the licensee normally does not own a competing technology.

However, there may be cases where for the purposes of the block exemption the parties are considered non-competitors in spite of the fact that the licensee does own a competing technology. This is the case where the licensee owns a technology but does not license it and the licensor is not an actual or potential supplier on the product market. For the purposes of the block exemption the parties are in such circumstances neither competitors on the technology market nor competitors on the product market <sup>(51)</sup>. In such cases it is important to ensure that the licensee is not restricted in his ability to exploit his own technology and further develop it. This technology constitutes a competitive constraint in the market, which should be preserved. In such a situation restrictions on the licensee's use of his own technology or on research and development are normally considered to be restrictive of competition and not to satisfy the conditions of Article 81(3). For instance, an obligation on the licensee to pay royalties not only on the basis of products it produces with the licensed technology but also on the basis of products it produces with its own technology will generally limit the ability of the licensee to exploit its own technology and thus be excluded from the scope of the block exemption.

116. In cases where the licensee does not own a competing technology or is not already developing such a technology, a restriction on the ability of the parties to carry out independent research and development may be restrictive of competition where only a few technologies are available. In that case the parties may be an important (potential) source of innovation in the market. This is particularly so where the parties possess the necessary assets and skills to carry out further research and development. In that case the conditions of Article 81(3) are unlikely to be fulfilled. In other cases where several technologies are available and where the parties do not possess special assets or skills, the restriction on research and development is likely to either fall outside Article 81(1) for lack of an appreciable restrictive effect or satisfy the conditions of Article 81(3). The restraint may promote the dissemination of new technology by assuring the licensor that the licence does not create a new competitor and by inducing the licensee to focus on the exploitation and development of the licensed technology. Moreover, Article 81(1) only applies where the agreement reduces the licensee's incentive to improve and exploit his own technology. This is for instance not likely to be the case where the licensor is entitled to terminate the licence agreement once the licensee commences to produce on the basis of his own competing technology. Such a right does not reduce the licensee's incentive to innovate, since the agreement can only be terminated when a commercially viable technology has been developed and products produced on the basis thereof are ready to be put on the market.

## 6. Withdrawal and disapplication of the Block Exemption Regulation

### 6.1. Withdrawal procedure

117. According to Article 6 of the TTBER, the Commission and the competition authorities of the Member States may withdraw the benefit of the block exemption in respect of individual agreements that do not fulfil the conditions of Article 81(3). The power of the competition authorities of the Member States to withdraw the benefit of the block exemption is limited to cases where the relevant geographic market is no wider than the territory of the Member State in question.
118. The four conditions of Article 81(3) are cumulative and must all be fulfilled for the exception rule to be applicable<sup>(52)</sup>. The block exemption can therefore be withdrawn where a particular agreement fails one or more of the four conditions.
119. Where the withdrawal procedure is applied, the withdrawing authority bears the burden of proving that the agreement falls within the scope of Article 81(1) and that the agreement does not satisfy all four conditions of Article 81(3). Given that withdrawal implies that the agreement in question restricts competition within the meaning of Article 81(1) and does not fulfil the conditions of Article 81(3), withdrawal is necessarily accompanied by a negative decision based on Articles 5, 7 or 9 of Regulation 1/2003.
120. According to Article 6, withdrawal may in particular be warranted in the following circumstances:
1. access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third party technology;
  2. access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements preventing licensors from licensing to other licensees;
  3. without any objectively valid reason the parties refrain from exploiting the licensed technology.
121. Articles 4 and 5 of the TTBER, containing the list of hardcore restrictions of competition and excluded restrictions, aim at ensuring that block exempted agreements do not reduce the incentive to innovate, do not delay the dissemination of technology, and do not

unduly restrict competition between the licensor and licensee or between licensees. However, the list of hardcore restrictions and the list of excluded restrictions do not take into account all the possible impacts of licence agreements. In particular, the block exemption does not take account of any cumulative effect of similar restrictions contained in networks of licence agreements. Licence agreements may lead to foreclosure of third parties both at the level of the licensor and at the level of the licensee. Foreclosure of other licensors may stem from the cumulative effect of networks of licence agreements prohibiting the licensees from exploiting competing technologies, leading to the exclusion of other (potential) licensors. Foreclosure of licensors is likely to arise in cases where most of the undertakings on the market that could (efficiently) take a competing licence are prevented from doing so as a consequence of restrictive agreements and where potential licensees face relatively high barriers to entry. Foreclosure of other licensees may stem from the cumulative effect of licence agreements prohibiting licensors from licensing other licensees and thereby preventing potential licensees from gaining access to the necessary technology. The issue of foreclosure is examined in more detail in section IV.2.7 below. In addition, the Commission is likely to withdraw the benefit of the block exemption where a significant number of licensors of competing technologies in individual agreements impose on their licensees to extend to them more favourable conditions agreed with other licensors.

122. The Commission is also likely to withdraw the benefit of the block exemption where the parties refrain from exploiting the licensed technology, unless they have an objective justification for doing so. Indeed, when the parties do not exploit the licensed technology, no efficiency enhancing activity takes place, in which case the very rationale of the block exemption disappears. However, exploitation does not need to take the form of an integration of assets. Exploitation also occurs where the licence creates design freedom for the licensee by allowing him to exploit his own technology without facing the risk of infringement claims by the licensor. In the case of licensing between competitors, the fact that the parties do not exploit the licensed technology may be an indication that the arrangement is a disguised cartel. For these reasons the Commission will examine very closely cases of non-exploitation.

### 6.2. Disapplication of the Block Exemption Regulation

123. Article 7 of the TTBER enables the Commission to exclude from the scope of the TTBER, by means of regulation, parallel networks of similar agreements where these cover more than 50 % of a relevant market. Such a measure is not addressed to individual undertakings but concerns all undertakings whose agreements are defined in the regulation disapplying the TTBER.

124. Whereas withdrawal of the benefit of the TTBER by the Commission under Article 6 implies the adoption of a decision under Articles 7 or 9 of Regulation 1/2003, the effect of a Commission disapplication regulation under Article 7 of the TTBER is merely to remove, in respect of the restraints and the markets concerned, the benefit of the TTBER and to restore the full application of Article 81(1) and (3). Following the adoption of a regulation declaring the TTBER inapplicable for a particular market in respect of agreements containing certain restraints, the criteria developed by the relevant case law of the Community Courts and by notices and previous decisions adopted by the Commission will give guidance on the application of Article 81 to individual agreements. Where appropriate, the Commission will take a decision in an individual case, which can provide guidance to all the undertakings operating on the market concerned.
125. For the purpose of calculating the 50 % market coverage ratio, account must be taken of each individual network of licence agreements containing restraints, or combinations of restraints, producing similar effects on the market.
126. Article 7 does not entail an obligation on the part of the Commission to act where the 50 % market-coverage ratio is exceeded. In general, disapplication is appropriate when it is likely that access to the relevant market or competition therein is appreciably restricted. In assessing the need to apply Article 7, the Commission will consider whether individual withdrawal would be a more appropriate remedy. This may depend, in particular, on the number of competing undertakings contributing to a cumulative effect on a market or the number of affected geographic markets within the Community.
127. Any regulation adopted under Article 7 must clearly set out its scope. This means, first, that the Commission must define the relevant product and geographic market(s) and, secondly, that it must identify the type of licensing restraint in respect of which the TTBER will no longer apply. As regards the latter aspect, the Commission may modulate the scope of its regulation according to the competition concern which it intends to address. For instance, while all parallel networks of non-compete arrangements will be taken into account for the purpose of establishing the 50 % market coverage ratio, the Commission may nevertheless restrict the scope of the disapplication regulation only to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, due to the lesser degree of foreclosure attributable to such restraints. Where appropriate, the Commission may also provide guidance by specifying the market share level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect. In general, when the market share of the products incorporating a technology licensed by an individual licensor does not exceed 5 %, the agreement or network of agreements covering that technology is not considered to contribute significantly to a cumulative foreclosure effect<sup>(53)</sup>.
128. The transitional period of not less than six months that the Commission will have to set under Article 7(2) should allow the undertakings concerned to adapt their agreements to take account of the regulation disapplying the TTBER.
129. A regulation disapplying the TTBER will not affect the block exempted status of the agreements concerned for the period preceding its entry into force.
- IV. APPLICATION OF ARTICLE 81(1) AND 81(3) OUTSIDE THE SCOPE OF THE BLOCK EXEMPTION REGULATION**
- 1. The general framework for analysis**
130. Agreements that fall outside the block exemption, for example because the market share thresholds are exceeded or the agreement involves more than two parties, are subject to individual assessment. Agreements that either do not restrict competition within the meaning of Article 81(1) or which fulfil the conditions of Article 81(3) are valid and enforceable. It is recalled that there is no presumption of illegality of agreements that fall outside the scope of the block exemption provided that they do not contain hardcore restrictions of competition. In particular, there is no presumption that Article 81(1) applies merely because the market share thresholds are exceeded. Individual assessment based on the principles described in these guidelines is required.
131. In order to promote predictability beyond the application of the TTBER and to confine detailed analysis to cases that are likely to present real competition concerns, the Commission takes the view that outside the area of hardcore restrictions Article 81 is unlikely to be infringed where there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user. In assessing whether the technologies are sufficiently substitutable the relative commercial strength of the technologies in question must be taken into account. The competitive constraint imposed by a technology is limited if it does not constitute a commercially viable alternative to the licensed technology. For instance, if due to network effects in the market consumers have a strong preference for products incorporating the licensed

technology, other technologies already on the market or likely to come to market within a reasonable period of time may not constitute a real alternative and may therefore impose only a limited competitive constraint. The fact that an agreement falls outside the safe harbour described in this paragraph does not imply that the agreement is caught by Article 81(1) and, if so, that the conditions of Article 81(3) are not satisfied. As for the market share safe harbour of the TTBER, this additional safe harbour merely creates a negative presumption that the agreement is not prohibited by Article 81. Outside the safe harbour individual assessment of the agreement based on the principles developed in these guidelines is required.

### 1.1. The relevant factors

132. In the application of Article 81 to individual cases it is necessary to take due account of the way in which competition operates on the market in question. The following factors are particularly relevant in this respect:

- (a) the nature of the agreement;
- (b) the market position of the parties;
- (c) the market position of competitors;
- (d) the market position of buyers of the licensed products;
- (e) entry barriers;
- (f) maturity of the market; and
- (g) other factors.

The importance of individual factors may vary from case to case and depends on all other factors. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers it may not be indicative of market power. It is therefore not possible to provide firm rules on the importance of the individual factors.

133. Technology transfer agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the competitive relationship between the parties and the restraints that it contains. In the latter regard it is necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement has been implemented by the parties and the incentives that they face.

134. The market position of the parties provides an indication of the degree of market power, if any, possessed by the licensor, the licensee or both. The higher their market share the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. These competitive advantages may for instance result from being a first mover in the market, from holding essential patents or from having superior technology.

135. In analysing the competitive relationship between the parties it is sometimes necessary to go beyond the analysis set out in the above sections II.3 on market definition and II.4 on the distinction between competitors and non-competitors. Even where the licensor is not an actual or potential supplier on the product market and the licensee is not an actual or potential competitor on the technology market, it is relevant to the analysis whether the licensee owns a competing technology, which is not being licensed. If the licensee has a strong position on the product market, an agreement granting him an exclusive licence to a competing technology can restrict competition significantly compared to the situation where the licensor does not grant an exclusive licence or licences other undertakings.

136. Market shares and possible competitive advantages and disadvantages are also used to assess the market position of competitors. The stronger the actual competitors and the greater their number the less risk there is that the parties will be able to individually exercise market power. However, if the number of competitors is rather small and their market position (size, costs, R&D potential, etc.) is rather similar, this market structure may increase the risk of collusion.

137. The market position of buyers provides an indication of whether or not one or more buyers possess buyer power. The first indicator of buying power is the market share of the buyer on the purchase market. This share reflects the importance of his demand for possible suppliers. Other indicators focus on the position of the buyer on his resale market, including characteristics such as a wide geographic spread of his outlets, and his brand image amongst final consumers. In some circumstances buyer power may prevent the licensor and/or the licensee from exercising market power on the market and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong buyers have the capacity and the incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices. Where the strong buyers merely extract favourable terms from the supplier or simply pass on any price increase to their customers, the position of the buyers is not such as to prevent the exercise of market power by the licensee on the product market and therefore not such as to solve the competition problem on that market<sup>(54)</sup>.

138. Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within one or two years, entry barriers can, as a general rule, be said to be low. Entry barriers may result from a wide variety of factors such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations, essential facilities, a first mover advantage or brand loyalty of consumers created by strong advertising over a period of time. Restrictive agreements entered into by undertakings may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. Entry barriers may be present at all stages of the research and development, production and distribution process. The question whether certain of these factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are those costs which have to be incurred to enter or be active on a market but which are lost when the market is exited. The more costs are sunk, the more potential entrants have to weigh the risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.
139. A mature market is a market that has existed for some time, where the technology used is well known and widespread and not changing very much and in which demand is relatively stable or declining. In such a market restrictions of competition are more likely to have negative effects than in more dynamic markets.
140. In the assessment of particular restraints other factors may have to be taken into account. Such factors include cumulative effects, i.e. the coverage of the market by similar agreements, the duration of the agreements, the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and discussions on the 'right' price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.
- 1.2. Negative effects of restrictive licence agreements**
141. The negative effects on competition on the market that may result from restrictive technology transfer agreements include the following:
1. reduction of inter-technology competition between the companies operating on a technology market or on a market for products incorporating the technologies in question, including facilitation of collusion, both explicit and tacit;
  2. foreclosure of competitors by raising their costs, restricting their access to essential inputs or otherwise raising barriers to entry; and
  3. reduction of intra-technology competition between undertakings that produce products on the basis of the same technology.
142. Technology transfer agreements may reduce inter-technology competition, i.e. competition between undertakings that license or produce on the basis of substitutable technologies. This is particularly so where reciprocal obligations are imposed. For instance, where competitors transfer competing technologies to each other and impose a reciprocal obligation to provide each other with future improvements of their respective technologies and where this agreement prevents either competitor from gaining a technological lead over the other, competition in innovation between the parties is restricted (see also paragraph 208 below).
143. Licensing between competitors may also facilitate collusion. The risk of collusion is particularly high in concentrated markets. Collusion requires that the undertakings concerned have similar views on what is in their common interest and on how the co-ordination mechanisms function. For collusion to work the undertakings must also be able to monitor each other's market behaviour and there must be adequate deterrents to ensure that there is an incentive not to depart from the common policy on the market, while entry barriers must be high enough to limit entry or expansion by outsiders. Agreements can facilitate collusion by increasing transparency in the market, by controlling certain behaviour and by raising barriers to entry. Collusion can also exceptionally be facilitated by licensing agreements that lead to a high degree of commonality of costs, because undertakings that have similar costs are more likely to have similar views on the terms of coordination <sup>(55)</sup>.

144. Licence agreements may also affect inter-technology competition by creating barriers to entry for and expansion by competitors. Such foreclosure effects may stem from restraints that prevent licensees from licensing from third parties or create disincentives for them to do so. For instance, third parties may be foreclosed where incumbent licensors impose non-compete obligations on licensees to such an extent that an insufficient number of licensees are available to third parties and where entry at the level of licensees is difficult. Suppliers of substitutable technologies may also be foreclosed where a licensor with a sufficient degree of market power ties together various parts of a technology and licenses them together as a package while only part of the package is essential to produce a certain product.
145. Licence agreements may also reduce intra-technology competition, i.e. competition between undertakings that produce on the basis of the same technology. An agreement imposing territorial restraints on licensees, preventing them from selling into each other's territory reduces competition between them. Licence agreements may also reduce intra-technology competition by facilitating collusion between licensees. Moreover, licence agreements that reduce intra-technology competition may facilitate collusion between owners of competing technologies or reduce inter-technology competition by raising barriers to entry.
- 1.3. Positive effects of restrictive licence agreements and the framework for analysing such effects**
146. Even restrictive licence agreements mostly also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. This assessment takes place within the framework of Article 81(3), which contains an exception from the prohibition rule of Article 81(1). For this exception to be applicable the licence agreement must produce objective economic benefits, the restrictions on competition must be indispensable to attain the efficiencies, consumers must receive a fair share of the efficiency gains, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned.
147. The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur<sup>(56)</sup> and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case<sup>(57)</sup>. However, when applying Article 81(3) in accordance with these principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 81 cannot be applied without considering the *ex ante* investment and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.
148. The first condition of Article 81(3) requires an assessment of what are the objective benefits in terms of efficiencies produced by the agreement. In this respect, licence agreements have the potential of bringing together complementary technologies and other assets allowing new or improved products to be put on the market or existing products to be produced at lower cost. Outside the context of hardcore cartels, licensing often occurs because it is more efficient for the licensor to licence the technology than to exploit it himself. This may particularly be the case where the licensee already has access to the necessary production assets. The agreement allows the licensee to gain access to a technology that can be combined with these assets, allowing him to exploit new or improved technologies. Another example of potentially efficiency enhancing licensing is where the licensee already has a technology and where the combination of this technology and the licensor's technology gives rise to synergies. When the two technologies are combined the licensee may be able to attain a cost/output configuration that would not otherwise be possible. Licence agreements may also give rise to efficiencies at the distribution stage in the same way as vertical distribution agreements. Such efficiencies can take the form of cost savings or the provision of valuable services to consumers. The positive effects of vertical agreements are described in the Guidelines on Vertical Restraints<sup>(58)</sup>. A further example of possible efficiency gains is agreements whereby technology owners assemble a technology package for licensing to third parties. Such pooling arrangements may in particular reduce transaction costs, as licensees do not have to conclude separate licence agreements with each licensor. Pro-competitive licensing may also occur to ensure design freedom. In sectors where large numbers of intellectual property rights exist and where individual products may infringe upon a number of existing and future property rights, licence agreements whereby the parties agree not to assert their property rights against each other are often pro-competitive because they allow the parties to develop their respective technologies without the risk of subsequent infringement claims.
149. In the application of the indispensability test contained in Article 81(3) the Commission will in particular examine whether individual restrictions make it possible to perform the activity in question more efficiently than would have been the case in the absence of the restriction concerned. In making this assessment the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of Article 81(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives



would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable. In some cases, it may also be necessary to examine whether the agreement as such is indispensable to achieve the efficiencies. This may for example be so in the case of technology pools that include complementary but non-essential technologies<sup>(59)</sup>, in which case it must be examined to what extent such inclusion gives rise to particular efficiencies or whether, without a significant loss of efficiencies, the pool could be limited to technologies for which there are no substitutes. In the case of simple licensing between two parties it is generally not necessary to go beyond an examination of the indispensability of individual restraints. Normally there is no less restrictive alternative to the licence agreement as such.

150. The condition that consumers must receive a fair share of the benefits implies that consumers of the products produced under the licence must at least be compensated for the negative effects of the agreement<sup>(60)</sup>. This means that the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement. They may do so by changing the cost structure of the undertakings concerned, giving them an incentive to reduce price, or by allowing consumers to gain access to new or improved products, compensating for any likely price increase<sup>(61)</sup>.

151. The last condition of Article 81(3), according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. In the application of the last condition of Article 81(3) the relationship between Article 81(3) and Article 82 must be taken into account. According to settled case law, the application of Article 81(3) cannot prevent the application of Article 82 of the Treaty<sup>(62)</sup>. Moreover, since Articles 81 and 82 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 81(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position<sup>(63)</sup>.

152. The fact that the agreement substantially reduces one dimension of competition does not necessarily mean that competition is eliminated within the meaning of Article 81(3). A technology pool, for instance, can result in an industry standard, leading to a situation in which there is little competition in terms of the technological format. Once the main players in the market adopt a certain format, network effects may make it very difficult for alternative formats to survive. This does not

imply, however, that the creation of a de facto industry standard always eliminates competition within the meaning of the last condition of Article 81(3). Within the standard, suppliers may compete on price, quality and product features. However, in order for the agreement to comply with Article 81(3), it must be ensured that the agreement does not unduly restrict competition and does not unduly restrict future innovation.

## 2. The application of Article 81 to various types of licensing restraints

153. This section deals with various types of restraints that are commonly included in licence agreements. Given their prevalence it is useful to provide guidance as to how they are assessed outside the safe harbour of the TTBER. Restraints that have already been dealt with in the preceding parts of these guidelines, in particular sections III.4 and III.5, are only dealt with briefly in the present section.

154. This section covers both agreements between non-competitors and agreements between competitors. In respect of the latter a distinction is made — where appropriate — between reciprocal and non-reciprocal agreements. No such distinction is required in the case of agreements between non-competitors. When undertakings are neither actual nor potential competitors on a relevant technology market or on a market for products incorporating the licensed technology, a reciprocal licence is for all practical purposes no different from two separate licences. Arrangements whereby the parties assemble a technology package, which is then licensed to third parties, are technology pools, which are dealt with in section 4 below.

155. This section does not deal with obligations in licence agreements that are generally not restrictive of competition within the meaning of Article 81(1). These obligations include but are not limited to:

(a) confidentiality obligations;

(b) obligations on licensees not to sub-license;

(c) obligations not to use the licensed technology after the expiry of the agreement, provided that the licensed technology remains valid and in force;

(d) obligations to assist the licensor in enforcing the licensed intellectual property rights;

(e) obligations to pay minimum royalties or to produce a minimum quantity of products incorporating the licensed technology; and

(f) obligations to use the licensor's trade mark or indicate the name of the licensor on the product.

## 2.1. Royalty obligations

156. The parties to a licence agreement are normally free to determine the royalty payable by the licensee and its mode of payment without being caught by Article 81(1). This principle applies both to agreements between competitors and agreements between non-competitors. Royalty obligations may for instance take the form of lump sum payments, a percentage of the selling price or a fixed amount for each product incorporating the licensed technology. In cases where the licensed technology relates to an input which is incorporated into a final product it is as a general rule not restrictive of competition that royalties are calculated on the basis of the price of the final product, provided that it incorporates the licensed technology. In the case of software licensing royalties based on the number of users and royalties calculated on a per machine basis are generally compatible with Article 81(1).

157. In the case of licence agreements between competitors it is recalled, see paragraphs and above, that in a limited number of circumstances royalty obligations may amount to price fixing, which is a hardcore restriction (cf. Article 4(1)(a)). It is a hardcore restriction under Article 4(1)(a) if competitors provide for reciprocal running royalties in circumstances where the licence is a sham, in that its purpose is not to allow an integration of complementary technologies or to achieve another pro-competitive aim. It is also a hardcore restriction under Article 4(1)(a) and 4(1)(d) if royalties extend to products produced solely with the licensee's own technology.

158. Other types of royalty arrangements between competitors are block exempted up to the market share threshold of 20 % even if they restrict competition. Outside the safe harbour of the block exemption Article 81(1) may be applicable where competitors cross license and impose running royalties that are clearly disproportionate compared to the market value of the licence and where such royalties have a significant impact on market prices. In assessing whether the royalties are disproportionate it is relevant to have regard to the royalties paid by other licensees on the product market for the same or substitute technologies. In such cases it is unlikely that the conditions of Article 81(3) are satisfied. Article 81(1) may also apply where reciprocal running royalties per unit increase as output increases. If the parties have a significant degree of market power, such royalties may have the effect of limiting output.

159. Notwithstanding the fact that the block exemption only applies as long as the technology is valid and in force, the parties can normally agree to extend royalty obligations beyond the period of validity of the licensed intellectual property rights without falling foul of Article 81(1). Once these rights expire, third parties can legally exploit the technology in question and compete with the parties to the agreement. Such actual and potential competition will normally suffice to ensure that the obligation in question does not have appreciable anti-competitive effects.

160. In the case of agreements between non-competitors the block exemption covers agreements whereby royalties are calculated on the basis of both products produced with the licensed technology and products produced with technologies licensed from third parties. Such arrangements may facilitate the metering of royalties. However, they may also lead to foreclosure by increasing the cost of using third party inputs and may thus have similar effects as a non-compete obligation. If royalties are paid not just on products produced with the licensed technology but also on products produced with third party technology, then the royalties will increase the cost of the latter products and reduce demand for third party technology. Outside the scope of the block exemption it must therefore be examined whether the restriction has foreclosure effects. For that purpose it is appropriate to use the analytical framework set out in section 2.7 below. In the case of appreciable foreclosure effects such agreements are caught by Article 81(1) and unlikely to fulfil the conditions of Article 81(3), unless there is no other practical way of calculating and monitoring royalty payments.

## 2.2. Exclusive licensing and sales restrictions

161. For the present purposes it is useful to distinguish between restrictions as to production within a given territory (exclusive or sole licences) and restrictions on the sale of products incorporating the licensed technology into a given territory and to a given customer group (sales restrictions).

### 2.2.1. Exclusive and sole licences

162. A licence is deemed to be exclusive if the licensee is the only one who is permitted to produce on the basis of the licensed technology within a given territory. The licensor thus undertakes not to produce itself or license others to produce within a given territory. This territory may cover the whole world. Where the licensor undertakes only not to license third parties to produce within a given territory, the licence is a sole licence. Often exclusive or sole licensing is accompanied by sales restrictions that limit the parties in where they may sell products incorporating the licensed technology.

163. Reciprocal exclusive licensing between competitors falls under Article 4(1)(c), which identifies market sharing between competitors as a hardcore restriction. Reciprocal sole licensing between competitors is block exempted up to the market share threshold of 20 %. Under such an agreement the parties mutually commit not to license their competing technologies to third parties. In cases where the parties have a significant degree of market power such agreements may facilitate collusion by ensuring that the parties are the only sources of output in the market based on the licensed technologies.
164. Non-reciprocal exclusive licensing between competitors is block exempted up to the market share threshold of 20 %. Above the market share threshold it is necessary to analyse what are the likely anti-competitive effects of such exclusive licensing. Where the exclusive licence is world-wide it implies that the licensor leaves the market. In cases where exclusivity is limited to a particular territory such as a Member State the agreement implies that the licensor abstains from producing goods and services inside the territory in question. In the context of Article 81(1) it must in particular be assessed what is the competitive significance of the licensor. If the licensor has a limited market position on the product market or lacks the capacity to effectively exploit the technology in the licensee's territory, the agreement is unlikely to be caught by Article 81(1). A special case is where the licensor and the licensee only compete on the technology market and the licensor, for instance being a research institute or a small research based undertaking, lacks the production and distribution assets to effectively bring to market products incorporating the licensed technology. In such cases Article 81(1) is unlikely to be infringed.
165. Exclusive licensing between non-competitors — to the extent that it is caught by Article 81(1) <sup>(64)</sup> — is likely to fulfil the conditions of Article 81(3). The right to grant an exclusive licence is generally necessary in order to induce the licensee to invest in the licensed technology and to bring the products to market in a timely manner. This is in particular the case where the licensee must make large investments in further developing the licensed technology. To intervene against the exclusivity once the licensee has made a commercial success of the licensed technology would deprive the licensee of the fruits of his success and would be detrimental to competition, the dissemination of technology and innovation. The Commission will therefore only exceptionally intervene against exclusive licensing in agreements between non-competitors, irrespective of the territorial scope of the licence.
166. The main situation in which intervention may be warranted is where a dominant licensee obtains an exclusive licence to one or more competing technologies. Such agreements are likely to be caught by Article 81(1) and unlikely to fulfil the conditions of Article 81(3). It is a condition however that entry into the technology market is difficult and the licensed technology constitutes a real source of competition on the market. In such circumstances an exclusive licence may foreclose third party licensees and allow the licensee to preserve his market power.
167. Arrangements whereby two or more parties cross licence each other and undertake not to licence third parties give rise to particular concerns when the package of technologies resulting from the cross licences creates a de facto industry standard to which third parties must have access in order to compete effectively on the market. In such cases the agreement creates a closed standard reserved for the parties. The Commission will assess such arrangements according to the same principles as those applied to technology pools (see section 4 below). It will normally be required that the technologies which support such a standard be licensed to third parties on fair, reasonable and non-discriminatory terms <sup>(65)</sup>. Where the parties to the arrangement compete with third parties on an existing product market and the arrangement relates to that product market a closed standard is likely to have substantial exclusionary effects. This negative impact on competition can only be avoided by licensing also to third parties.
- 2.2.2. Sales restrictions
168. Also as regards sales restrictions there is an important distinction to be made between licensing between competitors and between non-competitors.
169. Restrictions on active and passive sales by one or both parties in a reciprocal agreement between competitors are hardcore restrictions of competition under Article 4(1)(c). Sales restrictions on either party in a reciprocal agreement between competitors are caught by Article 81(1) and are unlikely to fulfil the conditions of Article 81(3). Such restrictions are generally considered market sharing, since they prevent the affected party from selling actively and passively into territories and to customer groups which he actually served or could realistically have served in the absence of the agreement.
170. In the case of non-reciprocal agreements between competitors the block exemption applies to restrictions on active and passive sales by the licensee or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party (cf. Article 4(1)(c)(iv). Above the market share threshold of 20 % sales restrictions between licensor and licensee are caught by

Article 81(1) when one or both of the parties have a significant degree of market power. Such restrictions, however, may be indispensable for the dissemination of valuable technologies and therefore fulfil the conditions of Article 81(3). This may be the case where the licensor has a relatively weak market position in the territory where he exploits himself the technology. In such circumstances restrictions on active sales in particular may be indispensable to induce the licensor to grant the licence. In the absence thereof the licensor would risk facing active competition in his main area of activity. Similarly, restrictions on active sales by the licensor may be indispensable, in particular, where the licensee has a relatively weak market position in the territory allocated to him and has to make significant investments in order to efficiently exploit the licensed technology.

171. The block exemption also covers restrictions on active sales into the territory or to the customer group allocated to another licensee, who was not a competitor of the licensor at the time when he concluded the licence agreement with the licensor. It is a condition, however, that the agreement between the parties in question is non-reciprocal. Above the market share threshold such active sales restrictions are likely to be caught by Article 81(1) when the parties have a significant degree of market power. However, the restraint is likely to be indispensable within the meaning of Article 81(3) for the period of time required for the protected licensee to penetrate a new market and establish a market presence in the allocated territory or vis-à-vis the allocated customer group. This protection against active sales allows the licensee to overcome the asymmetry, which he faces due to the fact that some of the licensees are competing undertakings of the licensor and thus already established on the market. Restrictions on passive sales by licensees into a territory or to a customer group allocated to another licensee are hardcore restrictions under Article 4(1)(c) of the TTBER.

172. In the case of agreements between non-competitors sales restrictions between the licensor and a licensee are block exempted up to the market share threshold of 30 %. Above the market share threshold restrictions on active and passive sales by licensees to territories or customer groups reserved for the licensor may fall outside Article 81(1) where on the basis of objective factors it can be concluded that in the absence of the sales restrictions licensing would not occur. A technology owner cannot normally be expected to create direct competition with himself on the basis of his own technology. In other cases sales restrictions on the licensee may be caught by Article 81(1) both where the licensor individually has a significant degree of market power and in the case of a cumulative effect of similar agreements concluded by licensors which together hold a strong position on the market.

173. Sales restrictions on the licensor, when caught by Article 81(1), are likely to fulfil the conditions of Article 81(3) unless there are no real alternatives to the licensor's technology on the market or such alternatives are licensed by the licensee from third parties. Such restrictions and in particular restrictions on active sales are likely to be indispensable within the meaning of Article 81(3) in order to induce the licensee to invest in the production, marketing and sale of the products incorporating the licensed technology. It is likely that the licensee's incentive to invest would be significantly reduced if he would face direct competition from the licensor whose production costs are not burdened by royalty payments, possibly leading to sub-optimal levels of investment.

174. As regards restrictions on sales between licensees in agreements between non-competitors, the TTBER block exempts restrictions on active selling between territories or customer groups. Above the market share threshold restrictions on active sales between licensees' territories and customer groups limit intra-technology competition and are likely to be caught by Article 81(1) when the individual licensee has a significant degree of market power. Such restrictions, however, may fulfil the conditions of Article 81(3) where they are necessary to prevent free riding and to induce the licensee to make the investment necessary for efficient exploitation of the licensed technology inside his territory and to promote sales of the licensed product. Restrictions on passive sales are covered by the hardcore list of Article 4(2)(b), cf. paragraph 101 above, when they exceed two years from the date on which the licensee benefiting from the restrictions first put the product incorporating the licensed technology on the market inside his exclusive territory. Passive sales restrictions exceeding this two-year period are unlikely to fulfil the conditions of Article 81(3).

### 2.3. Output restrictions

175. Reciprocal output restrictions in licence agreements between competitors constitute a hardcore restriction covered by Article 4(1)(b) of the TTBER (cf. point 82 above). Article 4(1)(b) does not cover output restrictions imposed on the licensee in a non-reciprocal agreement or on one of the licensees in an reciprocal agreement. Such restrictions are block exempted up to the market share threshold of 20 %. Above the market share threshold, output restrictions on the licensee may restrict competition where the parties have a significant degree of market power. However, Article 81(3) is likely to apply in cases where the licensor's technology is substantially better than the licensee's technology and the output limitation substantially exceeds the output of the licensee prior to the conclusion of the agreement. In

that case the effect of the output limitation is limited even in markets where demand is growing. In the application of Article 81(3) it must also be taken into account that such restrictions may be necessary in order to induce the licensor to disseminate his technology as widely as possible. For instance, a licensor may be reluctant to license his competitors if he cannot limit the licence to a particular production site with a specific capacity (a site licence). Where the licence agreement leads to a real integration of complementary assets, output restrictions on the licensee may therefore fulfil the conditions of Article 81(3). However, this is unlikely to be the case where the parties have substantial market power.

176. Output restrictions in licence agreements between non-competitors are block exempted up to the market share threshold of 30 %. The main anti-competitive risk flowing from output restrictions on licensees in agreements between non-competitors is reduced intra-technology competition between licensees. The significance of such anti-competitive effects depends on the market position of the licensor and the licensees and the extent to which the output limitation prevents the licensee from satisfying demand for the products incorporating the licensed technology.

177. When output restrictions are combined with exclusive territories or exclusive customer groups, the restrictive effects are increased. The combination of the two types of restraints makes it more likely that the agreement serves to partition markets.

178. Output limitations imposed on the licensee in agreements between non-competitors may also have pro-competitive effects by promoting the dissemination of technology. As a supplier of technology, the licensor should normally be free to determine the output produced with the licensed technology by the licensee. If the licensor were not free to determine the output of the licensee, a number of licence agreements might not come into existence in the first place, which would have a negative impact on the dissemination of new technology. This is particularly likely to be the case where the licensor is also a producer, since in that case the output of the licensees may find their way back into the licensor's main area of operation and thus have a direct impact on these activities. On the other hand, it is less likely that output restrictions are necessary in order to ensure dissemination of the licensor's technology when combined with sales restrictions on the licensee prohibiting him from selling into a territory or customer group reserved for the licensor.

#### 2.4. Field of use restrictions

179. Under a field of use restriction the licence is either limited to one or more technical fields of application or one or more product markets. There are many cases in which the same technology can be used to make different products or can be incorporated into products belonging to different product markets. A new moulding technology may for instance be used to make plastic bottles and plastic glasses, each product belonging to separate product markets. However, a single product market may encompass several technical fields of use. For instance a new engine technology may be employed in four cylinder engines and six cylinder engines. Similarly, a technology to make chipsets may be used to produce chipsets with up to four CPUs and more than four CPUs. A licence limiting the use of the licensed technology to produce say four cylinder engines and chipsets with up to four CPUs constitutes a technical field of use restriction.

180. Given that field of use restrictions are block exempted and that certain customer restrictions are hardcore restrictions under Articles 4(1)(c) and 4(2)(b) of the TTBER, it is important to distinguish the two categories of restraints. A customer restriction presupposes that specific customer groups are identified and that the parties are restricted in selling to such identified groups. The fact that a technical field of use restriction may correspond to certain groups of customers within a product market does not imply that the restraint is to be classified as a customer restriction. For instance, the fact that certain customers buy predominantly or exclusively chipsets with more than four CPUs does not imply that a licence which is limited to chipsets with up to four CPUs constitutes a customer restriction. However, the field of use must be defined objectively by reference to identified and meaningful technical characteristics of the licensed product.

181. A field of use restriction limits the exploitation of the licensed technology by the licensee to one or more particular fields of use without limiting the licensor's ability to exploit the licensed technology. In addition, as with territories, these fields of use can be allocated to the licensee under an exclusive or sole licence. Field of use restrictions combined with an exclusive or sole licence also restrict the licensor's ability to exploit his own technology, by preventing him from exploiting it himself, including by way of licensing to others. In the case of a sole licence only licensing to third parties is restricted. Field of use restrictions combined with exclusive and sole licences are treated in the same way as the exclusive and sole licences dealt with in section 2.2.1 above. In particular, for licensing between competitors, this means that reciprocal exclusive licensing is hardcore under Article 4(1)(c).

182. Field of use restrictions may have pro-competitive effects by encouraging the licensor to license his technology for applications that fall outside his main area of focus. If the licensor could not prevent licensees from operating in fields where he exploits the technology himself or in fields where the value of the technology is not yet well established, it would be likely to create a disincentive for the licensor to license or would lead him to charge a higher royalty. It must also be taken into account that in certain sectors licensing often occurs to ensure design freedom by preventing infringement claims. Within the scope of the licence the licensee is able to develop his own technology without fearing infringement claims by the licensor.

183. Field of use restrictions on licensees in agreements between actual or potential competitors are block exempted up to the market share threshold of 20 %. The main competitive concern in the case of such restrictions is the risk that the licensee ceases to be a competitive force outside the licensed field of use. This risk is greater in the case of cross licensing between competitors where the agreement provides for asymmetrical field of use restrictions. A field of use restriction is asymmetrical where one party is permitted to use the licensed technology within one product market or technical field of use and the other party is permitted to use the other licensed technology within another product market or technical field of use. Competition concerns may in particular arise where the licensee's production facility, which is tooled up to use the licensed technology, is also used to produce with his own technology products outside the licensed field of use. If the agreement is likely to lead the licensee to reduce output outside the licensed field of use, the agreement is likely to be caught by Article 81(1). Symmetrical field of use restrictions, i.e. agreements whereby the parties are licensed to use each other's technologies within the same field(s) of use, are unlikely to be caught by Article 81(1). Such agreements are unlikely to restrict competition that existed in the absence of the agreement. Article 81(1) is also unlikely to apply in the case of agreements that merely enable the licensee to develop and exploit his own technology within the scope of the licence without fearing infringement claims by the licensor. In such circumstances field of use restrictions do not in themselves restrict competition that existed in the absence of the agreement. In the absence of the agreement the licensee also risked infringement claims outside the scope of the licensed field of use. However, if the licensee without business justification terminates or scales back his activities in the area outside the licensed field of use this may be an indication of an underlying market sharing arrangement amounting to a hardcore restriction under Article 4(1)(c) of the TTBER.

184. Field of use restrictions on licensee and licensor in agreements between non-competitors are block exempted up to the market share threshold of 30 %. Field of use restrictions in agreements between non-competitors whereby the licensor reserves one or

more product markets or technical fields of use for himself are generally either non-restrictive of competition or efficiency enhancing. They promote dissemination of new technology by giving the licensor an incentive to license for exploitation in fields in which he does not want to exploit the technology himself. If the licensor could not prevent licensees from operating in fields where the licensor exploits the technology himself, it would be likely to create a disincentive for the licensor to licence.

185. In agreements between non-competitors the licensor is normally also entitled to grant sole or exclusive licences to different licensees limited to one or more fields of use. Such restrictions limit intra-technology competition between licensees in the same way as exclusive licensing and are analysed in the same way (cf. section 2.2.1 above).

#### 2.5. Captive use restrictions

186. A captive use restriction can be defined as an obligation on the licensee to limit his production of the licensed product to the quantities required for the production of his own products and for the maintenance and repair of his own products. In other words, this type of use restriction takes the form of an obligation on the licensee to use the products incorporating the licensed technology only as an input for incorporation into his own production; it does not cover the sale of the licensed product for incorporation into the products of other producers. Captive use restrictions are block exempted up to the respective market share thresholds of 20 % and 30 %. Outside the scope of the block exemption it is necessary to examine what are the pro-competitive and anti-competitive effects of the restraint. In this respect it is necessary to distinguish agreements between competitors from agreements between non-competitors.

187. In the case of licence agreements between competitors a restriction that imposes on the licensee to produce under the licence only for incorporation into his own products prevents him from being a supplier of components to third party producers. If prior to the conclusion of the agreement, the licensee was not an actual or likely potential supplier of components to other producers, the captive use restriction does not change anything compared to the pre-existing situation. In those circumstances the restriction is assessed in the same way as in the case of agreements between non-competitors. If, on the other hand, the licensee is an actual or likely component supplier, it is necessary to examine what is the impact of the agreement on this activity. If by tooling up to use the licensor's technology the licensee ceases to use his own technology on a stand alone basis and thus to be a component supplier, the agreement restricts competition that existed prior to the agreement. It may result in serious negative market effects when the licensor has a significant degree of market power on the component market.

188. In the case of licence agreements between non-competitors there are two main competitive risks stemming from captive use restrictions: (a) a restriction of intra-technology competition on the market for the supply of inputs and (b) an exclusion of arbitrage between licensees enhancing the possibility for the licensor to impose discriminatory royalties on licensees.
189. Captive use restrictions, however, may also promote pro-competitive licensing. If the licensor is a supplier of components, the restraint may be necessary in order for the dissemination of technology between non-competitors to occur. In the absence of the restraint the licensor may not grant the licence or may do so only against higher royalties, because otherwise he would create direct competition to himself on the component market. In such cases a captive use restriction is normally either not restrictive of competition or covered by Article 81(3). It is a condition, however, that the licensee is not restricted in selling the licensed product as replacement parts for his own products. The licensee must be able to serve the after market for his own products, including independent service organisations that service and repair the products produced by him.
190. Where the licensor is not a component supplier on the relevant market, the above reason for imposing captive use restrictions does not apply. In such cases a captive use restriction may in principle promote the dissemination of technology by ensuring that licensees do not sell to producers that compete with the licensor on other markets. However, a restriction on the licensee not to sell into certain customer groups reserved for the licensor normally constitutes a less restrictive alternative. Consequently, in such cases a captive use restriction is normally not necessary for the dissemination of technology to take place.
- 2.6. Tying and bundling**
191. In the context of technology licensing tying occurs when the licensor makes the licensing of one technology (the tying product) conditional upon the licensee taking a licence for another technology or purchasing a product from the licensor or someone designated by him (the tied product). Bundling occurs where two technologies or a technology and a product are only sold together as a bundle. In both cases, however, it is a condition that the products and technologies involved are distinct in the sense that there is distinct demand for each of the products and technologies forming part of the tie or the bundle. This is normally not the case where the technologies or products are by necessity linked in such a way that the licensed technology cannot be exploited without the tied product or both parts of the bundle cannot be exploited without the other. In the following the term 'tying' refers to both tying and bundling.
192. Article 3 of the TTBER, which limits the application of the block exemption by market share thresholds, ensures that tying and bundling are not block exempted above the market share thresholds of 20 % in the case of agreements between competitors and 30 % in the case of agreements between non-competitors. The market share thresholds apply to any relevant technology or product market affected by the licence agreement, including the market for the tied product. Above the market share thresholds it is necessary to balance the anti-competitive and pro-competitive effects of tying.
193. The main restrictive effect of tying is foreclosure of competing suppliers of the tied product. Tying may also allow the licensor to maintain market power in the market for the tying product by raising barriers to entry since it may force new entrants to enter several markets at the same time. Moreover, tying may allow the licensor to increase royalties, in particular when the tying product and the tied product are partly substitutable and the two products are not used in fixed proportion. Tying prevents the licensee from switching to substitute inputs in the face of increased royalties for the tying product. These competition concerns are independent of whether the parties to the agreement are competitors or not. For tying to produce likely anti-competitive effects the licensor must have a significant degree of market power in the tying product so as to restrict competition in the tied product. In the absence of market power in the tying product the licensor cannot use his technology for the anti-competitive purpose of foreclosing suppliers of the tied product. Furthermore, as in the case of non-compete obligations, the tie must cover a certain proportion of the market for the tied product for appreciable foreclosure effects to occur. In cases where the licensor has market power on the market for the tied product rather than on the market for the tying product, the restraint is analysed as non-compete or quantity forcing, reflecting the fact that any competition problem has its origin on the market for the 'tied' product and not on the market for the 'tying' product<sup>(66)</sup>.
194. Tying can also give rise to efficiency gains. This is for instance the case where the tied product is necessary for a technically satisfactory exploitation of the licensed technology or for ensuring that production under the licence conforms to quality standards respected by the licensor and other licensees. In such cases tying is normally either not restrictive of competition or covered by Article 81(3). Where the licensees use the licensor's trademark or brand name or where it is otherwise obvious to consumers that there is a link between the product incorporating the licensed technology and the licensor, the licensor has a legitimate interest in ensuring that the quality of the products are such that it does not undermine the value of his technology or his reputation as an economic operator. Moreover, where it is known to consumers that the licensees (and the licensor) produce on the basis of the same technology it is unlikely that licensees would be willing to take a licence unless the technology is exploited by all in a technically satisfactory way.

195. Tying is also likely to be pro-competitive where the tied product allows the licensee to exploit the licensed technology significantly more efficiently. For instance, where the licensor licenses a particular process technology the parties can also agree that the licensee buys a catalyst from the licensor which is developed for use with the licensed technology and which allows the technology to be exploited more efficiently than in the case of other catalysts. Where in such cases the restriction is caught by Article 81(1), the conditions of Article 81(3) are likely to be fulfilled even above the market share thresholds.

## 2.7. Non-compete obligations

196. Non-compete obligations in the context of technology licensing take the form of an obligation on the licensee not to use third party technologies which compete with the licensed technology. To the extent that a non-compete obligation covers a product or additional technology supplied by the licensor the obligation is dealt with in the preceding section on tying.

197. The TTBER exempts non-compete obligations both in the case of agreements between competitors and in the case of agreements between non-competitors up to the market share thresholds of 20 % and 30 % respectively.

198. The main competitive risk presented by non-compete obligations is foreclosure of third party technologies. Non-compete obligations may also facilitate collusion between licensors in the case of cumulative use. Foreclosure of competing technologies reduces competitive pressure on royalties charged by the licensor and reduces competition between the incumbent technologies by limiting the possibilities for licensees to substitute between competing technologies. As in both cases the main problem is foreclosure, the analysis can in general be the same in the case of agreements between competitors and agreements between non-competitors. However, in the case of cross licensing between competitors where both agree not to use third party technologies the agreement may facilitate collusion between them on the product market, thereby justifying the lower market share threshold of 20 %.

199. Foreclosure may arise where a substantial part of potential licensees are already tied to one or, in the case of cumulative effects, more sources of technology and are prevented from exploiting competing technologies. Foreclosure effects may result from agreements concluded by a single licensor with a significant degree of market power or by a cumulative effect of agreements concluded by several licensors, even where each individual agreement or network of agreements is covered by the TTBER. In the latter case, however, a serious cumulative effect is unlikely to arise as long as less than 50 % of the market is tied. Above this threshold significant foreclosure is likely to occur when there are relatively high barriers to entry for new licensees. If barriers to entry are low, new licensees are able to enter the market and exploit commercially attractive technologies held by third parties and thus represent a real alternative to incumbent licensees. In order to determine the real possibility for entry and expansion by third parties it is also necessary to take account of the extent to which distributors are tied to licensees by non-compete obligations. Third party technologies only have a real possibility of entry if they have access to the necessary production and distribution assets. In other words, the ease of entry depends not only on the availability of licensees but also the extent to which they have access to distribution. In assessing foreclosure effects at the distribution level the Commission will apply the analytical framework set out in section IV.2.1 of the Guidelines on Vertical Restraints<sup>(67)</sup>.

200. When the licensor has a significant degree of market power, obligations on licensees to obtain the technology only from the licensor can lead to significant foreclosure effects. The stronger the market position of the licensor the higher the risk of foreclosing competing technologies. For appreciable foreclosure effects to occur the non-compete obligations do not necessarily have to cover a substantial part of the market. Even in the absence thereof, appreciable foreclosure effects may occur where non-compete obligations are targeted at undertakings that are the most likely to license competing technologies. The risk of foreclosure is particularly high where there is only a limited number of potential licensees and the licence agreement concerns a technology which is used by the licensees to make an input for their own use. In such cases the entry barriers for a new licensor are likely to be high. Foreclosure may be less likely in cases where the technology is used to make a product that is sold to third parties; although in this case the restriction also ties production capacity for the input in question, it does not tie demand for the product incorporating the input produced with the licensed technology. To enter the market in the latter case licensors only need access to one or more licensee(s) that have suitable production capacity and unless only few undertakings possess or are able to obtain the assets required to take a licence, it is unlikely that by imposing non-compete obligations on its licensees the licensor is able to deny competitors access to efficient licensees.



201. Non-compete obligations may also produce pro-competitive effects. First, such obligations may promote dissemination of technology by reducing the risk of misappropriation of the licensed technology, in particular know-how. If a licensee is entitled to license competing technologies from third parties, there is a risk that particularly licensed know-how would be used in the exploitation of competing technologies and thus benefit competitors. When a licensee also exploits competing technologies, it normally also makes monitoring of royalty payments more difficult, which may act as a disincentive to licensing.
202. Second, non-compete obligations possibly in combination with an exclusive territory may be necessary to ensure that the licensee has an incentive to invest in and exploit the licensed technology effectively. In cases where the agreement is caught by Article 81(1) because of an appreciable foreclosure effect, it may be necessary in order to benefit from Article 81(3) to choose a less restrictive alternative, for instance to impose minimum output or royalty obligations, which normally have less potential to foreclose competing technologies.
203. Third, in cases where the licensor undertakes to make significant client specific investments for instance in training and tailoring of the licensed technology to the licensee's needs, non-compete obligations or alternatively minimum output or minimum royalty obligations may be necessary to induce the licensor to make the investment and to avoid hold-up problems. However, normally the licensor will be able to charge directly for such investments by way of a lump sum payment, implying that less restrictive alternatives are available.
- 3. Settlement and non-assertion agreements**
204. Licensing may serve as a means of settling disputes or avoiding that one party exercises his intellectual property rights to prevent the other party from exploiting his own technology. Licensing including cross licensing in the context of settlement agreements and non-assertion agreements is not as such restrictive of competition since it allows the parties to exploit their technologies post agreement. However, the individual terms and conditions of such agreements may be caught by Article 81(1). Licensing in the context of settlement agreements is treated like other licence agreements. In the case of technologies that from a technical point of view are substitutes, it is therefore necessary to assess to what extent it is likely that the technologies in question are in a one-way or two-way blocking position (cf. paragraph 32 above). If so, the parties are not deemed to be competitors.
205. The block exemption applies provided that the agreement does not contain any hardcore restrictions of competition as set out in Article 4 of the TTBER. The hardcore list of Article 4(1) may in particular apply where it was clear to the parties that no blocking position exists and that consequently they are competitors. In such cases the settlement is merely a means to restrict competition that existed in the absence of the agreement.
206. In cases where it is likely that in the absence of the licence the licensee could be excluded from the market, the agreement is generally pro-competitive. Restrictions that limit intra-technology competition between the licensor and the licensee are often compatible with Article 81, see section 2 above.
207. Agreements whereby the parties cross license each other and impose restrictions on the use of their technologies, including restrictions on the licensing to third parties, may be caught by Article 81(1). Where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go beyond what is required in order to unblock, the agreement is likely to be caught by Article 81(1) even if it is likely that a mutual blocking position exists. Article 81(1) is particularly likely to apply where the parties share markets or fix reciprocal running royalties that have a significant impact on market prices.
208. Where under the agreement the parties are entitled to use each other's technology and the agreement extends to future developments, it is necessary to assess what is the impact of the agreement on the parties' incentive to innovate. In cases where the parties have a significant degree of market power the agreement is likely to be caught by Article 81(1) where the agreement prevents the parties from gaining a competitive lead over each other. Agreements that eliminate or substantially reduce the possibilities of one party to gain a competitive lead over the other reduce the incentive to innovate and thus adversely affect an essential part of the competitive process. Such agreements are also unlikely to satisfy the conditions of Article 81(3). It is particularly unlikely that the restriction can be considered indispensable within the meaning of the third condition of Article 81(3). The achievement of the objective of the agreement, namely to ensure that the parties can continue to exploit their own technology without being blocked by the other party, does not require that the parties agree to share future innovations. However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to allow the parties to develop their respective technologies and where

the licence does not lead them to use the same technological solutions. Such agreements merely create design freedom by preventing future infringement claims by the other party.

209. In the context of a settlement and non-assertion agreement, non-challenge clauses are generally considered to fall outside Article 81(1). It is inherent in such agreements that the parties agree not to challenge *ex post* the intellectual property rights covered by the agreement. Indeed, the very purpose of the agreement is to settle existing disputes and/or to avoid future disputes.

#### 4. Technology pools

210. Technology pools are defined as arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. In terms of their structure technology pools can take the form of simple arrangements between a limited number of parties or elaborate organisational arrangements whereby the organisation of the licensing of the pooled technologies is entrusted to a separate entity. In both cases the pool may allow licensees to operate on the market on the basis of a single licence.

211. There is no inherent link between technology pools and standards, but in some cases the technologies in the pool support (wholly or partly) a *de facto* or *de jure* industry standard. When technology pools do support an industry standard they do not necessarily support a single standard. Different technology pools may support competing standards <sup>(68)</sup>.

212. Agreements establishing technology pools and setting out the terms and conditions for their operation are not — irrespective of the number of parties — covered by the block exemption (cf. section III.2.2 above). Such agreements are addressed only by these guidelines. Pooling arrangements give rise to a number of particular issues regarding the selection of the included technologies and the operation of the pool, which do not arise in the context of other types of licensing. The individual licences granted by the pool to third party licensees, however, are treated like other licence agreements, which are block exempted when the conditions set out in the TTBER are fulfilled, including the requirements of Article 4 of the TTBER containing the list of hardcore restrictions.

213. Technology pools may be restrictive of competition. The creation of a technology pool necessarily implies joint

selling of the pooled technologies, which in the case of pools composed solely or predominantly of substitute technologies amounts to a price fixing cartel. Moreover, in addition to reducing competition between the parties, technology pools may also, in particular when they support an industry standard or establish a *de facto* industry standard, result in a reduction of innovation by foreclosing alternative technologies. The existence of the standard and the related technology pool may make it more difficult for new and improved technologies to enter the market.

214. Technology pools can also produce pro-competitive effects, in particular by reducing transaction costs and by setting a limit on cumulative royalties to avoid double marginalisation. The creation of a pool allows for one-stop licensing of the technologies covered by the pool. This is particularly important in sectors where intellectual property rights are prevalent and where in order to operate on the market licences need to be obtained from a significant number of licensors. In cases where licensees receive on-going services concerning the application of the licensed technology, joint licensing and servicing can lead to further cost reductions.

#### 4.1. The nature of the pooled technologies

215. The competitive risks and the efficiency enhancing potential of technology pools depend to a large extent on the relationship between the pooled technologies and their relationship with technologies outside the pool. Two basic distinctions must be made, namely (a) between technological complements and technological substitutes and (b) between essential and non-essential technologies.

216. Two technologies <sup>(69)</sup> are complements as opposed to substitutes when they are both required to produce the product or carry out the process to which the technologies relate. Conversely, two technologies are substitutes when either technology allows the holder to produce the product or carry out the process to which the technologies relate. A technology is essential as opposed to non-essential if there are no substitutes for that technology inside or outside the pool and the technology in question constitutes a necessary part of the package of technologies for the purposes of producing the product(s) or carrying out the process(es) to which the pool relates. A technology for which there are no substitutes, remains essential as long as the technology is covered by at least one valid intellectual property right. Technologies that are essential are by necessity also complements.

217. When technologies in a pool are substitutes, royalties are likely to be higher than they would otherwise be, because licensees do not benefit from rivalry between the technologies in question. When the technologies in the pool are complements the arrangement reduces transaction costs and may lead to lower overall royalties because the parties are in a position to fix a common royalty for the package as opposed to each fixing a royalty which does not take account of the royalty fixed by others.
218. The distinction between complementary and substitute technologies is not clear-cut in all cases, since technologies may be substitutes in part and complements in part. When due to efficiencies stemming from the integration of two technologies licensees are likely to demand both technologies the technologies are treated as complements even if they are partly substitutable. In such cases it is likely that in the absence of the pool licensees would want to licence both technologies due to the additional economic benefit of employing both technologies as opposed to employing only one of them.
219. The inclusion in the pool of substitute technologies restricts inter-technology competition and amounts to collective bundling. Moreover, where the pool is substantially composed of substitute technologies, the arrangement amounts to price fixing between competitors. As a general rule the Commission considers that the inclusion of substitute technologies in the pool constitutes a violation of Article 81(1). The Commission also considers that it is unlikely that the conditions of Article 81(3) will be fulfilled in the case of pools comprising to a significant extent substitute technologies. Given that the technologies in question are alternatives, no transaction cost savings accrue from including both technologies in the pool. In the absence of the pool licensees would not have demanded both technologies. It is not sufficient that the parties remain free to license independently. In order not to undermine the pool, which allows them to jointly exercise market power, the parties are likely to have little incentive to do so.
220. When a pool is composed only of technologies that are essential and therefore by necessity also complements, the creation of the pool as such generally falls outside Article 81(1) irrespective of the market position of the parties. However, the conditions on which licences are granted may be caught by Article 81(1).
221. Where non-essential but complementary patents are included in the pool there is a risk of foreclosure of third party technologies. Once a technology is included in the pool and is licensed as part of the package, licensees are likely to have little incentive to license a competing technology when the royalty paid for the package already covers a substitute technology. Moreover, the inclusion of technologies which are not necessary for the purposes of producing the product(s) or carrying out the process(es) to which the technology pool relates also forces licensees to pay for technology that they may not need. The inclusion of complementary patents thus amounts to collective bundling. When a pool encompasses non-essential technologies, the agreement is likely to be caught by Article 81(1) where the pool has a significant position on any relevant market.
222. Given that substitute and complementary technologies may be developed after the creation of the pool, the assessment of essentiality is an on-going process. A technology may therefore become non-essential after the creation of the pool due to the emergence of new third party technologies. One way to ensure that such third party technologies are not foreclosed is to exclude from the pool technologies that have become non-essential. However, there may be other ways to ensure that third party technologies are not foreclosed. In the assessment of technology pools comprising non-essential technologies, i.e. technologies for which substitutes exist outside the pool or which are not necessary in order to produce one or more products to which the pool relates, the Commission will in its overall assessment, *inter alia*, take account of the following factors:
- (a) whether there are any pro-competitive reasons for including the non-essential technologies in the pool;
  - (b) whether the licensors remain free to license their respective technologies independently. Where the pool is composed of a limited number of technologies and there are substitute technologies outside the pool, licensees may want to put together their own technological package composed partly of technology forming part of the pool and partly of technology owned by third parties;

(c) whether, in cases where the pooled technologies have different applications some of which do not require use of all of the pooled technologies, the pool offers the technologies only as a single package or whether it offers separate packages for distinct applications. In the latter case it is avoided that technologies which are not essential to a particular product or process are tied to essential technologies;

(d) whether the pooled technologies are available only as a single package or whether licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties. The possibility to obtain a licence for only part of the package may reduce the risk of foreclosure of third party technologies outside the pool, in particular where the licensee obtains a corresponding reduction in royalties. This requires that a share of the overall royalty has been assigned to each technology in the pool. Where the licence agreements concluded between the pool and individual licensees are of relatively long duration and the pooled technology supports a *de facto* industry standard, it must also be taken into account that the pool may foreclose access to the market of new substitute technologies. In assessing the risk of foreclosure in such cases it is relevant to take into account whether or not licensees can terminate at reasonable notice part of the licence and obtain a corresponding reduction of royalties.

#### 4.2. Assessment of individual restraints

223. The purpose of this section is to address a certain number of restraints that in one form or another are commonly found in technology pools and which need to be assessed in the overall context of the pool. It is recalled, cf. paragraph 212 above, that the TTBER applies to licence agreements concluded between the pool and third party licensees. This section is therefore limited to addressing the creation of the pool and licensing issues that are particular to licensing in the context of technology pools.

224. In making its assessment the Commission will be guided by the following main principles:

1. The stronger the market position of the pool the greater the risk of anti-competitive effects.
2. Pools that hold a strong position on the market should be open and non-discriminatory.

3. Pools should not unduly foreclose third party technologies or limit the creation of alternative pools.

225. Undertakings setting up a technology pool that is compatible with Article 81, and any industry standard that it may support, are normally free to negotiate and fix royalties for the technology package and each technology's share of the royalties either before or after the standard is set. Such agreement is inherent in the establishment of the standard or pool and cannot in itself be considered restrictive of competition and may in certain circumstances lead to more efficient outcomes. In certain circumstances it may be more efficient if the royalties are agreed before the standard is chosen and not after the standard is decided upon, to avoid that the choice of the standard confers a significant degree of market power on one or more essential technologies. On the other hand, licensees must remain free to determine the price of products produced under the licence. Where the selection of technologies to be included in the pool is carried out by an independent expert this may further competition between available technological solutions.

226. Where the pool has a dominant position on the market, royalties and other licensing terms should be fair and non-discriminatory and licences should be non-exclusive. These requirements are necessary to ensure that the pool is open and does not lead to foreclosure and other anti-competitive effects on down stream markets. These requirements, however, do not preclude different royalties for different uses. It is in general not considered restrictive of competition to apply different royalty rates to different product markets, whereas there should be no discrimination within product markets. In particular, the treatment of licensees should not depend on whether they are licensors or not. The Commission will therefore take into account whether licensors are also subject to royalty obligations.

227. Licensors and licensees must be free to develop competing products and standards and must also be free to grant and obtain licences outside the pool. These requirements are necessary in order to limit the risk of foreclosure of third party technologies and ensure that the pool does not limit innovation and preclude the creation of competing technological solutions. Where a pool supports a (*de facto*) industry standard and where the parties are subject to non-compete obligations, the pool creates a particular risk of preventing the development of new and improved technologies and standards.

228. Grant back obligations should be non-exclusive and be limited to developments that are essential or important to the use of the pooled technology. This allows the pool to feed on and benefit from improvements to the pooled technology. It is legitimate for the parties to ensure that the exploitation of the pooled technology cannot be held up by licensees that hold or obtain essential patents.
229. One of the problems identified with regard to patent pools is the risk that they shield invalid patents. Pooling raises the costs/risks for a successful challenge, because the challenge fails if only one patent in the pool is valid. The shielding of invalid patents in the pool may oblige licensees to pay higher royalties and may also prevent innovation in the field covered by an invalid patent. In order to limit this risk any right to terminate a licence in the case of a challenge must be limited to the technologies owned by the licensor who is the addressee of the challenge and must not extend to the technologies owned by the other licensors in the pool.
- 4.3. The institutional framework governing the pool**
230. The way in which a technology pool is created, organised and operated can reduce the risk of it having the object or effect of restricting competition and provide assurances to the effect that the arrangement is pro-competitive.
231. When participation in a standard and pool creation process is open to all interested parties representing different interests it is more likely that technologies for inclusion into the pool are selected on the basis of price/quality considerations than when the pool is set up by a limited group of technology owners. Similarly, when the relevant bodies of the pool are composed of persons representing different interests, it is more likely that licensing terms and conditions, including royalties, will be open and non-discriminatory and reflect the value of the licensed technology than when the pool is controlled by licensor representatives.
232. Another relevant factor is the extent to which independent experts are involved in the creation and operation of the pool. For instance, the assessment of whether or not a technology is essential to a standard supported by a pool is often a complex matter that requires special expertise. The involvement in the selection process of independent experts can go a long way in ensuring that a commitment to include only essential technologies is implemented in practice.
233. The Commission will take into account how experts are selected and what are the exact functions that they are to perform. Experts should be independent from the undertakings that have formed the pool. If experts are connected to the licensors or otherwise depend on them, the involvement of the expert will be given less weight. Experts must also have the necessary technical expertise to perform the various functions with which they have been entrusted. The functions of independent experts may include, in particular, an assessment of whether or not technologies put forward for inclusion into the pool are valid and whether or not they are essential.
234. It is also relevant to consider the arrangements for exchanging sensitive information among the parties. In oligopolistic markets exchanges of sensitive information such as pricing and output data may facilitate collusion<sup>(70)</sup>. In such cases the Commission will take into account to what extent safeguards have been put in place, which ensure that sensitive information is not exchanged. An independent expert or licensing body may play an important role in this respect by ensuring that output and sales data, which may be necessary for the purposes of calculating and verifying royalties is not disclosed to undertakings that compete on affected markets.
235. Finally, it is relevant to take account of the dispute resolution mechanism foreseen in the instruments setting up the pool. The more dispute resolution is entrusted to bodies or persons that are independent of the pool and the members thereof, the more likely it is that the dispute resolution will operate in a neutral way.

<sup>(1)</sup> OJ L 123, 27.4.2004. The TTBER replaces Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements (OJ L 31, 9.2.1996, p. 2).

<sup>(2)</sup> See Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, [2000] ECR I-1365, paragraph 130, and paragraph 106 of the Commission Guidelines on the application of Article 81(3) of the Treaty, not yet published.

<sup>(3)</sup> Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

<sup>(4)</sup> In the following the term 'agreement' includes concerted practices and decisions of associations of undertakings.

<sup>(5)</sup> See Commission Notice on the concept of effect on trade between Member States contained in Articles 81 and 82 of the Treaty, not yet published.

- <sup>(6)</sup> In the following the term 'restriction' includes the prevention and distortion of competition.
- <sup>(7)</sup> This principle of Community exhaustion is for example enshrined in Article 7(1) of Directive 104/89/EEC to approximate the laws of the Member States relating to trade marks (OJ L 40, 11.2.1989, p. 1), which provides that the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.
- <sup>(8)</sup> On the other hand, the sale of copies of a protected work does not lead to the exhaustion of performance rights, including rental rights, in the work, see in this respect Case 158/86, *Warner Brothers and Metronome Video*, [1988] ECR 2605, and Case C-61/97, *Foreningen af danske videogramdistributører*, [1998] ECR I-5171.
- <sup>(9)</sup> See e.g. Joined Cases 56/64 and 58/64, *Consten and Gründig*, [1966] ECR 429.
- <sup>(10)</sup> The methodology for the application of Article 81(3) is set out in the Commission Guidelines on the application of Article 81(3) of the Treaty cited in note 2.
- <sup>(11)</sup> See Case 56/65, *Société Technique Minière*, [1966] ECR 337, and Case C-7/95 P, *John Deere*, [1998] ECR I-3111, paragraph 76.
- <sup>(12)</sup> See in this respect e.g. judgment in *Consten and Gründig* cited in note 9.
- <sup>(13)</sup> See in this respect the judgment in *Société Technique Minière* cited in note 11 and Case 258/78, *Nungesser*, [1982] ECR 2015.
- <sup>(14)</sup> See in this respect e.g. Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, paragraph 99.
- <sup>(15)</sup> See Joined Cases 29/83 and 30/83, *CRAM and Rheinzink*, [1984] ECR 1679, paragraph 26, and Joined Cases 96/82 and others, *ANSEAU-NAVEWA*, [1983] ECR 3369, paragraphs 23-25.
- <sup>(16)</sup> See the judgment in *John Deere*, [1998] cited in note 11.
- <sup>(17)</sup> Guidance on the issue of appreciability can be found in Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13). The notice defines appreciability in a negative way. Agreements, which fall outside the scope of the *de minimis* notice, do not necessarily have appreciable restrictive effects. An individual assessment is required.
- <sup>(18)</sup> See Article 1(2) of Council Regulation No 1/2003 cited in note 3.
- <sup>(19)</sup> Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).
- <sup>(20)</sup> As to these distinctions see also Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2, paragraphs 44 to 52).
- <sup>(21)</sup> See to that effect paragraphs 50 to 52 of the Guidelines on horizontal cooperation agreements, cited in the previous note.
- <sup>(22)</sup> *Idem*, paragraph 51.
- <sup>(23)</sup> See in this respect the Notice on agreements of minor importance cited in note 17.
- <sup>(24)</sup> According to Article 3(2) of Regulation 1/2003, agreements which may affect trade between Member States but which are not prohibited by Article 81 cannot be prohibited by national competition law.
- <sup>(25)</sup> Under Council Regulation 19/65, OJ Special Edition Series I 1965-1966, p. 35, the Commission is not empowered to block exempt technology transfer agreements concluded between more than two undertakings.
- <sup>(26)</sup> See recital 19 of the TTBER and further section 2.5 below.
- <sup>(27)</sup> OJ C 1, 3.1.1979, p. 2.
- <sup>(28)</sup> See paragraph 3 of the subcontracting notice.
- <sup>(29)</sup> See in this respect Commission Decision in *Moosehead/Whitbread* (OJ L 100, 20.4.1990, p. 32).
- <sup>(30)</sup> See in this respect Case 262/81, *Coditel (II)*, [1982] ECR 3381.
- <sup>(31)</sup> OJ L 336, 29.12.1999, p. 21.
- <sup>(32)</sup> OJ L 304, 5.12.2000, p. 3.
- <sup>(33)</sup> OJ L 304, 5.12.2000, p. 7.
- <sup>(34)</sup> See note 31.
- <sup>(35)</sup> See the guide 'Competition policy in Europe — The competition rules for supply and distribution agreements', 2002.
- <sup>(36)</sup> OJ C 291, 13.10.2000, p. 1, and note 31.
- <sup>(37)</sup> See paragraph 29 above.

- (<sup>38</sup>) The reasons for this calculation rule are explained in paragraph 23 above.
- (<sup>39</sup>) See e.g. the case law cited in note 15.
- (<sup>40</sup>) See in this respect paragraph 98 of the Guidelines on the application of Article 81(3) of the Treaty cited in note 2.
- (<sup>41</sup>) This is also the case where one party grants a licence to the other party and accepts to buy a physical input from the licensee. The purchase price can serve the same function as the royalty.
- (<sup>42</sup>) See in this respect Case 193/83, *Windsurfing International*, [1986] ECR 611, paragraph 67.
- (<sup>43</sup>) For a general definition of active and passive sales, reference is made to paragraph 50 of the Guidelines on vertical restraints cited in note 36.
- (<sup>44</sup>) Field of use restrictions are further dealt with in section IV.2.4 below.
- (<sup>45</sup>) This hardcore restriction applies to licence agreements concerning trade within the Community. As regards agreements concerning exports outside the Community or imports/re-imports from outside the Community see Case C-306/96, *Javico*, [1998] ECR I-1983.
- (<sup>46</sup>) See in this respect paragraph 77 of the judgment in *Nungesser* cited in note 13.
- (<sup>47</sup>) See in this respect Case 26/76, *Metro (I)*, [1977] ECR 1875.
- (<sup>48</sup>) If the licensed technology is outdated no restriction of competition arises, see in this respect Case 65/86, *Bayer v Sillhofer*, [1988] ECR 5249.
- (<sup>49</sup>) As to non-challenge clauses in the context of settlement agreements see point 209 below.
- (<sup>50</sup>) See paragraph 14 above.
- (<sup>51</sup>) See paragraphs 66 and 67 above.
- (<sup>52</sup>) See in this respect paragraph 42 of the Guidelines on the application of Article 81(3) of the Treaty, cited in note 2.
- (<sup>53</sup>) See in this respect paragraph 8 of the Commission Notice on agreements of minor importance, cited in note 17.
- (<sup>54</sup>) See in this respect Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, paragraph 101.
- (<sup>55</sup>) See in this respect paragraph 23 of the Guidelines on horizontal cooperation agreements, cited in note 20.
- (<sup>56</sup>) See Joined Cases 25/84 and 26/84, *Ford*, [1985] ECR 2725.
- (<sup>57</sup>) See in this respect for example Commission Decision in *TPS* (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition of Article 81(1) also only applies as long as the agreement has a restrictive object or restrictive effects.
- (<sup>58</sup>) Cited in note 36. See in particular paragraphs 115 *et seq.*
- (<sup>59</sup>) As to these concepts see section IV.4.1 below.
- (<sup>60</sup>) See paragraph 85 of the Guidelines on the application of Article 81(3) of the Treaty, cited in note 2.
- (<sup>61</sup>) *Idem*, paragraphs 98 and 102.
- (<sup>62</sup>) See paragraph 130 of the judgment cited in note 2. Similarly, the application of Article 81(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 81(1), see to that effect Case C-309/99, *Wouters*, [2002] ECR I-1577, paragraph 120.
- (<sup>63</sup>) See in this respect Case T-51/89, *Tetra Pak (I)*, [1990] ECR II-309. See also paragraph 106 of the Guidelines on the application of Article 81(3) of the Treaty cited in note 2 above.
- (<sup>64</sup>) See the judgment in *Nungesser* cited in note 13.
- (<sup>65</sup>) See in this respect the Commission's Notice in the Canon/Kodak Case (OJ C 330, 1.11.1997, p. 10) and the IGR Stereo Television Case mentioned in the XI Report on Competition Policy, paragraph 94.
- (<sup>66</sup>) For the applicable analytical framework see section 2.7 below and paragraphs 138 *et seq.* of the Guidelines on Vertical Restraints cited in note 36.
- (<sup>67</sup>) See note 36.
- (<sup>68</sup>) See in this respect the Commission's press release IP/02/1651 concerning the licensing of patents for third generation (3G) mobile services. This case involved five technology pools creating five different technologies, each of which could be used to produce 3G equipment.
- (<sup>69</sup>) The term 'technology' is not limited to patents. It covers also patent applications and intellectual property rights other than patents.
- (<sup>70</sup>) See in this respect the judgment in *John Deere* cited in note 11.

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#### **iv. Research and development agreements**

8. Commission Regulation 1217/2010/EU of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ 2010 L 335/36

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



**COMMISSION REGULATION (EU) No 1217/2010**

**of 14 December 2010**

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to  
certain categories of research and development agreements**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices <sup>(1)</sup>,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (\*) by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 101(1) of the Treaty which have as their object the research and development of products, technologies or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding intellectual property rights.
- (2) Article 179(2) of the Treaty calls upon the Union to encourage undertakings, including small and medium-sized undertakings, in their research and technological development activities of high quality, and to support their efforts to cooperate with one another. This Regulation is intended to facilitate research and development while at the same time effectively protecting competition.
- (3) Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements <sup>(2)</sup> defines categories of research and development agreements which the Commission regarded as normally satisfying the conditions laid down

in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 December 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

- (4) This Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible. Below a certain level of market power it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of research and development agreements will outweigh any negative effects on competition.
- (5) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the relevant market.
- (6) Agreements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not fall within the scope of Article 101(1) of the Treaty. In certain circumstances, however, such as where the parties agree not to carry out other research and development in the same field, thereby forgoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 101(1) of the Treaty and should therefore be included within the scope of this Regulation.
- (7) The benefit of the exemption established by this Regulation should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.
- (8) Cooperation in research and development and in the exploitation of the results is most likely to promote technical and economic progress if the parties contribute complementary skills, assets or activities to the co-operation. This also includes scenarios where one party merely finances the research and development activities of another party.

<sup>(1)</sup> OJ L 285, 29.12.1971, p. 46.

<sup>(2)</sup> OJ L 304, 5.12.2000, p. 7.

(\*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union (TFEU). The two articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Regulation.

- (9) The joint exploitation of results can be considered as the natural consequence of joint research and development. It can take different forms such as manufacture, the exploitation of intellectual property rights that substantially contribute to technical or economic progress, or the marketing of new products.
- (10) Consumers can generally be expected to benefit from the increased volume and effectiveness of research and development through the introduction of new or improved products or services, a quicker launch of those products or services, or the reduction of prices brought about by new or improved technologies or processes.
- (11) In order to justify the exemption, the joint exploitation should relate to products, technologies or processes for which the use of the results of the research and development is decisive. Moreover, all the parties should agree in the research and development agreement that they will all have full access to the final results of the joint research and development, including any arising intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as the final results become available. Access to the results should generally not be limited as regards the use of the results for the purposes of further research and development. However, where the parties, in accordance with this Regulation, limit their rights of exploitation, in particular where they specialise in the context of exploitation, access to the results for the purposes of exploitation may be limited accordingly. Moreover, where academic bodies, research institutes or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results participate in research and development, they may agree to use the results of research and development solely for the purpose of further research. Depending on their capabilities and commercial needs, the parties may make unequal contributions to their research and development cooperation. Therefore, in order to reflect, and to make up for, the differences in the value or the nature of the parties' contributions, a research and development agreement benefiting from this Regulation may provide that one party is to compensate another for obtaining access to the results for the purposes of further research or exploitation. However, the compensation should not be so high as to effectively impede such access.
- (12) Similarly, where the research and development agreement does not provide for any joint exploitation of the results, the parties should agree in the research and development agreement to grant each other access to their respective pre-existing know-how, as long as this know-how is indispensable for the purposes of the exploitation of the results by the other parties. The rates of any licence fee charged should not be so high as to effectively impede access to the know-how by the other parties.
- (13) The exemption established by this Regulation should be limited to research and development agreements which do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products, services or technologies in question. It is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products, services or technologies capable of being improved or replaced by the results of the research and development exceeds a certain level at the time the agreement is entered into. However, there is no presumption that research and development agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty once the market share threshold set out in this Regulation is exceeded or other conditions of this Regulation are not met. In such cases, an individual assessment of the research and development agreement needs to be conducted under Article 101 of the Treaty.
- (14) In order to ensure the maintenance of effective competition during joint exploitation of the results, provision should be made for the block exemption to cease to apply if the parties' combined share of the market for the products, services or technologies arising out of the joint research and development becomes too great. The exemption should continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilisation of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the investments involved.
- (15) This Regulation should not exempt agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by a research and development agreement. In principle, agreements containing certain types of severe restrictions of competition such as limitations on the freedom of parties to carry out research and development in a field unconnected to the agreement, the fixing of prices charged to third parties, limitations on output or sales, and limitations on effecting passive sales for the contract products or contract technologies in territories or to customers reserved for other parties should be excluded from the benefit of the exemption established by this Regulation irrespective of the market share of the parties. In this context, field of use restrictions do not constitute limitations of output or sales, and also do not constitute territorial or customer restrictions.
- (16) The market share limitation, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the parties to eliminate competition in respect of a substantial part of the products or services in question.

- (17) The possibility cannot be ruled out that anti-competitive foreclosure effects may arise where one party finances several research and development projects carried out by competitors with regard to the same contract products or contract technologies, in particular where it obtains the exclusive right to exploit the results vis-à-vis third parties. Therefore the benefit of this Regulation should be conferred on such paid-for research and development agreements only if the combined market share of all the parties involved in the connected agreements, that is to say, the financing party and all the parties carrying out the research and development, does not exceed 25 %.
- (18) Agreements between undertakings which are not competing manufacturers of products, technologies or processes capable of being improved, substituted or replaced by the results of the research and development will only eliminate effective competition in research and development in exceptional circumstances. It is therefore appropriate to enable such agreements to benefit from the exemption established by this Regulation irrespective of market share and to address any exceptional cases by way of withdrawal of its benefit.
- (19) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>(1)</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
- (20) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption established by this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (21) The benefit of this Regulation could be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, for example, where the existence of a research and development agreement substantially restricts the scope for third parties to carry out research and development in the relevant field because of the limited research capacity available elsewhere, where because of the particular structure of supply, the existence of the research and development agreement substantially restricts the access of third parties to the market for the contract products or contract technologies, where without any objectively valid reason, the parties do not exploit the results of the joint research and development vis-à-vis third parties, where the contract products or contract technologies are not subject in the whole or a substantial part of

the internal market to effective competition from products, technologies or processes considered by users as equivalent in view of their characteristics, price and intended use, or where the existence of the research and development agreement would restrict competition in innovation or eliminate effective competition in research and development on a particular market.

- (22) As research and development agreements are often of a long-term nature, especially where the cooperation extends to the exploitation of the results, the period of validity of this Regulation should be fixed at 12 years,

HAS ADOPTED THIS REGULATION:

#### Article 1

##### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:
- (a) 'research and development agreement' means an agreement entered into between two or more parties which relate to the conditions under which those parties pursue:
- (i) joint research and development of contract products or contract technologies and joint exploitation of the results of that research and development;
  - (ii) joint exploitation of the results of research and development of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties;
  - (iii) joint research and development of contract products or contract technologies excluding joint exploitation of the results;
  - (iv) paid-for research and development of contract products or contract technologies and joint exploitation of the results of that research and development;
  - (v) joint exploitation of the results of paid-for research and development of contract products or contract technologies pursuant to a prior agreement between the same parties; or
  - (vi) paid-for research and development of contract products or contract technologies excluding joint exploitation of the results;
- (b) 'agreement' means an agreement, a decision by an association of undertakings or a concerted practice;

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

- (c) 'research and development' means the acquisition of know-how relating to products, technologies or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results;
  - (d) 'product' means a good or a service, including both intermediary goods or services and final goods or services;
  - (e) 'contract technology' means a technology or process arising out of the joint research and development;
  - (f) 'contract product' means a product arising out of the joint research and development or manufactured or provided applying the contract technologies;
  - (g) 'exploitation of the results' means the production or distribution of the contract products or the application of the contract technologies or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application;
  - (h) 'intellectual property rights' means intellectual property rights, including industrial property rights, copyright and neighbouring rights;
  - (i) 'know-how' means a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified;
  - (j) 'secret', in the context of know-how, means that the know-how is not generally known or easily accessible;
  - (k) 'substantial', in the context of know-how, means that the know-how is significant and useful for the manufacture of the contract products or the application of the contract technologies;
  - (l) 'identified', in the context of know-how, means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
  - (m) 'joint', in the context of activities carried out under a research and development agreement, means activities where the work involved is:
    - (i) carried out by a joint team, organisation or undertaking;
    - (ii) jointly entrusted to a third party; or
    - (iii) allocated between the parties by way of specialisation in the context of research and development or exploitation;
  - (n) 'specialisation in the context of research and development' means that each of the parties is involved in the research and development activities covered by the research and development agreement and they divide the research and development work between them in any way that they consider most appropriate; this does not include paid-for research and development;
  - (o) 'specialisation in the context of exploitation' means that the parties allocate between them individual tasks such as production or distribution, or impose restrictions upon each other regarding the exploitation of the results such as restrictions in relation to certain territories, customers or fields of use; this includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties;
  - (p) 'paid-for research and development' means research and development that is carried out by one party and financed by a financing party;
  - (q) 'financing party' means a party financing paid-for research and development while not carrying out any of the research and development activities itself;
  - (r) 'competing undertaking' means an actual or potential competitor;
  - (s) 'actual competitor' means an undertaking that is supplying a product, technology or process capable of being improved, substituted or replaced by the contract product or the contract technology on the relevant geographic market;
  - (t) 'potential competitor' means an undertaking that, in the absence of the research and development agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market;
  - (u) 'relevant product market' means the relevant market for the products capable of being improved, substituted or replaced by the contract products;
  - (v) 'relevant technology market' means the relevant market for the technologies or processes capable of being improved, substituted or replaced by the contract technologies.
2. For the purposes of this Regulation, the terms 'undertaking' and 'party' shall include their respective connected undertakings.

'Connected undertakings' means:

- (a) undertakings in which a party to the research and development agreement, directly or indirectly:
  - (i) has the power to exercise more than half the voting rights;
  - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
  - (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the research and development agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the research and development agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
  - (i) parties to the research and development agreement or their respective connected undertakings referred to in points (a) to (d); or
  - (ii) one or more of the parties to the research and development agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

#### Article 2

##### Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to research and development agreements.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

2. The exemption provided for in paragraph 1 shall apply to research and development agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties or to an entity the parties establish to carry out the joint research and development, paid-for research and development or joint exploitation, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

#### Article 3

##### Conditions for exemption

1. The exemption provided for in Article 2 shall apply subject to the conditions set out in paragraphs 2 to 5.

2. The research and development agreement must stipulate that all the parties have full access to the final results of the joint research and development or paid-for research and development, including any resulting intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as they become available. Where the parties limit their rights of exploitation in accordance with this Regulation, in particular where they specialise in the context of exploitation, access to the results for the purposes of exploitation may be limited accordingly. Moreover, research institutes, academic bodies, or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results may agree to confine their use of the results for the purposes of further research. The research and development agreement may foresee that the parties compensate each other for giving access to the results for the purposes of further research or exploitation, but the compensation must not be so high as to effectively impede such access.

3. Without prejudice to paragraph 2, where the research and development agreement provides only for joint research and development or paid-for research and development, the research and development agreement must stipulate that each party must be granted access to any pre-existing know-how of the other parties, if this know-how is indispensable for the purposes of its exploitation of the results. The research and development agreement may foresee that the parties compensate each other for giving access to their pre-existing know-how, but the compensation must not be so high as to effectively impede such access.

4. Any joint exploitation may only pertain to results which are protected by intellectual property rights or constitute know-how and which are indispensable for the manufacture of the contract products or the application of the contract technologies.

5. Parties charged with the manufacture of the contract products by way of specialisation in the context of exploitation must be required to fulfil orders for supplies of the contract products from the other parties, except where the research and development agreement also provides for joint distribution within the meaning of point (m)(i) or (ii) of Article 1(1) or where the parties have agreed that only the party manufacturing the contract products may distribute them.

#### Article 4

##### Market share threshold and duration of exemption

1. Where the parties are not competing undertakings, the exemption provided for in Article 2 shall apply for the duration of the research and development. Where the results are jointly exploited, the exemption shall continue to apply for 7 years from the time the contract products or contract technologies are first put on the market within the internal market.



2. Where two or more of the parties are competing undertakings, the exemption provided for in Article 2 shall apply for the period referred to in paragraph 1 of this Article only if, at the time the research and development agreement is entered into:

- (a) in the case of research and development agreements referred to in point (a)(i), (ii) or (iii) of Article 1(1), the combined market share of the parties to a research and development agreement does not exceed 25 % on the relevant product and technology markets; or
- (b) in the case of research and agreements referred to in point (a)(iv), (v) or (vi) of Article 1(1), the combined market share of the financing party and all the parties with which the financing party has entered into research and development agreements with regard to the same contract products or contract technologies, does not exceed 25 % on the relevant product and technology markets.

3. After the end of the period referred to in paragraph 1, the exemption shall continue to apply as long as the combined market share of the parties does not exceed 25 % on the relevant product and technology markets.

#### Article 5

##### Hardcore restrictions

The exemption provided for in Article 2 shall not apply to research and development agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the restriction of the freedom of the parties to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the research and development agreement relates or, after the completion of the joint research and development or the paid-for research and development, in the field to which it relates or in a connected field;
- (b) the limitation of output or sales, with the exception of:
  - (i) the setting of production targets where the joint exploitation of the results includes the joint production of the contract products;
  - (ii) the setting of sales targets where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies within the meaning of point (m)(i) or (ii) of Article 1(1);
  - (iii) practices constituting specialisation in the context of exploitation; and
  - (iv) the restriction of the freedom of the parties to manufacture, sell, assign or license products, technologies or processes which compete with the contract products or contract technologies during the period for which the parties have agreed to jointly exploit the results;

- (c) the fixing of prices when selling the contract product or licensing the contract technologies to third parties, with the exception of the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies within the meaning of point (m)(i) or (ii) of Article 1(1);

- (d) the restriction of the territory in which, or of the customers to whom, the parties may passively sell the contract products or license the contract technologies, with the exception of the requirement to exclusively license the results to another party;

- (e) the requirement not to make any, or to limit, active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation;

- (f) the requirement to refuse to meet demand from customers in the parties' respective territories, or from customers otherwise allocated between the parties by way of specialisation in the context of exploitation, who would market the contract products in other territories within the internal market;

- (g) the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the internal market.

#### Article 6

##### Excluded restrictions

The exemption provided for in Article 2 shall not apply to the following obligations contained in research and development agreements:

- (a) the obligation not to challenge after completion of the research and development the validity of intellectual property rights which the parties hold in the internal market and which are relevant to the research and development or, after the expiry of the research and development agreement, the validity of intellectual property rights which the parties hold in the internal market and which protect the results of the research and development, without prejudice to the possibility to provide for termination of the research and development agreement in the event of one of the parties challenging the validity of such intellectual property rights;
- (b) the obligation not to grant licences to third parties to manufacture the contract products or to apply the contract technologies unless the agreement provides for the exploitation of the results of the joint research and development or paid-for research and development by at least one of the parties and such exploitation takes place in the internal market vis-à-vis third parties.



*Article 7*

**Application of the market share threshold**

For the purposes of applying the market share threshold provided for in Article 4 the following rules shall apply:

- (a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties;
- (b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
- (c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of that subparagraph;
- (d) if the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above that level without exceeding 30 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 25 % threshold was first exceeded;

- (e) if the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above 30 %, the exemption provided for in Article 2 shall continue to apply for a period of one calendar year following the year in which the level of 30 % was first exceeded;

- (f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years.

*Article 8*

**Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 January 2011 to 31 December 2012 in respect of agreements already in force on 31 December 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 2659/2000.

*Article 9*

**Period of validity**

This Regulation shall enter into force on 1 January 2011.

It shall expire on 31 December 2022.

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

Done at Brussels, 14 December 2010.

*For the Commission*

*The President*

José Manuel BARROSO

## **v. Specialisation agreements**

9. Commission Regulation 1218/2010/EU of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, OJ 2010 L 335/43

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



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**COMMISSION REGULATION (EU) No 1218/2010**

**of 14 December 2010**

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to  
certain categories of specialisation agreements**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices <sup>(1)</sup>,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union <sup>(\*)</sup> by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 101(1) of the Treaty which have as their object specialisation, including agreements necessary for achieving it.

(2) Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements <sup>(2)</sup> defines categories of specialisation agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 December 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) This Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible. Below a certain level of market power it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of specialisation agreements will outweigh any negative effects on competition.

(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the relevant market.

(5) The benefit of the exemption established by this Regulation should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

(6) Agreements on specialisation in production are most likely to contribute to improving the production or distribution of goods if the parties have complementary skills, assets or activities, because they can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. The same can generally be said about agreements on specialisation in the preparation of services. Given effective competition, it is likely that consumers will receive a fair share of the resulting benefits.

(7) Such advantages can arise from agreements whereby one party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party (unilateral specialisation), from agreements whereby each party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party (reciprocal specialisation) and from agreements whereby the parties

<sup>(1)</sup> OJ L 285, 29.12.1971, p. 46.

<sup>(2)</sup> OJ L 304, 5.12.2000, p. 3.

<sup>(\*)</sup> With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union (TFEU). The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Regulation.

undertake to jointly manufacture certain products or prepare certain services (joint production). In the context of this Regulation, the concepts of unilateral and reciprocal specialisation do not require a party to reduce capacity, as it is sufficient if they reduce their production volumes. The concept of joint production, however, does not require the parties to reduce their individual production activities outside the scope of their envisaged joint production arrangement.

- (8) The nature of unilateral and reciprocal specialisation agreements presupposes that the parties are active on the same product market. It is not necessary for the parties to be active on the same geographic market. Consequently, the application of this Regulation to unilateral and reciprocal specialisation agreements should be limited to scenarios where the parties are active on the same product market. Joint production agreements can be entered into by parties who are already active on the same product market but also by parties who wish to enter a product market by way of the agreement. Therefore, joint production agreements should fall within the scope of this Regulation irrespective of whether the parties are already active in the same product market.

- (9) To ensure that the benefits of specialisation will materialise without one party leaving the market downstream of production entirely, unilateral and reciprocal specialisation agreements should only be covered by this Regulation where they provide for supply and purchase obligations or joint distribution. Supply and purchase obligations may, but do not have to, be of an exclusive nature.

- (10) It can be presumed that, where the parties' share of the relevant market for the products which are the subject matter of a specialisation agreement does not exceed a certain level, the agreements will, as a general rule, give rise to economic benefits in the form of economies of scale or scope or better production technologies, while allowing consumers a fair share of the resulting benefits. However, where the products manufactured under a specialisation agreement are intermediary products which one or more of the parties fully or partly use as an input for their own production of certain downstream products which they subsequently sell on the market, the exemption conferred by this Regulation should also be conditional on the parties' share on the relevant market for these downstream products not exceeding a certain level. In such a case, merely looking at the parties' market share at the level of the intermediary product would ignore the potential risk of foreclosing or increasing the price of inputs for competitors at the level of the downstream products. However, there is no presumption that specialisation agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty once the market share threshold set out in this Regulation is

exceeded or other conditions of this Regulation are not met. In such cases, an individual assessment of the specialisation agreement needs to be conducted under Article 101 of the Treaty.

- (11) This Regulation should not exempt agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by a specialisation agreement. In principle, agreements containing certain types of severe restrictions of competition relating to the fixing of prices charged to third parties, limitation of output or sales, and allocation of markets or customers should be excluded from the benefit of the exemption established by this Regulation irrespective of the market share of the parties.

- (12) The market share limitation, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the parties to eliminate competition in respect of a substantial part of the products or services in question.

- (13) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(1)</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.

- (14) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption established by this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.

- (15) The benefit of this Regulation could be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003 where, for example, the relevant market is very concentrated and competition is already weak, in particular because of the individual market positions of other market participants or links between other market participants created by parallel specialisation agreements.

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

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- (16) In order to facilitate the conclusion of specialisation agreements, which can have a bearing on the structure of the parties, the period of validity of this Regulation should be fixed at 12 years,

belong, and, in addition, where the specialisation products are intermediary products which one or more of the parties fully or partly use captively for the production of downstream products, the relevant product and geographic market to which the downstream products belong;

HAS ADOPTED THIS REGULATION:

#### Article 1

##### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'specialisation agreement' means a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement;
- (b) 'unilateral specialisation agreement' means an agreement between two parties which are active on the same product market by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products;
- (c) 'reciprocal specialisation agreement' means an agreement between two or more parties which are active on the same product market, by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them;
- (d) 'joint production agreement' means an agreement by virtue of which two or more parties agree to produce certain products jointly;
- (e) 'agreement' means an agreement, a decision by an association of undertakings or a concerted practice;
- (f) 'product' means a good or a service, including both intermediary goods or services and final goods or services, with the exception of distribution and rental services;
- (g) 'production' means the manufacture of goods or the preparation of services and includes production by way of subcontracting;
- (h) 'preparation of services' means activities upstream of the provision of services to customers;
- (i) 'relevant market' means the relevant product and geographic market to which the specialisation products

(j) 'specialisation product' means a product which is produced under a specialisation agreement;

(k) 'downstream product' means a product for which a specialisation product is used by one or more of the parties as an input and which is sold by those parties on the market;

(l) 'competing undertaking' means an actual or potential competitor;

(m) 'actual competitor' means an undertaking that is active on the same relevant market;

(n) 'potential competitor' means an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to enter the relevant market;

(o) 'exclusive supply obligation' means an obligation not to supply a competing undertaking other than a party to the agreement with the specialisation product;

(p) 'exclusive purchase obligation' means an obligation to purchase the specialisation product only from a party to the agreement;

(q) 'joint', in the context of distribution, means that the parties:

(i) carry out the distribution of the products by way of a joint team, organisation or undertaking; or

(ii) appoint a third party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking;

(r) 'distribution' means distribution, including the sale of goods and the provision of services.

2. For the purposes of this Regulation, the terms 'undertaking' and 'party' shall include their respective connected undertakings.

‘Connected undertakings’ means:

- (a) undertakings in which a party to the specialisation agreement, directly or indirectly:
  - (i) has the power to exercise more than half the voting rights;
  - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
  - (iii) has the right to manage the undertaking’s affairs;
- (b) undertakings which directly or indirectly have, over a party to the specialisation agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the specialisation agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
  - (i) parties to the specialisation agreement or their respective connected undertakings referred to in points (a) to (d); or
  - (ii) one or more of the parties to the specialisation agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

#### Article 2

##### Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to specialisation agreements.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

2. The exemption provided for in paragraph 1 shall apply to specialisation agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not

constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

3. The exemption provided for in paragraph 1 shall apply to specialisation agreements whereby:

- (a) the parties accept an exclusive purchase or exclusive supply obligation; or
- (b) the parties do not independently sell the specialisation products but jointly distribute those products.

#### Article 3

##### Market share threshold

The exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on any relevant market.

#### Article 4

##### Hardcore restrictions

The exemption provided for in Article 2 shall not apply to specialisation agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the fixing of prices when selling the products to third parties with the exception of the fixing of prices charged to immediate customers in the context of joint distribution;
- (b) the limitation of output or sales with the exception of:
  - (i) provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of the capacity and production volume in the context of a joint production agreement; and
  - (ii) the setting of sales targets in the context of joint distribution;
- (c) the allocation of markets or customers.

#### Article 5

##### Application of the market share threshold

For the purposes of applying the market share threshold provided for in Article 3 the following rules shall apply:

- (a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties;

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(b) the market share shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of that subparagraph;

(d) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above that level without exceeding 25 %, the exemption provided for in Article 2 shall continue to apply for a period of 2 consecutive calendar years following the year in which the 20 % threshold was first exceeded;

(e) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 2 shall continue to apply for a period of 1 calendar year following the year in which the level of 25 % was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of 2 calendar years.

#### *Article 6*

##### **Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 January 2011 to 31 December 2012 in respect of agreements already in force on 31 December 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 2658/2000.

#### *Article 7*

##### **Period of validity**

This Regulation shall enter into force on 1 January 2011.

It shall expire on 31 December 2022.

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

Done at Brussels, 14 December 2010.

*For the Commission*  
*The President*

José Manuel BARROSO

### **c. Procedure (Arts. 101 and 102 TFEU)**

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>







10. Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



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COUNCIL REGULATION (EC) No 1/2003  
of 16 December 2002  
on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty  
(Text with EEA relevance)  
(OJ L 1, 4.1.2003, p. 1)

Amended by:

		Official Journal		
		No	page	date
► <u>M1</u>	Council Regulation (EC) No 411/2004 of 26 February 2004	L 68	1	6.3.2004
► <u>M2</u>	Council Regulation (EC) No 1419/2006 of 25 September 2006	L 269	1	28.9.2006

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▼B

**COUNCIL REGULATION (EC) No 1/2003**  
**of 16 December 2002**  
**on the implementation of the rules on competition laid down in**  
**Articles 81 and 82 of the Treaty**  
**(Text with EEA relevance)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

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

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

Whereas:

- (1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 (\*) of the Treaty <sup>(4)</sup>, has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.
- (2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.
- (3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.
- (4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.

<sup>(1)</sup> OJ C 365 E, 19.12.2000, p. 284.

<sup>(2)</sup> OJ C 72 E, 21.3.2002, p. 305.

<sup>(3)</sup> OJ C 155, 29.5.2001, p. 73.

<sup>(\*)</sup> The title of Regulation No 17 has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty.

<sup>(4)</sup> OJ L 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

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- (5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.
- (6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.
- (7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.
- (8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.
- (9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible

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with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

- (10) Regulations such as 19/65/EEC <sup>(1)</sup>, (EEC) No 2821/71 <sup>(2)</sup>, (EEC) No 3976/87 <sup>(3)</sup>, (EEC) No 1534/91 <sup>(4)</sup>, or (EEC) No 479/92 <sup>(5)</sup> empower the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called ‘block’ exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.
- (11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings

<sup>(1)</sup> Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices (OJ 36, 6.3.1965, p. 533). Regulation as last amended by Regulation (EC) No 1215/1999 (OJ L 148, 15.6.1999, p. 1).

<sup>(2)</sup> Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.

<sup>(3)</sup> Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 374, 31.12.1987, p. 9). Regulation as last amended by the Act of Accession of 1994.

<sup>(4)</sup> Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).

<sup>(5)</sup> Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (Consortia) (OJ L 55, 29.2.1992, p. 3). Regulation amended by the Act of Accession of 1994.

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- or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.
- (12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.
- (13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.
- (14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.
- (15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.
- (16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent.

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However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

- (17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.
- (18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.
- (19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.
- (20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.
- (21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.



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- (22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.
- (23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.
- (24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.
- (25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.
- (26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.
- (27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.

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- (28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.
- (29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.
- (30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.
- (31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74 <sup>(1)</sup>, which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.
- (32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.
- (33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.
- (34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.

<sup>(1)</sup> Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

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- (35) In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.
- (36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17<sup>(1)</sup> should therefore be repealed and Regulations (EEC) No 1017/68<sup>(2)</sup>, (EEC) No 4056/86<sup>(3)</sup> and (EEC) No 3975/87<sup>(4)</sup> should be amended in order to delete the specific procedural provisions they contain.
- (37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.
- (38) Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance,

<sup>(1)</sup> OJ 124, 28.11.1962, p. 2751/62; Regulation as last amended by Regulation No 1002/67/EEC (OJ 306, 16.12.1967, p. 1).

<sup>(2)</sup> Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1). Regulation as last amended by the Act of Accession of 1994.

<sup>(3)</sup> Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 (The title of the Regulation has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty) of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4). Regulation as last amended by the Act of Accession of 1994.

<sup>(4)</sup> Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EEC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).

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HAS ADOPTED THIS REGULATION:

CHAPTER I  
PRINCIPLES

*Article 1*

**Application of Articles 81 and 82 of the Treaty**

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.
3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

*Article 2*

**Burden of proof**

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

*Article 3*

**Relationship between Articles 81 and 82 of the Treaty and national competition laws**

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81 (3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.
3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition

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authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

## CHAPTER II

### POWERS

#### *Article 4*

#### **Powers of the Commission**

For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

#### *Article 5*

#### **Powers of the competition authorities of the Member States**

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

#### *Article 6*

#### **Powers of the national courts**

National courts shall have the power to apply Articles 81 and 82 of the Treaty.

## CHAPTER III

### COMMISSION DECISIONS

#### *Article 7*

#### **Finding and termination of infringement**

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a

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legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

*Article 8*

**Interim measures**

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

*Article 9*

**Commitments**

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

- (a) where there has been a material change in any of the facts on which the decision was based;
- (b) where the undertakings concerned act contrary to their commitments; or
- (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

*Article 10*

**Finding of inapplicability**

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.



## CHAPTER IV COOPERATION

### *Article 11*

#### **Cooperation between the Commission and the competition authorities of the Member States**

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.
2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29 (1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.
3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.
4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.
5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.
6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

### *Article 12*

#### **Exchange of information**

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and

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does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,
- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

*Article 13*

**Suspension or termination of proceedings**

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.
2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

*Article 14*

**Advisory Committee**

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).
2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.
3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.
4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall



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determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.

7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

*Article 15*

**Cooperation with national courts**

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

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*Article 16*

**Uniform application of Community competition law**

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.
2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V

**POWERS OF INVESTIGATION**

*Article 17*

**Investigations into sectors of the economy and into types of agreements**

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply *mutatis mutandis*.

*Article 18*

**Requests for information**

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.
2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

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3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.

6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

*Article 19*

**Power to take statements**

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

*Article 20*

**The Commission's powers of inspection**

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

- (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (c) to take or obtain in any form copies of or extracts from such books or records;
- (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

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(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

*Article 21*

**Inspection of other premises**

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of

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transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20 (2)(a), (b) and (c). Article 20(5) and (6) shall apply *mutatis mutandis*.

Article 22

**Investigations by competition authorities of Member States**

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

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CHAPTER VI  
PENALTIES

*Article 23*

**Fines**

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

- (a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
- (b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
- (c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);
- (d) in response to a question asked in accordance with Article 20(2)(e),
  - they give an incorrect or misleading answer,
  - they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
  - they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);
- (e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

- (a) they infringe Article 81 or Article 82 of the Treaty; or
- (b) they contravene a decision ordering interim measures under Article 8; or
- (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require

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payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

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

*Article 24*

**Periodic penalty payments**

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

- (a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;
- (b) to comply with a decision ordering interim measures taken pursuant to Article 8;
- (c) to comply with a commitment made binding by a decision pursuant to Article 9;
- (d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);
- (e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII

**LIMITATION PERIODS**

*Article 25*

**Limitation periods for the imposition of penalties**

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

- (a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

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- (b) five years in the case of all other infringements.
2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.
3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:
- (a) written requests for information by the Commission or by the competition authority of a Member State;
  - (b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;
  - (c) the initiation of proceedings by the Commission or by the competition authority of a Member State;
  - (d) notification of the statement of objections of the Commission or of the competition authority of a Member State.
4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.
5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.
6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

*Article 26*

**Limitation period for the enforcement of penalties**

1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.
2. Time shall begin to run on the day on which the decision becomes final.
3. The limitation period for the enforcement of penalties shall be interrupted:
- (a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;
  - (b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.
4. Each interruption shall start time running afresh.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:



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- (a) time to pay is allowed;
- (b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII  
**HEARINGS AND PROFESSIONAL SECRECY**

*Article 27*

**Hearing of the parties, complainants and others**

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.
2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.
3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.
4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 28*

**Professional secrecy**

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.
2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all represen-

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tatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX  
EXEMPTION REGULATIONS

*Article 29*

**Withdrawal in individual cases**

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81 (3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81 (3) of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X  
GENERAL PROVISIONS

*Article 30*

**Publication of decisions**

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 31*

**Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

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*Article 33*

**Implementing provisions**

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, *inter alia*:
  - (a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;
  - (b) the practical arrangements for the exchange of information and consultations provided for in Article 11;
  - (c) the practical arrangements for the hearings provided for in Article 27.
2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

CHAPTER XI

**TRANSITIONAL, AMENDING AND FINAL PROVISIONS**

*Article 34*

**Transitional provisions**

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.
2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

*Article 35*

**Designation of competition authorities of Member States**

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.
2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.
3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.
4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different

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from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

*Article 36*

**Amendment of Regulation (EEC) No 1017/68**

Regulation (EEC) No 1017/68 is amended as follows:

1. Article 2 is repealed;
2. in Article 3(1), the words ‘The prohibition laid down in Article 2’ are replaced by the words ‘The prohibition in Article 81(1) of the Treaty’;
3. Article 4 is amended as follows:
  - (a) In paragraph 1, the words ‘The agreements, decisions and concerted practices referred to in Article 2’ are replaced by the words ‘Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty’;
  - (b) Paragraph 2 is replaced by the following:

‘2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease.’
4. Articles 5 to 29 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to the date of application of this Regulation until the date of expiration of those decisions;
5. in Article 30, paragraphs 2, 3 and 4 are deleted.

*Article 37*

**Amendment of Regulation (EEC) No 2988/74**

In Regulation (EEC) No 2988/74, the following Article is inserted:

*‘Article 7a*

**Exclusion**

This Regulation shall not apply to measures taken under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (\*)

(\*) OJ L 1, 4.1.2003, p. 1.’

*Article 38*

**Amendment of Regulation (EEC) No 4056/86**

Regulation (EEC) No 4056/86 is amended as follows:

1. Article 7 is amended as follows:
  - (a) Paragraph 1 is replaced by the following:

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‘1. *Breach of an obligation*

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (\*) adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed.

(\*) OJ L 1, 4.1.2003, p. 1.’

(b) Paragraph 2 is amended as follows:

(i) In point (a), the words ‘under the conditions laid down in Section II’ are replaced by the words ‘under the conditions laid down in Regulation (EC) No 1/2003’;

(ii) The second sentence of the second subparagraph of point (c) (i) is replaced by the following:

‘At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No 1/2003, whether to accept commitments offered by the undertakings concerned with a view, *inter alia*, to obtaining access to the market for non-conference lines.’

2. Article 8 is amended as follows:

(a) Paragraph 1 is deleted.

(b) In paragraph 2 the words ‘pursuant to Article 10’ are replaced by the words ‘pursuant to Regulation (EC) No 1/2003’.

(c) Paragraph 3 is deleted;

3. Article 9 is amended as follows:

(a) In paragraph 1, the words ‘Advisory Committee referred to in Article 15’ are replaced by the words ‘Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003’;

(b) In paragraph 2, the words ‘Advisory Committee as referred to in Article 15’ are replaced by the words ‘Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003’;

4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81 (3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 26, the words ‘the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)’ are deleted.

*Article 39*

**Amendment of Regulation (EEC) No 3975/87**

Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

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*Article 40*

**Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91**

Article 7 of Regulation No 19/65/EEC, Article 7 of Regulation (EEC) No 2821/71 and Article 7 of Regulation (EEC) No 1534/91 are repealed.

*Article 41*

**Amendment of Regulation (EEC) No 3976/87**

Regulation (EEC) No 3976/87 is amended as follows:

1. Article 6 is replaced by the following:

*'Article 6*

The Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (\*) before publishing a draft Regulation and before adopting a Regulation.

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(\*) OJ L 1, 4.1.2003, p. 1.'

2. Article 7 is repealed.

*Article 42*

**Amendment of Regulation (EEC) No 479/92**

Regulation (EEC) No 479/92 is amended as follows:

1. Article 5 is replaced by the following:

*'Article 5*

Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (\*)

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(\*) OJ L 1, 4.1.2003, p. 1.'

2. Article 6 is repealed.

*Article 43*

**Repeal of Regulations No 17 and No 141**

1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.
2. Regulation No 141 is repealed.
3. References to the repealed Regulations shall be construed as references to this Regulation.

▼ B

*Article 44*

**Report on the application of the present Regulation**

Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17.

On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

*Article 45*

**Entry into force**

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

It shall apply from 1 May 2004.

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

11. Commission Regulation 773/2004/EC of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123/18

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





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► B

COMMISSION REGULATION (EC) No 773/2004  
of 7 April 2004  
relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty  
(Text with EEA relevance)  
(OJ L 123, 27.4.2004, p. 18)

Amended by:

		Official Journal		
		No	page	date
► <u>M1</u>	Commission Regulation (EC) No 1792/2006 of 23 October 2006	L 362	1	20.12.2006
► <u>M2</u>	Commission Regulation (EC) No 622/2008 of 30 June 2008	L 171	3	1.7.2008

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**COMMISSION REGULATION (EC) No 773/2004**

**of 7 April 2004**

**relating to the conduct of proceedings by the Commission pursuant  
to Articles 81 and 82 of the EC Treaty**

**(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 (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(1)</sup>, and in particular Article 33 thereof,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation (EC) No 1/2003 empowers the Commission to regulate certain aspects of proceedings for the application of Articles 81 and 82 of the Treaty. It is necessary to lay down rules concerning the initiation of proceedings by the Commission as well as the handling of complaints and the hearing of the parties concerned.
- (2) According to Regulation (EC) No 1/2003, national courts are under an obligation to avoid taking decisions which could run counter to decisions envisaged by the Commission in the same case. According to Article 11(6) of that Regulation, national competition authorities are relieved from their competence once the Commission has initiated proceedings for the adoption of a decision under Chapter III of Regulation (EC) No 1/2003. In this context, it is important that courts and competition authorities of the Member States are aware of the initiation of proceedings by the Commission. The Commission should therefore be able to make public its decisions to initiate proceedings.
- (3) Before taking oral statements from natural or legal persons who consent to be interviewed, the Commission should inform those persons of the legal basis of the interview and its voluntary nature. The persons interviewed should also be informed of the purpose of the interview and of any record which may be made. In order to enhance the accuracy of the statements, the persons interviewed should also be given an opportunity to correct the statements recorded. Where information gathered from oral statements is exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, that information should only be used in evidence to impose sanctions on natural persons where the conditions set out in that Article are fulfilled.
- (4) Pursuant to Article 23(1)(d) of Regulation (EC) No 1/2003 fines may be imposed on undertakings and associations of undertakings where they fail to rectify within the time limit fixed by the Commission an incorrect, incomplete or misleading answer given by a member of their staff to questions in the course of inspections. It is therefore necessary to provide the undertaking concerned with a record of any explanations given and to

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

▼B

- establish a procedure enabling it to add any rectification, amendment or supplement to the explanations given by the member of staff who is not or was not authorised to provide explanations on behalf of the undertaking. The explanations given by a member of staff should remain in the Commission file as recorded during the inspection.
- (5) Complaints are an essential source of information for detecting infringements of competition rules. It is important to define clear and efficient procedures for handling complaints lodged with the Commission.
  - (6) In order to be admissible for the purposes of Article 7 of Regulation (EC) No 1/2003, a complaint must contain certain specified information.
  - (7) In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that form should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation (EC) No 1/2003.
  - (8) Natural or legal persons having chosen to lodge a complaint should be given the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement. However, they should not have access to business secrets or other confidential information belonging to other parties involved in the proceedings.
  - (9) Complainants should be granted the opportunity of expressing their views if the Commission considers that there are insufficient grounds for acting on the complaint. Where the Commission rejects a complaint on the grounds that a competition authority of a Member State is dealing with it or has already done so, it should inform the complainant of the identity of that authority.
  - (10) In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.
  - (11) Provision should also be made for the hearing of persons who have not submitted a complaint as referred to in Article 7 of Regulation (EC) No 1/2003 and who are not parties to whom a statement of objections has been addressed but who can nevertheless show a sufficient interest. Consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services. Where it considers this to be useful for the proceedings, the Commission should also be able to invite other persons to express their views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. Where appropriate, it should also be able to invite such persons to express their views at that oral hearing.
  - (12) To improve the effectiveness of oral hearings, the Hearing Officer should have the power to allow the parties concerned, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.
  - (13) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The category of 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking or person. The Commission should be able to request undertakings or associations of undertakings

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▼ **B**

that submit or have submitted documents or statements to identify confidential information.

- (14) Where business secrets or other confidential information are necessary to prove an infringement, the Commission should assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.
- (15) In the interest of legal certainty, a minimum time-limit for the various submissions provided for in this Regulation should be laid down.
- (16) This Regulation replaces Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty <sup>(1)</sup>, which should therefore be repealed.
- (17) This Regulation aligns the procedural rules in the transport sector with the general rules of procedure in all sectors. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector <sup>(2)</sup> should therefore be repealed.
- (18) Regulation (EC) No 1/2003 abolishes the notification and authorisation system. 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 <sup>(3)</sup> should therefore be repealed,

HAS ADOPTED THIS REGULATION:

CHAPTER I

**SCOPE**

*Article 1*

**Subject-matter and scope**

This regulation applies to proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty.

CHAPTER II

**INITIATION OF PROCEEDINGS**

*Article 2*

**Initiation of proceedings**

▼ **M2**

1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation, a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.

<sup>(1)</sup> OJ L 354, 30.12.1998, p. 18.

<sup>(2)</sup> OJ L 354, 30.12.1998, p. 22.

<sup>(3)</sup> OJ L 377, 31.12.1994, p. 28.

▼B

2. The Commission may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.
3. The Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.
4. The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings.

CHAPTER III  
INVESTIGATIONS BY THE COMMISSION

*Article 3*

**Power to take statements**

1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.
2. The interview may be conducted by any means including by telephone or electronic means.
3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

*Article 4*

**Oral questions during inspections**

1. When, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003, officials or other accompanying persons authorised by the Commission ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.
2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.
3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.

CHAPTER IV  
HANDLING OF COMPLAINTS

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▼ **B**

*Article 5*

**Admissibility of complaints**

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003.

Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.

2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the Commission. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.

3. Complaints shall be submitted in one of the official languages of the Community.

*Article 6*

**Participation of complainants in proceedings**

▼ **M2**

1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections, except in cases where the settlement procedure applies, where it shall inform the complainant in writing of the nature and subject matter of the procedure. The Commission shall also set a time limit within which the complainant may make known its views in writing.

▼ **B**

2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

*Article 7*

**Rejection of complaints**

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

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*Article 8*

**Access to information**

1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.
2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

*Article 9*

**Rejections of complaints pursuant to Article 13 of Regulation (EC)  
No 1/2003**

Where the Commission rejects a complaint pursuant to Article 13 of Regulation (EC) No 1/2003, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

CHAPTER V

**EXERCISE OF THE RIGHT TO BE HEARD**

*Article 10*

**Statement of objections and reply**

▼ **M2**

1. The Commission shall inform the parties concerned of the objections raised against them. The statement of objections shall be notified in writing to each of the parties against whom objections are raised.

▼ **B**

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.
3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, ► **M1** 30 ◀ paper copies of their submission and of the documents attached to it. They may propose that the Commission hear persons who may corroborate the facts set out in their submission.

▼ **M2**

*Article 10a*

**Settlement procedure in cartel cases**

1. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly

▼ M2

introducing settlement submissions. The Commission shall not be obliged to take into account replies received after the expiry of that time limit.

If two or more parties within the same undertaking indicate their willingness to engage in settlement discussions pursuant to the first subparagraph, they shall appoint a joint representation to engage in discussions with the Commission on their behalf. When setting the time limit referred to in the first subparagraph, the Commission shall indicate to the relevant parties that they are identified within the same undertaking, for the sole purpose of enabling them to comply with this provision.

2. Parties taking part in settlement discussions may be informed by the Commission of:

- (a) the objections it envisages to raise against them;
- (b) the evidence used to determine the envisaged objections;
- (c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and
- (d) the range of potential fines.

This information shall be confidential vis-à-vis third parties, save where the Commission has given a prior explicit authorisation for disclosure.

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 81 of the Treaty as well as their liability. Before the Commission sets a time limit to introduce their settlement submissions, the parties concerned shall be entitled to have the information specified in Article 10a(2), first subparagraph disclosed to them, upon request, in a timely manner. The Commission shall not be obliged to take into account settlement submissions received after the expiry of that time limit.

3. When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the Commission, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions. The Commission may then proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation (EC) No 1/2003.

4. The Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties involved, if it considers that procedural efficiencies are not likely to be achieved.

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*Article 11*

**Right to be heard**

▼ M2

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.



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2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

▼ M2

*Article 12*

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.
2. However, when introducing their settlement submissions the parties shall confirm to the Commission that they would only require having the opportunity to develop their arguments at an oral hearing, if the statement of objections does not reflect the contents of their settlement submissions.

▼ B

*Article 13*

**Hearing of other persons**

1. If natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time-limit within which they may make known their views in writing.
2. The Commission may, where appropriate, invite persons referred to in paragraph 1 to develop their arguments at the oral hearing of the parties to whom a statement of objections has been addressed, if the persons referred to in paragraph 1 so request in their written comments.
3. The Commission may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. The Commission may also invite such persons to express their views at that oral hearing.

*Article 14*

**Conduct of oral hearings**

1. Hearings shall be conducted by a Hearing Officer in full independence.
2. The Commission shall invite the persons to be heard to attend the oral hearing on such date as it shall determine.
3. The Commission shall invite the competition authorities of the Member States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the Member States.
4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.
5. Persons heard by the Commission may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.
6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.
7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited

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to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

CHAPTER VI

ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

*Article 15*

**Access to the file and use of documents**

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.

▼M2

1a. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and in order to enable the parties willing to introduce settlement submissions to do so, the Commission shall disclose to them the evidence and documents described in Article 10a(2) upon request and subject to the conditions established in the relevant subparagraphs. In view thereof, when introducing their settlement submissions, the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement submissions.

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2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States. The right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.

3. Nothing in this Regulation prevents the Commission from disclosing and using information necessary to prove an infringement of Articles 81 or 82 of the Treaty.

4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

*Article 16*

**Identification and protection of confidential information**

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.

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3. Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.

The Commission may set a time-limit within which the undertakings and associations of undertakings are to:

- (a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;
- (b) provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted;
- (c) provide a concise description of each piece of deleted information.

4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

CHAPTER VII

GENERAL AND FINAL PROVISIONS

*Article 17*

**Time-limits**

**▼M2**

1. In setting the time limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2), Article 10a(1), Article 10a(2), Article 10a(3) and Article 16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.

**▼B**

2. The time-limits referred to in Article 6(1), Article 7(1) and Article 10(2) shall be at least four weeks. However, for proceedings initiated with a view to adopting interim measures pursuant to Article 8 of Regulation (EC) No 1/2003, the time-limit may be shortened to one week.

**▼M2**

3. The time limits referred to in Article 4(3), Article 10a(1), Article 10a(2) and Article 16(3) shall be at least two weeks. The time limit referred to in Article 3(3) shall be at least two weeks, except for settlement submissions, for which corrections shall be made within one week. The time limit referred to in Article 10a(3) shall be at least two weeks.

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4. Where appropriate and upon reasoned request made before the expiry of the original time-limit, time-limits may be extended.

**▼B**

*Article 18*

**Repeals**

Regulations (EC) No 2842/98, (EC) No 2843/98 and (EC) No 3385/94 are repealed.

References to the repealed regulations shall be construed as references to this regulation.

*Article 19*

**Transitional provisions**

Procedural steps taken under Regulations (EC) No 2842/98 and (EC) No 2843/98 shall continue to have effect for the purpose of applying this Regulation.

*Article 20*

**Entry into force**

This Regulation shall enter into force on 1 May 2004.

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



ANNEX

**FORM C**

COMPLAINT PURSUANT TO ARTICLE 7 OF REGULATION (EC) No 1/2003

**I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint**

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.
2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

**II. Details of the alleged infringement and evidence**

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.
4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).
5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

**III. Finding sought from the Commission and legitimate interest**

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.
7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

**IV. Proceedings before national competition authorities or national courts**

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.

## **II. Specifically regarding merger control**

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





12. Council Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings (Merger Regulation), OJ 2004 L 24/1

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(Acts whose publication is obligatory)

**COUNCIL REGULATION (EC) No 139/2004  
of 20 January 2004  
on the control of concentrations between undertakings  
(the EC Merger Regulation)  
(Text with EEA relevance)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

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

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

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings <sup>(4)</sup> has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.

(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.

(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.

(4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.

(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

<sup>(1)</sup> OJ C 20, 28.1.2003, p. 4.

<sup>(2)</sup> Opinion delivered on 9.10.2003 (not yet published in the Official Journal).

<sup>(3)</sup> Opinion delivered on 24.10.2003 (not yet published in the Official Journal).

<sup>(4)</sup> OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1). Corrigendum in OJ L 40, 13.2.1998, p. 17.

- (8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.
- (9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.
- (10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.
- (11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the 'one-stop shop' principle.
- (12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.
- (13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.
- (14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.
- (15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.
- (16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to

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- the Commission. Such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.
- (17) The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.
- (18) The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.
- (19) Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.
- (20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.
- (21) This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.
- (22) The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.
- (23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.
- (24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

- (25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.
- (26) A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.
- (27) In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.
- (28) In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.
- (29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.
- (30) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.
- (31) The Commission should have at its disposal appropriate instruments to ensure the enforcement of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.

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- (32) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.
- (33) The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.
- (34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.
- (35) A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.
- (36) The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union <sup>(1)</sup>. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.
- (37) The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.
- (38) In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.
- (39) In the course of an inspection, officials authorised by the Commission should have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.
- (40) Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.
- <sup>(1)</sup> OJ C 364, 18.12.2000, p. 1.



- (41) When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against themselves or against others the existence of such infringements.
- (42) For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of the rights of defence of the undertakings concerned, in particular the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network and with the competent authorities of third countries should likewise be safeguarded.
- (43) Compliance with this Regulation should be enforceable, as appropriate, by means of fines and periodic penalty payments. The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 229 of the Treaty.
- (44) The conditions in which concentrations, involving undertakings having their seat or their principal fields of activity in the Community, are carried out in third countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for such undertakings.
- (45) This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law.
- (46) The Commission should be able to lay down detailed rules concerning the implementation of this Regulation in accordance with the procedures for the exercise of implementing powers conferred on the Commission. For the adoption of such implementing provisions, the Commission should be assisted by an Advisory Committee composed of the representatives of the Member States as specified in Article 23,
2. A concentration has a Community dimension where:
- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,
- unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:
- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,
- unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.
5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

#### Article 2

### Appraisal of concentrations

HAS ADOPTED THIS REGULATION:

#### Article 1

##### Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

- (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

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(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:

— whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

— whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

#### Article 3

##### Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies<sup>(1)</sup> provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

#### Article 4

##### **Prior notification of concentrations and pre-notification referral at the request of the notifying parties**

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term 'notified concentration' shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term 'concentration' includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly

affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply *mutatis mutandis*.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

<sup>(1)</sup> OJ L 222, 14. 8. 1978, p. 11. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).



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Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

#### Article 5

#### Calculation of turnover

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC<sup>(1)</sup>, after deduction of value added tax and other taxes directly related to those items, where appropriate:

(i) interest income and similar income;

(ii) income from securities:

— income from shares and other variable yield securities,

— income from participating interests,

— income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

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

(iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

<sup>(1)</sup> OJ L 372, 31. 12. 1986, p. 1. Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council.

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5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:

- (a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);
- (b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

#### Article 6

#### Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

- (a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.
- (b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

- (c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

- (a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,
- or
- (b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).

5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

#### Article 7

#### Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

- (a) the concentration is notified to the Commission pursuant to Article 4 without delay; and
- (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account *inter alia* the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).

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This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

#### Article 8

#### Powers of decision of the Commission

1. Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where the Commission finds that a concentration:

- (a) has already been implemented and that concentration has been declared incompatible with the common market, or
- (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,
- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

- (a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;
- (b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;
- (c) has already been implemented and is declared incompatible with the common market.

6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:

- (a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or
- (b) the undertakings concerned commit a breach of an obligation attached to the decision.

7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:

- (a) it finds that a concentration has been implemented
  - (i) in contravention of a condition attached to a decision under Article 6(1)(b), or
  - (ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or
- (b) a decision has been revoked pursuant to paragraph 6.

8. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

#### Article 9

#### Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

- (a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or
- (b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

- (a) it shall itself deal with the case in accordance with this Regulation; or
- (b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

- (a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or

- (b) within 65 working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the 65 working days referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The competent authority of the Member State concerned shall decide upon the case without undue delay.

Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law.

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Article 10

**Time limits for initiating proceedings and for decisions**

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2) or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.

2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.

3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

**Requests for information**

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.

3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court of Justice.



4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.

6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.

#### Article 12

##### Inspections by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

2. If so requested by the Commission or by the competent authority of the Member State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

#### Article 13

##### The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:

- (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (c) to take or obtain in any form copies of or extracts from such books or records;
- (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
- (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

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6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection, including the sealing of business premises, books or records, ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

#### Article 14

##### Fines

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

- (a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);
- (b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);
- (c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;
- (d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);

(e) in response to a question asked in accordance with Article 13(2)(e),

- they give an incorrect or misleading answer,
- they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
- they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);

(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:

- (a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);
- (b) implement a concentration in breach of Article 7;
- (c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);
- (d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

#### Article 15

##### Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:

- (a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);
- (b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);

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(c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;

(d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).

2. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

#### Article 16

##### Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

#### Article 17

##### Professional secrecy

1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

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

#### Article 18

##### Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage

of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

#### Article 19

##### Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Article 6(2) or Article 8(2), second subparagraph.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.



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3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).

Article 21

#### Application of the Regulation and jurisdiction

4. The Advisory Committee shall consist of representatives of the competent authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003 <sup>(1)</sup>, (EEC) No 1017/68 <sup>(2)</sup>, (EEC) No 4056/86 <sup>(3)</sup> and (EEC) No 3975/87 <sup>(4)</sup> shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

7. The Commission shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Article 20

#### Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the *Official Journal of the European Union*.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

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

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(2)</sup> OJ L 175, 23. 7. 1968, p. 1. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

<sup>(3)</sup> OJ L 378, 31. 12. 1986, p. 4. Regulation as last amended by Regulation (EC) No 1/2003.

<sup>(4)</sup> OJ L 374, 31. 12. 1987, p. 1. Regulation as last amended by Regulation (EC) No 1/2003.

Article 22

**Referral to the Commission**

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

Article 23

**Implementing provisions**

1. The Commission shall have the power to lay down in accordance with the procedure referred to in paragraph 2:

- (a) implementing provisions concerning the form, content and other details of notifications and submissions pursuant to Article 4;
  - (b) implementing provisions concerning time limits pursuant to Article 4(4), (5) Articles 7, 9, 10 and 22;
  - (c) the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) and Article 8(2);
  - (d) implementing provisions concerning hearings pursuant to Article 18.
2. The Commission shall be assisted by an Advisory Committee, composed of representatives of the Member States.
- (a) Before publishing draft implementing provisions and before adopting such provisions, the Commission shall consult the Advisory Committee.
  - (b) Consultation shall take place at a meeting convened at the invitation of and chaired by the Commission. A draft of the implementing provisions to be taken shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent.
  - (c) The Advisory Committee shall deliver an opinion on the draft implementing provisions, if necessary by taking a vote. The Commission shall take the utmost account of the opinion delivered by the Committee.

Article 24

**Relations with third countries**

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a third country.

2. Initially not more than one year after the entry into force of this Regulation and, thereafter periodically, the Commission shall draw up a report examining the treatment accorded to undertakings having their seat or their principal fields of activity in the Community, in the terms referred to in paragraphs 3 and 4, as regards concentrations in third countries. The Commission shall submit those reports to the Council, together with any recommendations.

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3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country does not grant undertakings having their seat or their principal fields of activity in the Community, treatment comparable to that granted by the Community to undertakings from that country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for undertakings having their seat or their principal fields of activity in the Community.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 307 of the Treaty, under international agreements, whether bilateral or multilateral.

#### Article 25

##### Repeal

1. Without prejudice to Article 26(2), Regulations (EEC) No 4064/89 and (EC) No 1310/97 shall be repealed with effect from 1 May 2004.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.

#### Article 26

##### Entry into force and transitional provisions

1. This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 May 2004.

2. Regulation (EEC) No 4064/89 shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of that Regulation before the date of application of this Regulation, subject, in particular, to the provisions governing applicability set out in Article 25(2) and (3) of Regulation (EEC) No 4064/89 and Article 2 of Regulation (EEC) No 1310/97.

3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of application of this Regulation.

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

Done at Brussels, 20 January 2004.

For the Council  
The President  
C. MCCREEVY

ANNEX

Correlation table

Regulation (EEC) No 4064/89	This Regulation
Article 1(1), (2) and (3)	Article 1(1), (2) and (3)
Article 1(4)	Article 1(4)
Article 1(5)	Article 1(5)
Article 2(1)	Article 2(1)
—	Article 2(2)
Article 2(2)	Article 2(3)
Article 2(3)	Article 2(4)
Article 2(4)	Article 2(5)
Article 3(1)	Article 3(1)
Article 3(2)	Article 3(4)
Article 3(3)	Article 3(2)
Article 3(4)	Article 3(3)
—	Article 3(4)
Article 3(5)	Article 3(5)
Article 4(1) first sentence	Article 4(1) first subparagraph
Article 4(1) second sentence	—
—	Article 4(1) second and third subparagraphs
Article 4(2) and (3)	Article 4(2) and (3)
—	Article 4(4) to (6)
Article 5(1) to (3)	Article 5(1) to (3)
Article 5(4), introductory words	Article 5(4), introductory words
Article 5(4) point (a)	Article 5(4) point (a)
Article 5(4) point (b), introductory words	Article 5(4) point (b), introductory words
Article 5(4) point (b), first indent	Article 5(4) point (b)(i)
Article 5(4) point (b), second indent	Article 5(4) point (b)(ii)
Article 5(4) point (b), third indent	Article 5(4) point (b)(iii)
Article 5(4) point (b), fourth indent	Article 5(4) point (b)(iv)
Article 5(4) points (c), (d) and (e)	Article 5(4) points (c), (d) and (e)
Article 5(5)	Article 5(5)
Article 6(1), introductory words	Article 6(1), introductory words
Article 6(1) points (a) and (b)	Article 6(1) points (a) and (b)
Article 6(1) point (c)	Article 6(1) point (c), first sentence
Article 6(2) to (5)	Article 6(2) to (5)
Article 7(1)	Article 7(1)
Article 7(3)	Article 7(2)
Article 7(4)	Article 7(3)
Article 7(5)	Article 7(4)
Article 8(1)	Article 6(1) point (c), second sentence
Article 8(2)	Article 8(1) and (2)
Article 8(3)	Article 8(3)

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Regulation (EEC) No 4064/89	This Regulation
Article 8(4)	Article 8(4)
—	Article 8(5)
Article 8(5)	Article 8(6)
Article 8(6)	Article 8(7)
—	Article 8(8)
Article 9(1) to (9)	Article 9(1) to (9)
Article 9(10)	—
Article 10(1) and (2)	Article 10(1) and (2)
Article 10(3)	Article 10(3) first subparagraph, first sentence
—	Article 10(3) first subparagraph, second sentence
—	Article 10(3) second subparagraph
Article 10(4)	Article 10(4) first subparagraph
—	Article 10(4), second subparagraph
Article 10(5)	Article 10(5), first and fourth subparagraphs
—	Article 10(5), second, third and fifth subparagraphs
Article 10(6)	Article 10(6)
Article 11(1)	Article 11(1)
Article 11(2)	—
Article 11(3)	Article 11(2)
Article 11(4)	Article 11(4) first sentence
—	Article 11(4) second and third sentences
Article 11(5) first sentence	—
Article 11(5) second sentence	Article 11(3)
Article 11(6)	Article 11(5)
—	Article 11(6) and (7)
Article 12	Article 12
Article 13(1) first subparagraph	Article 13(1)
Article 13(1) second subparagraph, introductory words	Article 13(2) introductory words
Article 13(1) second subparagraph, point (a)	Article 13(2) point (b)
Article 13(1) second subparagraph, point (b)	Article 13(2) point (c)
Article 13(1) second subparagraph, point (c)	Article 13(2) point (e)
Article 13(1) second subparagraph, point (d)	Article 13(2) point (a)
—	Article 13(2) point (d)
Article 13(2)	Article 13(3)
Article 13(3)	Article 13(4) first and second sentences
Article 13(4)	Article 13(4) third sentence
Article 13(5)	Article 13(5), first sentence
—	Article 13(5), second sentence
Article 13(6) first sentence	Article 13(6)
Article 13(6) second sentence	—
—	Article 13(7) and (8)
Article 14(1) introductory words	Article 14(1) introductory words
Article 14(1) point (a)	Article 14(2) point (a)
Article 14(1) point (b)	Article 14(1) point (a)
Article 14(1) point (c)	Article 14(1) points (b) and (c)

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Regulation (EEC) No 4064/89	This Regulation
Article 14(1) point (d)	Article 14(1) point (d)
—	Article 14(1) points (e) and (f)
Article 14(2) introductory words	Article 14(2) introductory words
Article 14(2) point (a)	Article 14(2) point (d)
Article 14(2) points (b) and (c)	Article 14(2) points (b) and (c)
Article 14(3)	Article 14(3)
Article 14(4)	Article 14(4)
Article 15(1) introductory words	Article 15(1) introductory words
Article 15(1) points (a) and (b)	Article 15(1) points (a) and (b)
Article 15(2) introductory words	Article 15(1) introductory words
Article 15(2) point (a)	Article 15(1) point (c)
Article 15(2) point (b)	Article 15(1) point (d)
Article 15(3)	Article 15(2)
Articles 16 to 20	Articles 16 to 20
Article 21(1)	Article 21(2)
Article 21(2)	Article 21(3)
Article 21(3)	Article 21(4)
Article 22(1)	Article 21(1)
Article 22(3)	—
—	Article 22(1) to (3)
Article 22(4)	Article 22(4)
Article 22(5)	—
—	Article 22(5)
Article 23	Article 23(1)
—	Article 23(2)
Article 24	Article 24
—	Article 25
Article 25(1)	Article 26(1), first subparagraph
—	Article 26(1), second subparagraph
Article 25(2)	Article 26(2)
Article 25(3)	Article 26(3)
—	Annex



13. Commission Regulation 802/2004/EC implementing Council Regulation (EC) No. 139/2004 (The "Implementing Regulation") and its annexes (Form CO, Short Form CO and Form RS), OJ 2004 L 133/1

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





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COMMISSION REGULATION (EC) No 802/2004

of ► C1 21 April 2004 ◀

implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

(Text with EEA relevance)

(OJ L 133, 30.4.2004, p. 1)

Amended by:

		Official Journal		
		No	page	date
► <u>M1</u>	Commission Regulation (EC) No 1792/2006 of 23 October 2006	L 362	1	20.12.2006
► <u>M2</u>	Commission Regulation (EC) No 1033/2008 of 20 October 2008	L 279	3	22.10.2008

Corrected by:

► C1 Corrigendum, OJ L 172, 6.5.2004, p. 9 (802/2004)

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**COMMISSION REGULATION (EC) No 802/2004**  
**of 21 April 2004**  
**implementing Council Regulation (EC) No 139/2004 on the control**  
**of concentrations between undertakings**  
**(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 (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation) <sup>(1)</sup>, and in particular Article 23(1) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings <sup>(2)</sup>, as last amended by Regulation (EC) No 1310/97 <sup>(3)</sup>, and in particular Article 23 thereof,

Having consulted the Advisory Committee,

Whereas:

- (1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings has been recast, with substantial amendments to various provisions of that Regulation.
- (2) Commission Regulation (EC) No 447/98 <sup>(4)</sup> of 1 March 1998 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 must be modified in order to take account of those amendments. For the sake of clarity it should therefore be repealed and replaced by a new regulation.
- (3) The Commission has adopted measures concerning the terms of reference of hearing officers in certain competition proceedings.
- (4) Regulation (EC) No 139/2004 is based on the principle of compulsory notification of concentrations before they are put into effect. On the one hand, a notification has important legal consequences which are favourable to the parties to the proposed concentration, while, on the other hand, failure to comply with the obligation to notify renders the parties liable to fines and may also entail civil law disadvantages for them. 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.
- (5) It is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration.
- (6) Regulation (EC) No 139/2004 also allows the undertakings concerned to request, in a reasoned submission, prior to notification, that a concentration fulfilling the requirements of that Regulation be referred to the Commission by one or more

<sup>(1)</sup> OJ L 24, 29.1.2004, p. 1.

<sup>(2)</sup> OJ L 395, 30.12.1989, p. 1.

<sup>(3)</sup> OJ L 180, 9.7.1997, p. 1.

<sup>(4)</sup> OJ L 61, 2.3.1998, p. 1. Regulation as amended by the 2003 Act of Accession.

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Member States, or referred by the Commission to one or more Member States, as the case may be. It is important to provide the Commission and the competent authorities of the Member States concerned with sufficient information, in order to enable them to assess, within a short period of time, whether or not a referral ought to be made. To that end, the reasoned submission requesting the referral should contain certain specific information.

- (7) In order to simplify and expedite examination of notifications and of reasoned submissions, it is desirable to prescribe that forms be used.
- (8) Since notification sets in motion legal time-limits pursuant to Regulation (EC) No 139/2004, the conditions governing such time-limits and the time when they become effective should also be determined.
- (9) Rules must be laid down in the interests of legal certainty for calculating the time-limits provided for in Regulation (EC) No 139/2004. In particular, the beginning and end of time periods and the circumstances suspending the running of such periods must be determined, with due regard to the requirements resulting from the exceptionally tight legal timeframe available for the proceedings.
- (10) 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. For these purposes, the Commission should distinguish between the parties who notify the concentration, other parties involved in the proposed concentration, third parties and parties regarding whom the Commission intends to take a decision imposing a fine or periodic penalty payments.
- (11) The Commission should give the notifying parties and other parties involved in the proposed concentration, if they so request, an opportunity before notification to discuss the intended concentration informally and in strict confidence. In addition, the Commission should, 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, with a view, if possible, to resolving such problems by mutual agreement.
- (12) In accordance with the principle of respect for 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. The other parties involved in the proposed concentration should also be informed of the Commission's objections and should be granted the opportunity to express their views.
- (13) Third parties demonstrating a sufficient interest must also be given the opportunity of expressing their views, if they make a written application to that effect.
- (14) The various persons entitled to submit comments should do so in writing, both in their own interests and in the interests of sound administration, without prejudice to their right to request a formal oral hearing, where appropriate, to supplement the written procedure. In urgent cases, however, the Commission must be enabled to proceed immediately to formal oral hearings of the notifying parties, of other parties involved or of third parties.
- (15) 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.
- (16) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential infor-

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mation. The Commission should be able to ask undertakings that have submitted documents or statements to identify confidential information.

- (17) In order to enable the Commission to carry out a proper assessment of commitments offered by the notifying parties with a view to rendering the concentration compatible with the common market, and to ensure due consultation with other parties involved, with third parties and with the authorities of the Member States as provided for in Regulation (EC) No 139/2004, in particular Article 18(1), 18(4), Article 19(1), 19(2), 19(3) and 19(5) thereof, the procedure and time-limits for submitting the commitments referred to in Article 6(2) and Article 8(2) of that Regulation should be laid down.
- (18) It is also necessary to define the rules applicable to certain time limits set by the Commission.
- (19) The Advisory Committee on Concentrations must deliver its opinion on the basis of a preliminary draft decision. It must therefore be consulted on a case after the inquiry in to that case has been completed. Such consultation does not, however, prevent the Commission from reopening an inquiry if need be.

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

*Article 1*

**Scope**

This Regulation shall apply to the control of concentrations conducted pursuant to Regulation (EC) No 139/2004.

CHAPTER II

NOTIFICATIONS AND OTHER SUBMISSIONS

*Article 2*

**Persons entitled to submit notifications**

1. Notifications shall be submitted by the persons or undertakings referred to in Article 4(2) of Regulation (EC) No 139/2004.
2. Where notifications are signed by representatives of persons or of undertakings, such representatives shall produce written proof that they are authorised to act.
3. Joint notifications shall be submitted by a joint representative who is authorised to transmit and to receive documents on behalf of all notifying parties.

*Article 3*

**Submission of notifications**

1. Notifications shall be submitted in the manner prescribed by Form CO as set out in Annex I. Under the conditions set out in Annex II, notifications may be submitted in Short Form as defined therein. Joint notifications shall be submitted on a single form.

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2. One original and ►M1 37 ◄ copies of the Form CO and the supporting documents shall be submitted to the Commission. The notification shall be delivered to the address referred to in Article 23(1) and in the format specified by the Commission.
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. For the notifying parties, this language shall also be the language of the proceeding, as well as that of any subsequent proceedings relating to the same concentration. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages of the Community, a translation into the language of the proceeding shall be attached.
5. Where notifications are made pursuant to Article 57 of the Agreement on the European Economic Area, they may also be submitted 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 proceeding for the notifying parties.

*Article 4*

**Information and documents to be provided**

1. Notifications shall contain the information, including documents, requested in the applicable forms set out in the Annexes. The information shall be correct and complete.
2. The Commission may dispense with the obligation to provide any particular information in the notification, including documents, or with any other requirement specified in Annexes I and II where the Commission considers that compliance with those obligations or requirements 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 5(2) and 5(3).

*Article 5*

**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 any material respect, the Commission shall inform the notifying parties or their representatives in writing without delay. 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 coming to light subsequent to the notification which the notifying parties know or ought to know, or any new information coming to light subsequent to the notification which the parties know or ought to know and which would have had to be notified if known at the time of notification, shall be communicated to the Commission without delay. In such cases, when these material changes or new information could have a

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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 relevant information 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 (EC) No 139/2004, it shall specify the date upon which the notification has been received. Where, further to the application of paragraphs 2, 3 and 4 of this Article, the effective date of notification is later than the date specified in that publication, the Commission shall issue a further publication in which it shall state the later date.

*Article 6*

**Specific provisions relating to reasoned submissions, supplements and certifications**

1. Reasoned submissions within the meaning of Article 4(4) and 4(5) of Regulation (EC) No 139/2004 shall contain the information, including documents, requested in accordance with Annex III to this Regulation.

2. Article 2, Article 3(1), third sentence, 3(2) to (5), Article 4, Article 5(1), 5 (2) first sentence, 5 (3), 5 (4), Article 21 and Article 23 of this Regulation shall apply *mutatis mutandis* to reasoned submissions within the meaning of Article 4(4) and 4(5) of Regulation (EC) No 139/2004.

Article 2, Article 3(1), third sentence, 3(2) to (5), Article 4, Article 5(1) to (4), Article 21 and Article 23 of this Regulation shall apply *mutatis mutandis* to supplements to notifications and certifications within the meaning of Article 10(5) of Regulation (EC) No 139/2004.

**CHAPTER III  
TIME-LIMITS**

*Article 7*

**Beginning of time periods**

Time periods shall begin on the working day, as defined in Article 24 of this Regulation, following the event to which the relevant provision of Regulation (EC) No 139/2004 refers.

*Article 8*

**Expiry of time periods**

A time period calculated in working days shall expire at the end of its last working day.

A time period set by the Commission in terms of a calendar date shall expire at the end of that day.

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*Article 9*

**Suspension of time limit**

1. The time limits referred to in Articles 9(4), Article 10(1) and 10(3) of Regulation (EC) No 139/2004 shall be suspended where the Commission has to take a decision pursuant to Article 11(3) or Article 13(4) of that Regulation, on any of the following grounds:
  - (a) information which the Commission has requested pursuant to Article 11(2) of Regulation (EC) No 139/2004 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) information which the Commission has requested pursuant to Article 11(2) of Regulation (EC) No 139/2004 from a third 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 owing to circumstances for which one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, is responsible;
  - (c) one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, has refused to submit to an inspection deemed necessary by the Commission on the basis of Article 13(1) of Regulation (EC) No 139/2004 or to cooperate in the carrying out of such an inspection in accordance with Article 13(2) of that Regulation;
  - (d) the notifying parties have failed to inform the Commission of material changes in the facts contained in the notification, or of any new information of the kind referred to in Article 5(3) of this Regulation.
2. The time limits referred to in Articles 9(4), Article 10(1) and 10(3) of Regulation (EC) No 139/2004 shall be suspended where the Commission has to take a decision pursuant to Article 11(3) of that Regulation, without proceeding first by way of simple request for information, owing to circumstances for which one of the undertakings involved in the concentration is responsible.
3. The time limits referred to in Articles 9(4), Article 10(1) and (3) of Regulation (EC) No 139/2004 shall be suspended:
  - (a) in the cases referred to in points (a) and (b) of paragraph 1, for the period between the expiry of the time limit set in the simple request for information, and the receipt of the complete and correct information required by decision;
  - (b) in the cases referred to in point (c) of paragraph 1, for the period between the unsuccessful attempt to carry out the inspection and the completion of the inspection ordered by decision;
  - (c) in the cases referred to in point (d) of paragraph 1, for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information.
  - (d) in the cases referred to in paragraph 2 for the period between the expiry of the time limit set in the decision and the receipt of the complete and correct information required by decision.
4. The suspension of the time limit shall begin on the working day following the date on which the event causing the suspension occurred. It shall expire with the end of the day on which the reason for suspension is removed. Where such a day is not a working day, the suspension of the time-limit shall expire with the end of the following working day.

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*Article 10*

**Compliance with the time-limits**

1. The time limits referred to in Article 4(4), fourth subparagraph, Article 9(4), Article 10(1) and (3), and Article 22(3) of Regulation (EC) No 139/2004 shall be met where the Commission has taken the relevant decision before the end of the period.
2. The time limits referred to in Article 4(4), second subparagraph, Article 4(5), third subparagraph, Article 9(2), Article 22(1), second subparagraph, and 22(2), second subparagraph, of Regulation (EC) No 139/2004 shall be met by a Member State concerned where that Member State, before the end of the period, informs the Commission in writing or makes or joins the request in writing, as the case may be.
3. The time limit referred to in Article 9(6) of Regulation (EC) No 139/2004 shall be met where the competent authority of a Member State concerned informs the undertakings concerned in the manner set out in that provision before the end of the period.

CHAPTER IV

**EXERCISE OF THE RIGHT TO BE HEARD; HEARINGS**

*Article 11*

**Parties to be heard**

For the purposes of the rights to be heard pursuant to Article 18 of Regulation (EC) No 139/2004, the following parties are distinguished:

- (a) notifying parties, that is, persons or undertakings submitting a notification pursuant to Article 4(2) of Regulation (EC) No 139/2004;
- (b) other involved parties, that is, parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration;
- (c) third persons, that is natural or legal persons, including customers, suppliers and competitors, provided they demonstrate a sufficient interest within the meaning of Article 18(4), second sentence, of Regulation (EC) No 139/2004, which is the case in particular
  - for members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees;
  - for consumer associations, where the proposed concentration concerns products or services used by final consumers.
- (d) parties regarding whom the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004.

*Article 12*

**Decisions on the suspension of concentrations**

1. Where the Commission intends to take a decision pursuant to Article 7(3) of Regulation (EC) No 139/2004 which adversely affects one or more of 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 set a time limit within which they may make known their views in writing.
2. Where the Commission, pursuant to Article 18(2) of Regulation (EC) No 139/2004, has taken a decision referred to in paragraph 1 of



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this Article provisionally without having given the notifying parties and other involved parties the opportunity to make known their views, it shall without delay send them the text of the provisional decision and shall set a time limit within which they may make known their views in writing.

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 in writing within the time limit set, the Commission's provisional decision shall become final with the expiry of that period.

Article 13

**Decisions on the substance of the case**

1. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall, before consulting the Advisory Committee on Concentrations, hear the parties pursuant to Article 18(1) and (3) of that Regulation.

Article 12(2) of this Regulation shall apply *mutatis mutandis* where, in application of Article 18(2) of Regulation (EC) No 139/2004, the Commission has taken a decision pursuant to Article 8(5) of that Regulation provisionally.

2. 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 comments in writing.

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

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

The Commission shall not be obliged to take into account comments received after the expiry of a time limit which it has set.

3. The parties to whom the Commission's objections have been addressed or who have been informed of those objections shall, within the time limit set, submit in writing their comments on the objections. In their written comments, they may set out all facts and matters known to them which are relevant to their defence, and shall attach any relevant documents as proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts. They shall submit one original and 10 copies of their comments to the Commission to the address of the Commission's Directorate General for Competition. An electronic copy shall also be submitted at the same address and in the format specified by the Commission. The Commission shall forward copies of such written comments without delay to the competent authorities of the Member States.

4. Where the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004, 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 for in paragraph 2, first and second subparagraphs, and paragraph 3 shall apply, *mutatis mutandis*.

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*Article 14*

**Oral hearings**

1. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall afford the notifying parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing. It may also, at other stages in the proceedings, afford the notifying parties the opportunity of expressing their views orally.
2. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall also afford other involved parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing. It may also, at other stages in the proceedings, afford other involved parties the opportunity of expressing their views orally.
3. Where the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004, it shall afford parties on whom it proposes to impose a fine or periodic penalty payment the opportunity to develop their arguments in a formal oral hearing, if so requested in their written comments. It may also, at other stages in the proceedings, afford such parties the opportunity of expressing their views orally.

*Article 15*

**Conduct of formal oral hearings**

1. Formal oral hearings shall be conducted by the Hearing Officer in full independence.
2. The Commission shall invite the persons to be heard to attend the formal oral hearing on such date as it shall determine.
3. The Commission shall invite the competent authorities of the Member States to take part in any formal oral hearing.
4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.
5. Persons heard by the Commission may be assisted by their lawyers or other qualified and duly authorised persons admitted by the Hearing Officer.
6. Formal oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.
7. The Hearing Officer may allow all parties within the meaning of Article 11, the Commission services and the competent authorities of the Member States to ask questions during the formal oral hearing.  
  
The Hearing Officer may hold a preparatory meeting with the parties and the Commission services, so as to facilitate the efficient organisation of the formal oral hearing.
8. The statements made by each person heard shall be recorded. Upon request, the recording of the formal oral hearing shall be made available to the persons who attended that hearing. Regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

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*Article 16*

**Hearing of third persons**

1. If third persons apply in writing to be heard pursuant to Article 18(4), second sentence, of Regulation (EC) No 139/2004, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time limit within which they may make known their views.
2. The third persons referred to in paragraph 1 shall make known their views in writing within the time limit set. The Commission may, where appropriate, afford such third 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 third parties the opportunity of expressing their views orally.
3. The Commission may likewise invite any other natural or legal person to express its views, in writing as well as orally, including at a formal oral hearing.

CHAPTER V

**ACCESS TO THE FILE AND TREATMENT OF  
CONFIDENTIAL INFORMATION**

*Article 17*

**Access to the file and use of documents**

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections, for the purpose of enabling them to exercise their rights of defence. Access shall be granted after the notification of the statement of objections.
2. 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 comments.
3. The right of access to the file shall not extend to confidential information, or to internal documents of the Commission or of the competent authorities of the Member States. The right of access to the file shall equally not extend to correspondence between the Commission and the competent authorities of the Member States or between the latter.
4. Documents obtained through access to the file pursuant to this Article may only be used for the purposes of the relevant proceeding pursuant to Regulation (EC) No 139/2004.

*Article 18*

**Confidential information**

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information the disclosure of which is not considered necessary by the Commission for the purpose of the procedure.
2. Any person which makes known its views or comments pursuant to Articles 12, Article 13 and Article 16 of this Regulation, or supplies information pursuant to Article 11 of Regulation (EC) No 139/2004, or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission.

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3. Without prejudice to paragraph 2, the Commission may require persons referred to in Article 3 of Regulation (EC) No 139/2004, undertakings and associations of undertakings in all cases where they produce or have produced documents or statements pursuant to Regulation (EC) No 139/2004 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential.

The Commission may also require persons referred to in Article 3 of Regulation (EC) No 139/2004, undertakings or associations of undertakings to identify any part of a statement of objections, case summary or a decision adopted by the Commission which in their view contains business secrets.

Where business secrets or other confidential information are identified, the persons, undertakings and associations of undertakings shall give reasons and provide a separate non-confidential version by the date set by the Commission.

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4. If persons, undertakings or associations of undertakings fail to comply with paragraphs 2 or 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

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## CHAPTER VI COMMITMENTS OFFERED BY THE UNDERTAKINGS CONCERNED

### Article 19

#### Time limits for submission of commitments

1. Commitments offered by the undertakings concerned pursuant to Article 6(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission within not more than 20 working days from the date of receipt of the notification.

2. Commitments offered by the undertakings concerned pursuant to Article 8(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission within not more than 65 working days from the date on which proceedings were initiated.

Where pursuant to Article 10(3), second subparagraph, of Regulation (EC) No 139/2004 the period for the adoption of a decision pursuant to Article 8(1), (2) and (3) is extended, the period of 65 working days for the submission of commitments shall automatically be extended by the same number of working days.

In exceptional circumstances, the Commission may accept commitments offered after the expiry of the time limit for their submission within the meaning of this paragraph provided that the procedure provided for in Article 19(5) of Regulation (EC) No 139/2004 is complied with.

3. Articles 7, 8 and 9 shall apply *mutatis mutandis*.

### Article 20

#### Procedure for the submission of commitments

1. One original and 10 copies of commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission at the address of the Commission's Directorate General for Competition. An electronic

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copy shall also be submitted at the same address and in the format specified by the Commission. The Commission shall forward copies of such commitments without delay to the competent authorities of the Member States.

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1a. In addition to the requirements set out in paragraph 1, the undertakings concerned shall, at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004, submit one original and 10 copies of the information and documents prescribed by the Form RM relating to remedies (Form RM) as set out in Annex IV to this Regulation. The information submitted shall be correct and complete.

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2. When offering commitments pursuant to Articles 6(2) or Article 8(2) of Regulation (EC) No 139/2004, the undertakings concerned shall at the same time clearly identify any information which they consider to be confidential, giving reasons, and shall provide a separate non-confidential version.

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*Article 20a*

**Trustees**

1. The commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 may include, at the own expense of the undertakings concerned, the appointment of an independent trustee (or trustees) assisting the Commission in overseeing the parties' compliance with the commitments or having a mandate to implement the commitments. The trustee may be appointed by the parties, after the Commission has approved its identity, or by the Commission. The trustee shall carry out its tasks under the supervision of the Commission.

2. The Commission may attach such trustee-related provisions of the commitments as conditions and obligations pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004.

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CHAPTER VII

**MISCELLANEOUS PROVISIONS**

*Article 21*

**Transmission of documents**

1. Transmission of documents and invitations from the Commission to the addressees may be effected in any of the following ways:

- (a) delivery by hand against receipt;
- (b) registered letter with acknowledgement of receipt;
- (c) fax with a request for acknowledgement of receipt;
- (d) telex;
- (e) electronic mail with a request for acknowledgement of receipt.

2. Unless otherwise provided in this Regulation, 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 fax or by electronic mail, it shall be presumed that it has been received by the addressee on the day on which it was sent.

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*Article 22*

**Setting of time limits**

In setting the time limits provided for pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1), the Commission shall have regard to the time required for the preparation of statements and to the urgency of the case. It shall also take account of working days as well as public holidays in the country of receipt of the Commission's communication.

Time limits shall be set in terms of a precise calendar date.

*Article 23*

**Receipt of documents by the Commission**

1. In accordance with the provisions of Article 5(1) of this Regulation, notifications shall be delivered to the Commission at the address of the Commission's Directorate General for Competition as published by the Commission in the *Official Journal of the European Union*.

2. Additional information requested to complete notifications must reach the Commission at the address referred to in paragraph 1.

3. Written comments on Commission communications pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1) of this Regulation must have reached the Commission at the address referred to in paragraph 1 before the expiry of the time limit set in each case.

*Article 24*

**Definition of working days**

The expression working days in Regulation (EC) No 139/2004 and in this Regulation means all days other than Saturdays, Sundays, and Commission holidays as published in the *Official Journal of the European Union* before the beginning of each year.

*Article 25*

**Repeal and transitional provision**

1. Without prejudice to paragraphs 2 and 3, Regulation (EC) No 447/98 is repealed with effect from 1 May 2004.

References to the repealed Regulation shall be construed as references to this Regulation.

2. Regulation (EC) No 447/98 shall continue to apply to any concentration falling within the scope of Regulation (EEC) No 4064/89.

3. For the purposes of paragraph 2, Sections 1 to 12 of the Annex to Regulation (EC) No 447/98 shall be replaced by Sections 1 to 11 of Annex I to this Regulation. In such cases references in those sections to the 'EC Merger Regulation' and to the 'Implementing Regulation' shall be read as referring to the corresponding provisions of Regulation (EEC) No 4064/89 and Regulation (EC) No 447/98, respectively.

*Article 26*

**Entry into force**

This Regulation shall enter into force on 1 May 2004.

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

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ANNEX I

FORM CO RELATING TO THE NOTIFICATION OF A  
CONCENTRATION PURSUANT TO REGULATION (EC) No 139/2004

1. INTRODUCTION

1.1. The purpose of this Form

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This Form specifies the information that must be provided by notifying parties when submitting a notification to the European Commission of a proposed merger, acquisition or other concentration. The merger control system of the European Union is laid down in Council Regulation (EC) No 139/2004 (hereinafter referred to as 'the EC Merger Regulation'), and in Commission Regulation (EC) No 802/2004 (hereinafter referred to as 'the Implementing Regulation'), to which this Form CO is annexed <sup>(1)</sup>. The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site. Your attention is drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement') <sup>(2)</sup>.

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In order to limit the time and expense involved in complying with various merger control procedures in several individual countries, the European Union has put in place a system of merger control by which concentrations having a Community dimension (normally, where the parties to the concentration fulfil certain turnover thresholds) <sup>(3)</sup> are assessed by the European Commission in a single procedure (the 'one stop shop' principle). ► M2 Mergers which do not meet the turnover thresholds may fall within the competence of the Member States' and/or the EFTA States' authorities in charge of merger control. ◀

The EC Merger Regulation requires the Commission to reach a decision within a legal deadline. In an initial phase the Commission normally has 25 working days to decide whether to clear the concentration or to 'initiate proceedings', i.e., to undertake an in-depth investigation <sup>(4)</sup>. If the Commission decides to initiate proceedings, it normally has to take a final decision on the operation within no more than 90 working days of the date when proceedings are initiated <sup>(5)</sup>.

In view of these deadlines, and for the 'one stop shop' principle to work, it is essential that the Commission is provided, in a timely fashion, with the information required to carry out the necessary investigation and to assess the impact of the concentration on the markets concerned. This requires that a certain amount of information be provided at the time of notification.

It is recognised that the information requested in this Form is substantial. However, experience has shown that, depending on the specific characteristics of the case, not all information is always necessary for an adequate examination of the proposed concentration. Accordingly, if you consider that any particular information requested by this Form may not be necessary for the Commission's examination of the case, you are encouraged to ask the Commission to dispense with the obligation to provide certain information ('waiver'). See Section 1.3(g) for more details.

<sup>(1)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

<sup>(2)</sup> See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the 'Surveillance and Court Agreement'). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.

<sup>(3)</sup> The term 'concentration' is defined in Article 3 of the EC Merger Regulation and the term 'Community dimension' in Article 1 thereof. Furthermore, Article 4(5) provides that in certain circumstances where the Community turnover thresholds are not met, notifying parties may request that the Commission treat their proposed concentration as having a Community dimension.

<sup>(4)</sup> See Article 10(1) of the EC Merger Regulation.

<sup>(5)</sup> See Article 10(3) of the EC Merger Regulation.

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Pre-notification contacts are extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification and, in the majority of cases, will result in a significant reduction of the information required. Notifying parties may refer to the Commission's Best Practices on the Conduct of EC Merger Control Proceedings, which provides guidance on pre-notification contacts and the preparation of notifications.

In addition, it should be noted that certain concentrations, which are unlikely to pose any competition concerns, can be notified using a Short Form, which is attached to the Implementing Regulation, as Annex II.

1.2. **Who must notify**

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

In case of the acquisition of a controlling interest in one 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.

1.3. **The requirement for a correct and complete notification**

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate Section of this Form.

In particular you should note that:

- (a) In accordance with Article 10(1) of the EC Merger Regulation and Article 5(2) and (4) of the Implementing Regulation, the time-limits of the EC Merger Regulation linked to the notification will not begin to run until all the information that has to be supplied with the notification has been received by the Commission. This requirement is to ensure that the Commission is able to assess the notified concentration within the strict time-limits provided by the EC Merger Regulation.
- (b) The notifying parties should verify, in the course of preparing their notification, that contact names and numbers, and in particular fax numbers and e-mail addresses, provided to the Commission are accurate, relevant and up-to-date.
- (c) Incorrect or misleading information in the notification will be considered to be incomplete information (Article 5(4) of the Implementing Regulation).
- (d) If a notification is incomplete, the Commission will inform the notifying parties or their representatives 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 10(1) of the EC Merger Regulation, Articles 5(2) and (4) of the Implementing Regulation).
- (e) Under Article 14(1)(a) of the EC Merger Regulation, notifying parties who, either intentionally or negligently, supply incorrect or misleading information, may be liable to fines of up to 1 % of the aggregate turnover of the undertaking concerned. In addition, pursuant to Article 6(3)(a) and Article 8(6)(a) of the EC Merger Regulation the Commission may 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.

<sup>(1)</sup> See Article 4(2) of the EC Merger Regulation.



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- (f) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if such information 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 consider such a request, provided that you give reasons for the unavailability of that 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.

- (g) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information required, in the full or short form version, may not be necessary for the Commission's examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to its inquiry into the notified operation. You should explain this during your pre-notification contacts with the Commission and, submit a written request for a waiver, asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the Implementing Regulation.

1.4. How to notify

The notification must be completed in one of the official languages of the European Community. This language will 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 must 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 11, and annexing supporting documentation. In completing Sections 7 to 9 of this Form, the notifying parties are invited to consider whether, for purposes of clarity, these sections are best presented in numerical order, or whether they can be grouped together for each individual affected market (or group of affected markets).

For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information, and in particular market share information for the parties and their largest competitors, are presented in the body of Form CO. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Contact details must be provided in a format provided by the Commission's Directorate-General for Competition (DG Competition). For a proper investigatory process, it is essential that the contact details are accurate. Multiple instances of incorrect contact details may be a ground for declaring a notification incomplete.

Supporting documents are to 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 (Article 3(4) of the Implementing Regulation).

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

One original and ►M1 37 ◄ copies of the Form CO and the supporting documents shall be submitted to the Commission's Directorate-General for Competition.

The notification shall be delivered to the address referred to in Article 23 (1) of the Implementing Regulation and in the format specified by the Commission from time to time. This address is published in the *Official*

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*Journal of the European Union*. The notification must be delivered to the Commission on working days as defined by Article 24 of the Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the *Official Journal of the European Union*. The security instructions given on DG Competition's website must be adhered to.

1.5. Confidentiality

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation as well as the corresponding provisions of the EEA Agreement <sup>(1)</sup> require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality 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.

1.6. 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 who is a 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 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 should be read as meaning calendar year, unless otherwise stated. All information requested in this Form must, unless otherwise specified, relate to the year preceding that of the notification.

The financial data requested in Sections 3.3 to 3.5 must be provided in euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

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

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**1.7. Provision of information to Employees and their representatives**

The Commission would like to draw attention to the obligations to which the parties to a concentration may be subject under Community and/or national rules on information and consultation regarding transactions of a concentrative nature vis-à-vis employees and/or their representatives.

**SECTION 1**

**Description of the concentration**

- 1.1. Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, or joint venture), the areas of activity of the notifying parties, the markets on which the concentration will have an impact (including the main affected markets <sup>(1)</sup>), and the strategic and economic rationale for the concentration.
- 1.2. Provide a summary (up to 500 words) of the information provided under Section 1.1. It is intended that this summary will be published on the Commission's website at the date of notification. The summary must be drafted so that it contains no confidential information or business secrets.

**SECTION 2**

**Information about the parties**

**2.1. Information on notifying party (or parties)**

Give details of:

- 2.1.1. name and address of undertaking;
- 2.1.2. nature of the undertaking's business;
- 2.1.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and
- 2.1.4. an address for service of the notifying party (or each of the notifying parties) to which documents and, in particular, Commission decisions may be delivered. The name, telephone number and e-mail address of a person at this address who is authorised to accept service must be provided.

**2.2. Information on other parties <sup>(2)</sup> to the concentration**

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

- 2.2.1. name and address of undertaking;
- 2.2.2. nature of undertaking's business;
- 2.2.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and
- 2.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

**2.3. Appointment of representatives**

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

<sup>(1)</sup> See Section 6.III for the definition of affected markets.

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

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The written proof must contain the name and position of the persons granting such authority.

Provide the following contact details of any representatives who have been authorised to act for any of the parties to the concentration, indicating whom they represent:

- 2.3.1. name of representative;
- 2.3.2. address of representative;
- 2.3.3. name, address, telephone number, fax number and e-mail address of person to be contacted; and
- 2.3.4. an address of the representative (in Brussels if available) to which correspondence may be sent and documents delivered.

SECTION 3

**Details of the concentration**

- 3.1. 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 full-function joint venture within the meaning of Article 3(4) of the EC Merger Regulation or a contract or other means of conferring direct or indirect control within the meaning of Article 3(2) of the EC Merger Regulation;
  - (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; and
  - (h) the economic sectors involved in the concentration.
- 3.2. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be).
- 3.3. For each of the undertakings concerned by the concentration <sup>(1)</sup> provide the following data <sup>(2)</sup> for the last financial year:
  - 3.3.1. world-wide turnover;
  - 3.3.2. Community-wide turnover;
  - 3.3.3. EFTA-wide turnover;
  - 3.3.4. turnover in each Member State;

<sup>(1)</sup> See Commission Notice on the concept of undertakings concerned.

<sup>(2)</sup> See, generally, the Commission Notice on calculation of turnover. Turnover of the acquiring party or parties to the concentration should include the aggregated turnover of all undertakings within the meaning of Article 5(4) of the EC Merger Regulation. Turnover of the acquired party or parties should include the turnover relating to the parts subject to the transaction within the meaning of Article 5(2) of the EC Merger Regulation. Special provisions are contained in Articles 5(3), (4) and 5(5) of the EC Merger Regulation for credit, insurance, other financial institutions and joint undertakings.

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- 3.3.5. turnover in each EFTA State;
- 3.3.6. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved; and
- 3.3.7. the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved.
- 3.4. For the purposes of Article 1(3) of the EC Merger Regulation, if the operation does not meet the thresholds set out in Article 1(2), provide the following data for the last financial year:
  - 3.4.1. the Member States, if any, in which the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; and
  - 3.4.2. the Member States, if any, in which the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million.
- 3.5. For the purposes of determining whether the concentration qualifies as an EFTA cooperation case <sup>(1)</sup>, provide the following information with respect to the last financial year:
  - 3.5.1. does the combined turnover of the undertakings concerned in the territory of the EFTA States equal 25 % or more of their total turnover in the EEA territory?
  - 3.5.2. does each of at least two undertakings concerned have a turnover exceeding EUR 250 million in the territory of the EFTA States?
- 3.6. Describe the economic rationale of the concentration.

SECTION 4

**Ownership and control <sup>(2)</sup>**

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

This list must include:

  - 4.1.1. all undertakings or persons controlling these parties, directly or indirectly;
  - 4.1.2. all undertakings active on any affected market <sup>(3)</sup> that are controlled, directly or indirectly:
    - (a) by these parties;
    - (b) by any other undertaking identified in 4.1.1.

<sup>(1)</sup> ►M2 See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. ◄

<sup>(2)</sup> See Articles 3(3), 3(4) and 3(5) and Article 5(4) of the EC Merger Regulation.

<sup>(3)</sup> See Section 6 for the definition of affected markets.

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

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.

4.2. With respect to the parties to the concentration and each undertaking or person identified in response to Section 4.1, provide:

4.2.1. a list of all other undertakings which are active in 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;

4.2.2. 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 in affected markets; and (where applicable) for each undertaking a list of the members of their supervisory boards who are also members of the boards of management of any other undertaking which is active in affected markets;

in each case, identify the name of the other undertaking and the positions held;

4.2.3. details of acquisitions made during the last three years by the groups identified above (Section 4.1) 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 must 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 it is unavailable at the time of notification, it 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; and
- 5.4. copies of all analyses, reports, studies, surveys, and any comparable documents prepared by or for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to market shares, competitive conditions, competitors (actual and potential), the rationale of the concentration, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions.<sup>(1)</sup>

For each of these documents, indicate (if not contained in the document itself) the date of preparation, the name and title of each individual who prepared each such document.

<sup>(1)</sup> As set out in introductory Parts 1.1 and 1.3(g), in the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested documents would be appropriate. Where waivers are sought, the Commission may specify the documents to be provided in a particular case in a request for information under Article 11 of the EC Merger Regulation.

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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.<sup>(1)</sup>

The notifying party or parties must 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, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

**II. Relevant geographic markets:**

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand 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 *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in 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 shares at either level is 25 % or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration<sup>(2)</sup>. These are vertical relationships.

<sup>(1)</sup> See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

<sup>(2)</sup> For example, if a party to the concentration holds a market share larger than 25 % in a market that is upstream to a market in which the other party is active, then both the upstream and the downstream markets are affected markets. Similarly, if a vertically integrated company merges with another party which is active at the downstream level, and the merger leads to a combined market share downstream of 25 % or more, then both the upstream and the downstream markets are affected markets.

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On the basis of the above definitions and market share thresholds, provide the following information: <sup>(1)</sup>

- Identify each affected market within the meaning of Section III, at:
  - the EEA, Community or EFTA level;
  - the individual Member States or EFTA States level.

6.2. In addition, state and explain the parties' view regarding the scope of the relevant geographic market within the meaning of Section II that applies in relation to each affected market identified above.

IV. **Other markets in which the notified operation may have a significant impact**

6.3. On the basis of the above definitions, describe the product and geographic scope of markets other than affected markets identified in Section 6.1 in which the notified operation may have a significant impact, for example, where:

- (a) any of the parties to the concentration has a market share larger than 25 % and any other party to the concentration is a potential competitor into that market. A party may be considered a potential competitor, in particular, where it has plans to enter a market, or has developed or pursued such plans in the past two years;
- (b) any of the parties to the concentration has a market share larger than 25 % and any other party to the concentration holds important intellectual property rights for that market;
- (c) any of the parties to the concentration is present in a product market, which is a neighbouring market closely related to a product market in which any other party to the concentration is engaged, and the individual or combined market shares of the parties in any one of these markets is 25 % or more. Product markets are closely related neighbouring markets when the products are complementary to each other <sup>(2)</sup> or when they belong to a range of products that is generally purchased by the same set of customers for the same end use <sup>(3)</sup>;

where such markets include the whole or a part of the EEA.

In order to enable the Commission to consider, from the outset, the competitive impact of the proposed concentration in the markets identified under this Section 6.3, notifying parties are invited to submit the information under Sections 7 and 8 of this Form in relation to those markets.

SECTION 7

**Information on affected markets**

For each affected relevant product market, for each of the last three financial years <sup>(4)</sup>:

- (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; and

<sup>(1)</sup> As set out in introductory Parts 1.1 and 1.3(g), in the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested information would be appropriate for certain affected markets, or for certain other markets (as described under IV).

<sup>(2)</sup> Products (or services) are called complementary when, for example, the use (or consumption) of one product essentially implies the use (or consumption) of the other product, such as for staple machines and staples, and printers and printer cartridges.

<sup>(3)</sup> Examples of products belonging to such a range would be whisky and gin sold to bars and restaurants, and different materials for packaging a certain category of goods sold to producers of such goods.

<sup>(4)</sup> Without prejudice to Article 4(2) of the Implementing Regulation.



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(e) 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 euros) and volume (units)<sup>(1)</sup>. 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 5 % of the geographic market under consideration. On this basis, provide an estimate of the HHI index<sup>(2)</sup> pre- and post-merger, and the difference between the two (the delta)<sup>(3)</sup>. Indicate the proportion of market shares used as a basis to calculate the HHI. Identify the sources used to calculate these market shares and provide documents where available to confirm the calculation;
- 7.4. the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for the competitors identified under 7.3;
- 7.5. 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;
- 7.6. 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;
- 7.7. the manner in which the parties to the concentration produce, price and sell the products and/or services; for example, whether they manufacture and price locally, or sell through local distribution facilities;
- 7.8. 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. Russia, the United States of America, Japan, China, or other relevant areas); and
- 7.9. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors.

<sup>(1)</sup> The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration. If readily available, please provide disaggregated information on imports and exports by country of origin and destination, respectively.

<sup>(2)</sup> HHI stands for Herfindahl-Hirschman Index, a measure of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. For example, a market containing five firms with market shares of 40 %, 20 %, 15 %, 15 %, and 10 %, respectively, has an HHI of 2 550 ( $40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2 550$ ). The HHI ranges from close to zero (in an atomistic market) to 10 000 (in the case of a pure monopoly). The post-merger HHI is calculated on the working assumption that the individual market shares of the companies do not change. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly.

<sup>(3)</sup> The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15 % respectively would increase the HHI by 900 ( $30 \times 15 \times 2 = 900$ ). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually:  $(a)^2 + (b)^2$ . After the merger, the contribution is the square of their sum:  $(a + b)^2$ , which equals  $(a)^2 + (b)^2 + 2ab$ . The increase in the HHI is therefore represented by  $2ab$ .

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SECTION 8

**General conditions in affected markets**

- 8.1. Identify the five largest independent<sup>(1)</sup> suppliers to the parties to the concentration and their individual shares of purchases from each of these suppliers (of raw materials or goods used for purposes of producing the relevant products). Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for each of these suppliers.

**Structure of supply in affected markets**

- 8.2. Explain the distribution channels and service networks that exist in the affected markets. In so doing, take account of the following where appropriate:
- (a) the distribution systems prevailing in 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 4?
  - (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 4?
- 8.3. 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. If applicable, identify the location and capacity of the manufacturing facilities of each of the parties to the concentration in affected markets.
- 8.4. Specify whether any of the parties to the concentration, or any of the competitors, have 'pipeline products', products likely to be brought to market in the near term, or plans to expand (or contract) production or sales capacity. If so, provide an estimate of the projected sales and market shares of the parties to the concentration over the next three to five years.
- 8.5. If you consider any other supply-side considerations to be relevant, they should be specified.

**Structure of demand in affected markets**

- 8.6. Identify the five<sup>(2)</sup> largest independent customers of the 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 e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for each of these customers.
- 8.7. 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, for example in terms of brand loyalty, the provision of pre- and after-sales services, the provision of a full range of products, or network effects;

<sup>(1)</sup> That is, suppliers which are not subsidiaries, agents or undertakings forming part of the group of the party in question. In addition to those five independent suppliers the notifying parties can, if they consider it necessary for a proper assessment of the case, identify the intra-group suppliers. The same will apply in 8.6 in relation to customers.

<sup>(2)</sup> Experience has shown that the examination of complex cases often requires more customer contact details. In the course of pre-notification contacts, the Commission's services may ask for more customer contact details for certain affected markets.

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- (c) the role of product differentiation in terms of attributes or quality, and the extent to which the products of the parties to the concentration are close substitutes;
- (d) the role of switching costs (in terms of time and expense) for customers when changing from one supplier to another;
- (e) the degree of concentration or dispersion of customers;
- (f) segmentation of customers into different groups with a description of the 'typical customer' of each group;
- (g) the importance of exclusive distribution contracts and other types of long-term contracts; and
- (h) the extent to which public authorities, government agencies, State enterprises or similar bodies are important participants as a source of demand.

**Market entry**

- 8.8. Over the last five years, has there been any significant entry into any affected markets? If so, identify such entrants and provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) and an estimate of the current market share of each such entrant. If any of the parties to the concentration entered an affected market in the past five years, provide an analysis of the barriers to entry encountered.
- 8.9. In the opinion of the notifying parties, are there undertakings (including those at present operating only outside the Community or the EEA) that are likely to enter the market? If so, identify such entrants and provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive). Explain why such entry is likely and provide an estimate of the time within which such entry is likely to occur.
- 8.10. Describe the various factors influencing entry into affected markets, 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, production, establishing distribution systems, promotion, advertising, servicing, and so forth) 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, as well as barriers resulting from product certification procedures, or the need to have a proven track record;
  - (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 holders, licensees or licensors of patents, know-how and other rights in the relevant markets;
  - (e) the importance of economies of scale for the production or distribution of products in the affected markets; and
  - (f) access to sources of supply, such as availability of raw materials and necessary infrastructure.

**Research and development**

- 8.11. Give an account of the importance of research and development in the ability of a firm operating 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 parties to the concentration.  
  
In so doing, take account of the following, where appropriate:

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- (a) trends and intensities of research and development <sup>(1)</sup> in these markets and 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, and so on);
- (c) the major innovations that have been made in these markets and the undertakings responsible for these innovations; and
- (d) the cycle of innovation in these markets and where the parties are in this cycle of innovation.

**Cooperative Agreements**

- 8.12. To what extent do cooperative agreements (horizontal, vertical, or other) exist in the affected markets?
- 8.13. 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 and, where deemed useful, provide a copy of these agreements.

**Trade associations**

- 8.14. With respect to the trade associations in the affected markets:
  - (a) identify those of which the parties to the concentration are members; and
  - (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 e-mail address of the appropriate contact person for all trade associations listed above.

**SECTION 9**

**Overall market context and efficiencies**

- 9.1. 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.
- 9.2. Describe how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.
- 9.3. Should you wish the Commission specifically to consider from the outset <sup>(2)</sup> whether efficiency gains generated by the concentration are likely to enhance the ability and incentive of the new entity to act pro-competitively for the benefit of consumers, please provide a description of, and supporting documents relating to, each efficiency (including cost savings, new product introductions, and service or product improvements) that the parties anticipate will result from the proposed concentration relating to any relevant product <sup>(3)</sup>.

For each claimed efficiency, provide:

- <sup>(1)</sup> Research and development intensity is defined as research development expenditure as a proportion of turnover.
- <sup>(2)</sup> It should be noted that submitting information in response to Section 9.3 is voluntary. Parties are not required to offer any justification for not completing this section. Failure to provide information on efficiencies will not be taken to imply that the proposed concentration does not create efficiencies or that the rationale for the concentration is to increase market power. Not providing the requested information on efficiencies at the notification stage does not preclude providing the information at a later stage. However, the earlier the information is provided, the better the Commission can verify the efficiency claim.
- <sup>(3)</sup> For further guidance on the assessment of efficiencies, see the Commission Notice on the assessment of horizontal mergers.

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▼ **B**

- (i) a detailed explanation of how the proposed concentration would allow the new entity to achieve the efficiency. Specify the steps that the parties anticipate taking to achieve the efficiency, the risks involved in achieving the efficiency, and the time and costs required to achieve it;
- (ii) where reasonably possible, a quantification of the efficiency and a detailed explanation of how the quantification was calculated. Where relevant, also provide an estimate of the significance of efficiencies related to new product introductions or quality improvements. For efficiencies that involve cost savings, state separately the one-time fixed cost savings, recurring fixed cost savings, and variable cost savings (in euros per unit and euros per year);
- (iii) the extent to which customers are likely to benefit from the efficiency and a detailed explanation of how this conclusion is arrived at; and
- (iv) the reason why the party or parties could not achieve the efficiency to a similar extent by means other than through the concentration proposed, and in a manner that is not likely to raise competition concerns.

SECTION 10

**Cooperative effects of a joint venture**

10. For the purpose of Article 2(4) of the EC Merger Regulation, answer the following questions:
- (a) Do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is upstream or downstream from that of the joint venture or in a neighbouring market closely related to this market? <sup>(1)</sup>
- If the answer is affirmative, please indicate for each of the markets referred to here:
- the turnover of each parent company in the preceding financial year;
  - the economic significance of the activities of the joint venture in relation to this turnover;
  - the market share of each parent.
- If the answer is negative, please justify your answer.

▼ **M2**

- (b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, and, where applicable, the corresponding provisions of the EEA Agreement <sup>(2)</sup>, give your reasons.

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- (c) ► **M2** Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement <sup>(3)</sup> apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation: ◀
  - (i) contributes to improving the production or distribution of goods, or to promoting technical or economic progress;
  - (ii) allows consumers a fair share of the resulting benefit;
  - (iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
  - (iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>(1)</sup> For market definitions refer to Section 6.

<sup>(2)</sup> See Article 53(1) of the EEA Agreement.

<sup>(3)</sup> See Article 53(3) of the EEA Agreement.

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SECTION 11

**Declaration**

Article 2(2) of the Implementing Regulation states that where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the notification.

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:

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ANNEX II

**SHORT FORM FOR THE NOTIFICATION OF A CONCENTRATION  
PURSUANT TO REGULATION (EC) No 139/2004**

**1. INTRODUCTION**

**1.1. The purpose of the Short Form**

The Short Form specifies the information that must be provided by the notifying parties when submitting a notification to the European Commission of certain proposed mergers, acquisitions or other concentrations that are unlikely to raise competition concerns.

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In completing this Form, your attention is drawn to Council Regulation (EC) No 139/2004 (hereinafter referred to as 'the EC Merger Regulation'), and Commission Regulation (EC) No 802/2004 (hereinafter referred to as 'the Implementing Regulation'), to which this Form is annexed<sup>(1)</sup>. The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement')<sup>(2)</sup>.

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As a general rule, the Short Form may be used for the purpose of notifying concentrations, where one of the following conditions is met:

1. in the case of a joint venture, the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:
  - (a) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory; and
  - (b) the total value of the assets transferred to the joint venture is less than EUR 100 million in the EEA territory;
2. none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);
3. two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationships), provided that their combined market share is less than 15 %; and/or 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 (vertical relationships), and provided that none of their individual or combined market shares at either level is 25 % or more; or
4. a party is to acquire sole control of an undertaking over which it already has joint control.

The Commission may require a full form notification where it appears either that the conditions for using the Short Form are not met, or, exceptionally, where they are met, the Commission determines, nonetheless, that a notification under Form CO is necessary for an adequate investigation of possible competition concerns.

<sup>(1)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

<sup>(2)</sup> See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the 'Surveillance and Court Agreement'). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.

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Examples of cases where a notification under Form CO may be necessary are concentrations where it is difficult to define the relevant markets (for example, in emerging markets or where there is no established case practice); where a party is a new or potential entrant, or an important patent holder; where it is not possible to adequately determine the parties' market shares; in markets with high entry barriers, with a high degree of concentration or known competition problems; where at least two parties to the concentration are present in closely related neighbouring markets <sup>(1)</sup>; and in concentrations where an issue of coordination arises, as referred to in Article 2(4) of the EC Merger Regulation. Similarly, a Form CO notification may be required in the case of a party acquiring sole control of a joint venture in which it currently holds joint control, where the acquiring party and the joint venture, together, have a strong market position, or the joint venture and the acquiring party have strong positions in vertically related markets.

**1.2. Reversion to the full Form CO notification**

In assessing whether a concentration may be notified under the Short Form, the Commission will ensure that all relevant circumstances are established with sufficient clarity. In this respect, the responsibility to provide correct and complete information rests with the notifying parties.

If, after the concentration has been notified, the Commission considers that the case is not appropriate for notification under the Short Form, the Commission may require full, or where appropriate partial, notification under Form CO. This may be the case where:

- it appears that the conditions for using the Short Form are not met;
- although the conditions for using the Short Form are met, a full or partial notification under Form CO appears to be necessary for an adequate investigation of possible competition concerns or to establish that the transaction is a concentration within the meaning of Article 3 of the EC Merger Regulation;
- the Short Form contains incorrect or misleading information;

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- a Member State or an EFTA State expresses substantiated competition concerns about the notified concentration within 15 working days of receipt of the copy of the notification; or

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- a third party expresses substantiated competition concerns within the time-limit laid down by the Commission for such comments.

In such cases, the notification may be treated as being incomplete in a material respect pursuant to Article 5(2) of the Implementing Regulation. 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 all information required is received.

**1.3. Importance of pre-notification contacts**

Experience has shown that pre-notification contacts are extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification. Also, in cases where the parties wish to submit a Short Form notification, they are advised to engage in pre-notification contacts with the Commission in order to discuss whether the case is one for which it is appropriate to use a Short Form. Notifying parties may refer to the Commission's Best Practices on the Conduct of EC Merger Control Proceedings, which provides guidance on pre-notification contacts and the preparation of notifications.

<sup>(1)</sup> Product markets are closely related neighbouring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use.



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**1.4. Who must notify**

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

In the case of the acquisition of a controlling interest in one 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.

**1.5. The requirement for a correct and complete notification**

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate Section of this Form.

In particular you should note that:

- (a) In accordance with Article 10(1) of the EC Merger Regulation and Article 5(2) and (4) of the Implementing Regulation, the time-limits of the EC Merger Regulation linked to the notification will not begin to run until all the information that must be supplied with the notification has been received by the Commission. This requirement is to ensure that the Commission is able to assess the notified concentration within the strict time-limits provided by the EC Merger Regulation.
- (b) The notifying parties should verify, in the course of preparing their notification, that contact names and numbers, and in particular fax numbers and e-mail addresses, provided to the Commission are accurate, relevant and up-to-date.
- (c) Incorrect or misleading information in the notification will be considered to be incomplete information (Article 5(4) of the Implementing Regulation).
- (d) If a notification is incomplete, the Commission will inform the notifying parties or their representatives 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 10(1) of the EC Merger Regulation, Article 5(2) and (4) of the Implementing Regulation).
- (e) Under Article 14(1)(a) of the EC Merger Regulation, notifying parties who, either intentionally or negligently, supply incorrect or misleading information, may be liable to fines of up to 1 % of the aggregate turnover of the undertaking concerned. In addition, pursuant to Article 6(3)(a) and Article 8(6)(a) of the EC Merger Regulation the Commission may 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.
- (f) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if such information 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 consider such a request, provided that you give reasons for the unavailability of that 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.

- (g) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information

<sup>(1)</sup> See Article 4(2) of the EC Merger Regulation.

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required by this Form, if you consider that any particular information required may not be necessary for the Commission's examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to its inquiry into the notified operation. You should explain this during your pre-notification contacts with the Commission and submit a written request for a waiver, asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the Implementing Regulation.

1.6. **How to notify**

The notification must be completed in one of the official languages of the European Community. This language will 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 must 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 9, and annexing supporting documentation. In completing Section 7 of this Form, the notifying parties are invited to consider whether, for purposes of clarity, this section is best presented in numerical order, or whether information can be grouped together for each individual reportable market (or group of reportable markets).

For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information, in particular, market share information for the parties and their largest competitors, are presented in the body of this Form. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Contact details must be provided in a format provided by the Commission's Directorate-General for Competition (DG Competition). For a proper investigatory process, it is essential that the contact details are accurate. Multiple instances of incorrect contact details may be a ground for declaring a notification incomplete.

Supporting documents are to 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 (Article 3(4) of the Implementing Regulation).

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

One original and ►**MI** 37 ◀ copies of the Short Form and the supporting documents shall be submitted to the Commission's Directorate-General for Competition.

The notification shall be delivered to the address referred to in Article 23(1) of the Implementing Regulation and in the format specified by the Commission from time to time. This address is published in the *Official Journal of the European Union*. The notification must be delivered to the Commission on working days as defined by Article 24 of the Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the *Official Journal of the European Union*. The security instructions given on DG Competition's website must be adhered to.

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**1.7. Confidentiality**

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation as well as the corresponding provisions of the EEA Agreement <sup>(1)</sup> require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality 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.

**1.8. 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 who is a 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.

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

The financial data requested in Sections 3.3 to 3.5 must be provided in euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

**1.9. Provision of information to employees and their representatives**

The Commission would like to draw attention to the obligations to which the parties to a concentration may be subject under Community and/or national rules on information and consultation regarding transactions of a concentrative nature vis-à-vis employees and/or their representatives.

**SECTION 1**

**Description of the concentration**

- 1.1. Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, joint venture), the areas of activity of the notifying parties, the markets on which the concentration will have an impact (including

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

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the main reportable markets <sup>(1)</sup>), and the strategic and economic rationale for the concentration.

- 1.2. Provide a summary (up to 500 words) of the information provided under Section 1.1. It is intended that this summary will be published on the Commission's website at the date of notification. The summary must be drafted so that it contains no confidential information or business secrets.

SECTION 2

**Information about the parties**

- 2.1. Information on notifying party (or parties)  
Give details of:
  - 2.1.1. name and address of undertaking;
  - 2.1.2. nature of the undertaking's business;
  - 2.1.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and
  - 2.1.4. an address for service of the notifying party (or each of the notifying parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.
- 2.2. Information on other parties <sup>(2)</sup> to the concentration  
For each party to the concentration (except the notifying party or parties) give details of:
  - 2.2.1. name and address of undertaking;
  - 2.2.2. nature of undertaking's business;
  - 2.2.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and
  - 2.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.
- 2.3. Appointment of representatives  
Where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorised to act. The written proof must contain the name and position of the persons granting such authority.  
  
Provide the following contact details of information of any representatives who have been authorised to act for any of the parties to the concentration, indicating whom they represent:
  - 2.3.1. name of representative;
  - 2.3.2. address of representative;
  - 2.3.3. name, address, telephone number, fax number and e-mail address of person to be contacted; and
  - 2.3.4. an address of the representative for service (in Brussels if available) to which correspondence may be sent and documents delivered.

<sup>(1)</sup> See Section 6.III for the definition of reportable markets.

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

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SECTION 3

**Details of the concentration**

- 3.1. 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 full-function joint venture within the meaning of Article 3(4) of the EC Merger Regulation or a contract or other means of conferring direct or indirect control within the meaning of Article 3(2) of the EC Merger Regulation;
  - (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; and
  - (h) the economic sectors involved in the concentration.
- 3.2. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be);
- 3.3. For each of the undertakings concerned by the concentration <sup>(1)</sup> provide the following data <sup>(2)</sup> for the last financial year:
- 3.3.1. world-wide turnover;
  - 3.3.2. Community-wide turnover;
  - 3.3.3. EFTA-wide turnover;
  - 3.3.4. turnover in each Member State;
  - 3.3.5. turnover in each EFTA State;
  - 3.3.6. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved; and
  - 3.3.7. the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved.
- 3.4. For the purposes of Article 1(3) of the EC Merger Regulation, if the operation does not meet the thresholds set out in Article 1(2), provide the following data for the last financial year:
- 3.4.1. the Member States, if any, in which the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; and

<sup>(1)</sup> See Commission Notice on the concept of undertakings concerned.

<sup>(2)</sup> See, generally, the Commission Notice on calculation of turnover. Turnover of the acquiring party or parties to the concentration should include the aggregated turnover of all undertakings within the meaning of Article 5(4) of the EC Merger Regulation. Turnover of the acquired party or parties should include the turnover relating to the parts subject to the transaction within the meaning of Article 5(2) of the EC Merger Regulation. Special provisions are contained in Articles 5(3), (4) and 5(5) of the EC Merger Regulation for credit, insurance, other financial institutions and joint undertakings.

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- 3.4.2. the Member States, if any, in which the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million.
- 3.5. For the purposes of determining whether the concentration qualifies as an EFTA cooperation case <sup>(1)</sup>, provide the following information with respect to the last financial year:
  - 3.5.1. does the combined turnover of the undertakings concerned in the territory of the EFTA States equal 25 % or more of their total turnover in the EEA territory?
  - 3.5.2. does each of at least two undertakings concerned have a turnover exceeding EUR 250 million in the territory of the EFTA States?
- 3.6. In case the transaction concerns the acquisition of joint control of a joint venture, provide the following information:
  - 3.6.1. the turnover of the joint venture and/or the turnover of the contributed activities to the joint venture; and/or
  - 3.6.2. the total value of assets transferred to the joint venture.
- 3.7. Describe the economic rationale of the concentration.

SECTION 4

**Ownership and control <sup>(2)</sup>**

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

This list must include:

- 4.1. all undertakings or persons controlling these parties, directly or indirectly;
- 4.2. all undertakings active in any reportable market <sup>(3)</sup> that are controlled, directly or indirectly:
  - (a) by these parties;
  - (b) by any other undertaking identified in 4.1.

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

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

SECTION 5

**Supporting documentation**

Notifying parties must 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; and
- 5.2. copies of the most recent annual reports and accounts of all the parties to the concentration.

<sup>(1)</sup> ►M2 See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies to be treated as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. ◄

<sup>(2)</sup> See Articles 3(3), 3(4) and 3(5) and Article 5(4) of the EC Merger Regulation.

<sup>(3)</sup> See Section 6.III for the definition of reportable markets.

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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. <sup>(1)</sup>

The notifying party or parties must 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, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

**II. Relevant geographic markets**

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand 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 *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas, or substantial price differences.

**III. Reportable markets**

For purposes of information required in this Form, reportable markets consist of all relevant product and geographic markets, as well as plausible alternative relevant product and geographic market definitions, on the basis of which:

- (a) two or more of the parties to the concentration are engaged in business activities in the same relevant market (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 market in which any other party to the concentration is engaged, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration (vertical relationships).

6.1. On the basis of the above market definitions, identify all reportable markets.

SECTION 7

**Information on markets**

For each reportable market described in Section 6, for the year preceding the operation, provide the following: <sup>(2)</sup>

<sup>(1)</sup> See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

<sup>(2)</sup> In the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested information would be appropriate for certain reportable markets.

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- 7.1. an estimate of the total size of the market in terms of sales value (in euros) and volume (units) <sup>(1)</sup>. 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. Indicate if there have been significant changes to the sales and market shares for the last three financial years; and
- 7.3. for horizontal and vertical relationships, an estimate of the market share in value (and where appropriate, volume) of the three largest competitors (indicating the basis for the estimates). Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for these competitors.

SECTION 8

**Cooperative effects of a joint venture**

8. For the purpose of Article 2(4) of the EC Merger Regulation, please answer the following questions:
  - (a) Do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is upstream or downstream from that of the joint venture or in a neighbouring market closely related to this market? <sup>(2)</sup>

If the answer is affirmative, please indicate for each of the markets referred to here:

    - the turnover of each parent company in the preceding financial year;
    - the economic significance of the activities of the joint venture in relation to this turnover;
    - the market share of each parent.

If the answer is negative, please justify your answer.

▼ **M2**

- (b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement <sup>(3)</sup>, give your reasons.

▼ **B**

- (c) ► **M2** Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement <sup>(4)</sup> apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation: ◀
  - (i) contributes to improving the production or distribution of goods, or to promoting technical or economic progress;
  - (ii) allows consumers a fair share of the resulting benefit;
  - (iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
  - (iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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

<sup>(2)</sup> For market definitions refer to Section 6.

<sup>(3)</sup> See Article 53(1) of the EEA Agreement.

<sup>(4)</sup> See Article 53(3) of the EEA Agreement.



**▼B**

**SECTION 9**

**Declaration**

Article 2(2) of the Implementing Regulation states that where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the notification.

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by this Form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:

▼ **B**

*ANNEX III:*

**FORM RS**

**(RS = reasoned submission pursuant to Article 4(4) and (5) of Council Regulation (EC) No 139/2004)**

FORM RS RELATING TO REASONED SUBMISSIONS

**PURSUANT TO ARTICLES 4(4) AND 4(5) OF REGULATION (EC) No 139/2004**

INTRODUCTION

▼ **M2**

**A. The purpose of this Form**

This Form specifies the information that requesting parties should provide when making a reasoned submission for a pre-notification referral under Article 4(4) or (5) of Council Regulation (EC) No 139/2004 (hereinafter referred to as 'the EC Merger Regulation') <sup>(1)</sup>.

Your attention is drawn to the EC Merger Regulation and to Commission Regulation (EC) No 802/2004 (hereinafter referred to as 'the EC Merger Implementing Regulation'), to which this Form RS is annexed. The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement') <sup>(2)</sup>.

Experience has shown that prior contacts are extremely valuable to both the parties and the relevant authorities in determining the precise amount and type of information required. Accordingly, parties are encouraged to consult the Commission and the relevant Member State/s or EFTA State/s regarding the adequacy of the scope and type of information on which they intend to base their reasoned submission.

▼ **B**

**B. The requirement for a reasoned submission to be correct and complete**

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate section of this Form.

Incorrect or misleading information in the reasoned submission will be considered to be incomplete information (Article 5(4) of the EC Merger Implementing Regulation).

If parties submit incorrect information, the Commission will have the power to revoke any Article 6 or 8 decision it adopts following an Article 4(5) referral, pursuant to Article 6(3)(a) or 8(6)(a) of the EC Merger Regulation. Following revocation, national competition laws would once again be applicable to the transaction. In the case of referrals under Article 4(4) made on the basis of incorrect information, the Commission may require a notification pursuant to Article 4(1). In addition, the Commission will have the power to impose fines for submission of incorrect or misleading information pursuant to Article 14(1)(a) of the EC Merger Regulation. (See point d below). ► **M2** Finally, parties should also be aware that, if a referral is made on the basis of incorrect, misleading or incomplete information included in Form RS, the Commission and/or the Member States and the EFTA States may consider making a post-notification referral rectifying any referral made at pre-notification. ◀

In particular you should note that:

(1) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).  
(2) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the 'Surveillance and Court Agreement'). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.

▼ **B**

- (a) ► **M2** In accordance with Articles 4(4) and (5) of the EC Merger Regulation, the Commission is obliged to transmit reasoned submissions to the Member States and the EFTA States without delay. The time limits for considering a reasoned submission will begin upon receipt of the submission by the relevant Member State/s or EFTA State/s. ◀ The decision whether or not to accede to a reasoned submission will normally be taken on the basis of the information contained therein, without further investigation efforts being undertaken by the authorities involved.
- (b) The submitting parties should therefore verify, in the course of preparing their reasoned submission, that all information and arguments relied upon are sufficiently supported by independent sources.
- (c) Under Article 14(1)(a) of the EC Merger Regulation, parties making a reasoned submission who, either intentionally or negligently, provide incorrect or misleading information, may be liable to fines of up to 1 % of the aggregate turnover of the undertaking concerned.
- (d) You may request in writing that the Commission accept that the reasoned submission is complete notwithstanding the failure to provide information required by this Form, if such information 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 consider such a request, provided that you give reasons for the non-availability of that information, and provide your best estimates for missing data together with the sources for the estimates. ► **M2** Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission or the relevant Member State/s and EFTA State/s should also be provided. ◀

▼ **M2**

- (e) You may request that the Commission accept that the reasoned submission is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information requested by this Form may not be necessary for the Commission's or the relevant Member State/s' or EFTA State/s' examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to dealing with your request for a pre-notification referral. You should explain this during your prior contacts with the Commission and with the relevant Member State/s and EFTA State/s, and submit a written request for a waiver asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the EC Merger Implementing Regulation. The Commission may consult with the relevant Member State or EFTA State authority or authorities before deciding whether to accede to such a request.

▼ **B**

C. **Persons entitled to submit a reasoned submission**

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the Merger Regulation, the reasoned submission must 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 one undertaking by another, the acquirer must complete the reasoned submission.

In the case of a public bid to acquire an undertaking, the bidder must complete the reasoned submission.

Each party completing a reasoned submission is responsible for the accuracy of the information which it provides.

D. **How to make a reasoned submission**

The reasoned submission must be completed in one of the official languages of the European Union. This language will thereafter be the language of the proceedings for all submitting parties.

▼ M2

In order to facilitate treatment of Form RS by Member State and EFTA State authorities, parties are strongly encouraged to provide the Commission with a translation of their reasoned submission in a language or languages which will be understood by all addressees of the information. As regards requests for referral to (a) Member State/s or (an) EFTA State/s, the requesting parties are strongly encouraged to include a copy of the request in the language/s of the Member State/s and EFTA State/s to which referral is being requested.

▼ B

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing the declaration at the end, and annexing supporting documentation. For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information are presented in the body of Form RS. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Supporting documents are to 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.

Supporting documents may be originals or copies of the originals. In the latter case, the submitting party must confirm that they are true and complete.

One original and ► M1 37 ◀ copies of the Form RS and of the supporting documents must be submitted to the Commission. The reasoned submission shall be delivered to the address referred to in Article 23 (1) of the EC Merger Implementing Regulation and in the format specified by the Commission services.

The submission must be delivered to the address of the Commission's Directorate-General for Competition (DG Competition). This address is published in the *Official Journal of the European Union*. The submission must be delivered to the Commission on working days as defined by Article 24 of the EC Merger Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the *Official Journal of the European Union*. The security instructions given on DG Competition's website must be adhered to.

E. **Confidentiality**

▼ M2

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation, as well as the corresponding provisions of the EEA Agreement <sup>(1)</sup> require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

▼ B

If you believe that your interests would be harmed if any of the information supplied 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 reasoned submission is completed by more than one of the parties, business secrets may be submitted in separate annexes, and referred to in the submission as an annex. All such annexes must be included in the reasoned submission.

F. **Definitions and instructions for the purposes of this Form**

Submitting party or parties: in cases where a reasoned submission is made by only one of the undertakings who is a party to an operation, 'submitting

<sup>(1)</sup> 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 Surveillance and Court Agreement.

▼ **B**

parties' is used to refer only to the undertaking actually making the submission.

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 'submitting party(ies)' and 'party(ies) to the concentration' include all the undertakings which belong to the same groups as those 'parties'.

Affected markets: Section 4 of this Form requires the submitting parties to define the relevant product markets, and further to identify which of those relevant markets are likely to be affected by the 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 submitting 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 should be read as meaning calendar year, unless otherwise stated. All information requested in this Form relates, unless otherwise specified, to the year preceding that of the reasoned submission.

The financial data requested in this Form must be provided in Euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant Articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

SECTION 1

**Background information**

- 1.0. Indicate whether the reasoned submission is made under Article 4(4) or (5).

- Article 4(4) referral
- Article 4(5) referral

- 1.1. Information on the submitting party (or parties)

Give details of:

- 1.1.1. the name and address of undertaking;
- 1.1.2. the nature of the undertaking's business;
- 1.1.3. the name, address, telephone number, fax number and electronic address of, and position held by, the appropriate contact person; and
- 1.1.4. an address for service of the submitting party (or each of the submitting parties) to which documents and, in particular, Commission decisions may be delivered. The name, telephone number and e-mail address of a person at this address who is authorised to accept service must be provided.

- 1.2. Information on the other parties <sup>(1)</sup> to the concentration

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

- 1.2.1. the name and address of undertaking;
- 1.2.2. the nature of undertaking's business;

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

**▼B**

- 1.2.3. the name, address, telephone number, fax number and electronic address of, and position held by the appropriate contact person;
- 1.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.
- 1.3. Appointment of representatives  
  
Where reasoned submissions are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. The written proof must contain the name and position of the persons granting such authority.  
  
Provide the following contact details of any representatives who have been authorized to act for any of the parties to the concentration, indicating whom they represent:
  - 1.3.1. the name of the representative;
  - 1.3.2. the address of the representative;
  - 1.3.3. the name, address, telephone number, fax number and e-mail address of the person to be contacted; and
  - 1.3.4. an address of the representative (in Brussels if available) to which correspondence may be sent and documents delivered.

**SECTION 2**

**General background and details of the concentration**

- 2.1. Describe the general background to the concentration. In particular, give an overview of the main reasons for the transaction, including its economic and strategic rationale.  
  
Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, or joint venture.), the areas of activity of the submitting parties, the markets on which the concentration will have an impact (including the main affected markets <sup>(1)</sup>), and the strategic and economic rationale for the concentration.
- 2.2. Describe the legal nature of the transaction which is the subject of the reasoned submission. In doing so, indicate:
  - (a) whether the whole or parts of the parties are subject to the concentration;
  - (b) the proposed or expected date of any major events designed to bring about the completion of the concentration;
  - (c) the proposed structure of ownership and control after the completion of the concentration; and
  - (d) whether the proposed transaction is a concentration within the meaning of Article 3 of the EC Merger Regulation.
- 2.3. List the economic sectors involved in the concentration.
  - 2.3.1. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be).

<sup>(1)</sup> See Section 4 for the definition of affected markets.

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▼ **B**

- 2.4. Provide sufficient financial or other data to show that the concentration meets OR does not meet the jurisdictional thresholds under Article 1 of the EC Merger Regulation.
- 2.4.1. Provide a breakdown of the Community-wide turnover achieved by the undertakings concerned, indicating, where applicable, the Member State, if any, in which more than two-thirds of this turnover is achieved.

▼ **M2**

- 2.4.2. Provide a breakdown of the EFTA-wide turnover achieved by the undertakings concerned, indicating, where applicable, the EFTA State, if any, in which more than two-thirds of this turnover is achieved.

▼ **B**

SECTION 3

**Ownership and control <sup>(1)</sup>**

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 <sup>(2)</sup> 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 should be specified.

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

**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 <sup>(3)</sup>.

The submitting party or parties must 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, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

<sup>(1)</sup> See Article 3(3), 3(4) and 3(5) and Article 5(4).

<sup>(2)</sup> See Section 4 for the definition of affected markets.

<sup>(3)</sup> See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

▼ **B**

II. **Relevant geographic markets**

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand 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 *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas, or substantial price differences.

III. **Affected markets**

▼ **M2**

For the purposes of the 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:

▼ **B**

- (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 shares at either level is 25 % or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration <sup>(1)</sup>. These are vertical relationships.

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

▼ **M2**

- 4.1. Identify each affected market within the meaning of Section III:

- (a) at the EEA, Community or EFTA level;
- (b) in the case of a request for referral pursuant to Article 4(4) of the EC Merger Regulation, at the level of each individual Member State or EFTA State;
- (c) in the case of a request for referral pursuant to Article 4(5) of the EC Merger Regulation, at the level of each Member State or EFTA State identified at Section 6.3.1 of this Form as capable of reviewing the concentration.

▼ **B**

- 4.2. In addition, explain the submitting parties' view as to the scope of the relevant geographic market within the meaning of Section II in relation to each affected market identified at 4.1 above.

SECTION 5

**Information on affected markets**

▼ **M2**

For each affected relevant product market, for the last financial year,

<sup>(1)</sup> For example, if a party to the concentration holds a market share larger than 25 % in a market that is upstream to a market in which the other party is active, then both the upstream and the downstream markets are affected markets. Similarly, if a vertically integrated company merges with another party which is active at the downstream level, and the merger leads to a combined market share downstream of 25 % or more, then both the upstream and the downstream markets are affected markets.



▼ M2

- (a) for the EEA territory, for the Community as a whole and for the EFTA States as a whole;
- (b) in the case of a request for referral pursuant to Article 4(4) of the EC Merger Regulation, individually for each Member State/EFTA State where the parties to the concentration do business; and
- (c) in the case of a request for referral pursuant to Article 4(5) of the EC Merger Regulation, individually for each Member State/EFTA State identified at Section 6.3.1 of this Form as capable of reviewing the concentration where the parties to the concentration do business; and

▼ B

- (d) where in the opinion of the submitting parties, the relevant geographic market is different;

provide the following information:

- 5.1. an estimate of the total size of the market in terms of sales value (in Euros) and volume (units) <sup>(1)</sup>. Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;
- 5.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;
- 5.3. an estimate of the market share in value (and where appropriate volume) of all competitors (including importers) having at least 5 % of the geographic market under consideration;  
  
On this basis, provide an estimate of the HHI index <sup>(2)</sup> pre- and post-merger, and the difference between the two (the delta) <sup>(3)</sup>. Indicate the proportion of market shares used as a basis to calculate the HHI; Identify the sources used to calculate these market shares and provide documents where available to confirm the calculation;
- 5.4. the five largest independent customers of the parties in each affected market and their individual share of total sales for such products accounted for by each of those customers;
- 5.5. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors;
- 5.6. identify the five largest independent <sup>(4)</sup> suppliers to the parties;
- 5.7. Over the last five years, has there been any significant entry into any affected markets? In the opinion of the submitting parties are there undertakings (including those at present operating only in extra-Community markets) that are likely to enter the market? Please specify.
- 5.8. To what extent do cooperative agreements (horizontal or vertical) exist in the affected markets?
- 5.9. If the concentration is a joint venture, do two or more parents retain to a significant extent activities in the same market as the joint venture or in a

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

<sup>(2)</sup> HHI stands for Herfindahl-Hirschman Index, a measure of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. For example, a market containing five firms with market shares of 40 %, 20 %, 15 %, 15 %, and 10 %, respectively, has an HHI of 2550 ( $40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2550$ ). The HHI ranges from close to zero (in an atomistic market) to 10000 (in the case of a pure monopoly). The post-merger HHI is calculated on the working assumption that the individual market shares of the companies do not change. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly.

<sup>(3)</sup> The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15 % respectively would increase the HHI by 900 ( $30 \times 15 \times 2 = 900$ ). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually:  $(a)^2 + (b)^2$ . After the merger, the contribution is the square of their sum:  $(a + b)^2$ , which equals  $(a)^2 + (b)^2 + 2ab$ . The increase in the HHI is therefore represented by  $2ab$ .

<sup>(4)</sup> That is suppliers which are not subsidiaries, agents or undertakings forming part of the group of the party in question. In addition to those five independent suppliers the notifying parties can, if they consider it necessary for a proper assessment of the case, identify the intra-group suppliers. The same applies in relation to customers.

▼ B

market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market? <sup>(1)</sup>

- 5.10. Describe the likely impact of the proposed concentration on competition in the affected markets and how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.

SECTION 6

**Details of the referral request and reasons why the case should be referred**

- 6.1. Indicate whether the reasoned submission is made pursuant to Article 4(4) or 4(5) of the EC Merger Regulation, and fill in only the relevant sub-section:

- Article 4.4. referral
- Article 4.5 referral

*Sub-section 6.2*

ARTICLE 4(4) REFERRAL

▼ M2

- 6.2.1. Identify the Member State/s and EFTA State/s which, pursuant to Article 4(4) of the EC Merger Regulation, you submit should examine the concentration, indicating whether or not you have made informal contact with this Member State/s and/or EFTA State/s.

▼ B

- 6.2.2. Specify whether you are requesting referral of the whole or part of the case.

If you are requesting referral of part of the case, specify clearly the part or parts of the case for which you request the referral.

▼ M2

If you are requesting referral of the whole of the case, you must confirm that there are no affected markets outside the territory of the Member State/s and EFTA State/s to which you request the referral to be made.

- 6.2.3. Explain in what way each of the affected markets in the Member State/s and EFTA State/s to which referral is requested presents all the characteristics of a distinct market within the meaning of Article 4(4) of the EC Merger Regulation.

▼ B

- 6.2.4. Explain in what way competition may be significantly affected in each of the above-mentioned distinct markets within the meaning of Article 4(4).

▼ M2

- 6.2.5. In the event of a Member State/s and/or EFTA State/s becoming competent to review the whole or part of the case following a referral pursuant to Article 4(4) of the EC Merger Regulation, do you consent to the information contained in this Form being relied upon by the Member State/s and/or EFTA State/s in question for the purpose of its/their national proceedings relating to that case or part thereof? YES or NO

▼ B

*Sub-section 6.3*

ARTICLE 4(5) REFERRAL

▼ M2

- 6.3.1. For each Member State and/or EFTA State, specify whether the concentration is or is not capable of being reviewed under its national competition law. You must tick one box for each and every Member State and/or EFTA State.

Is the concentration capable of being reviewed under the national competition law of each of the following Member States and/or

<sup>(1)</sup> For market definitions refer to Section 4.

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▼ M2

EFTA States? You must reply for each Member State and/or EFTA State. Only indicate YES or NO for each Member State and/or EFTA State. Failure to indicate YES or NO for any Member State and/or EFTA State shall be deemed to constitute an indication of YES for that Member State and/or EFTA State.

Belgium:	YES	NO
Bulgaria:	YES	NO
Czech Republic:	YES	NO
Denmark:	YES	NO
Germany:	YES	NO
Estonia:	YES	NO
Ireland:	YES	NO
Greece:	YES	NO
Spain:	YES	NO
France:	YES	NO
Italy:	YES	NO
Cyprus:	YES	NO
Latvia:	YES	NO
Lithuania:	YES	NO
Luxembourg:	YES	NO
Hungary:	YES	NO
Malta:	YES	NO
Netherlands:	YES	NO
Austria:	YES	NO
Poland:	YES	NO
Portugal:	YES	NO
Romania:	YES	NO
Slovenia:	YES	NO
Slovakia:	YES	NO
Finland:	YES	NO
Sweden:	YES	NO
United Kingdom:	YES	NO
Iceland:	YES	NO
Norway:	YES	NO
Liechtenstein:	YES	NO

- 6.3.2. For each Member State and/or EFTA State, provide sufficient financial or other data to show that the concentration meets or does not meet the relevant jurisdictional criteria under the applicable national law.
- 6.3.3. Explain why the case should be examined by the Commission. Explain in particular whether the concentration might affect competition beyond the territory of one Member State and/or EFTA State.

▼ B

SECTION 7

**Declaration**

It follows from Articles 2(2) and 6(2) of the EC Merger Implementing Regulation that where reasoned submissions are signed by representatives of under-

**▼B**

takings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the submission.

The reasoned submission must conclude with the following declaration which is to be signed by or on behalf of all the submitting parties:

The submitting party or parties declare that, following careful verification, the information given in this reasoned submission is to the best of their knowledge and belief true, correct, and complete, that true and complete copies of documents required by Form RS, have been supplied, and that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:

▼ **M2**

*ANNEX IV*

**Form RM relating to the information concerning commitments submitted pursuant to Article 6(2) and Article 8(2) of Regulation (EC) No 139/2004**

**FORM RM RELATING TO REMEDIES**

**INTRODUCTION**

This form specifies the information and documents to be submitted by the undertakings concerned at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004. The information requested is necessary to allow the Commission to examine whether the commitments are capable of rendering the concentration compatible with the common market in that they will prevent a significant impediment to effective competition. The Commission may dispense with the obligation to provide any particular information in respect of the commitments offered, including documents, or with any other requirement laid down in this form where it considers that compliance with those obligations or requirements is not necessary for the examination of the commitments offered. The level of information required will vary according to the type and structure of the remedy proposed. For example, carve-out remedies will typically require more detailed information than divestitures of stand-alone businesses. The Commission is available to discuss the scope of the information required with the parties upfront. If you consider that any particular information requested by this Form may not be necessary for the Commission's assessment, you may approach the Commission asking to dispense with certain requirements, giving adequate reasons why that information is not relevant.

**SECTION 1**

**Description of the commitment**

- 1.1. Provide detailed information on
  - (i) the object of the commitments offered, and
  - (ii) the conditions for their implementation.
- 1.2. Where the commitments offered consist in the divestiture of a business, Section 5 provides for the specific information required.

**SECTION 2**

**Suitability to remove competition concerns**

2. Provide information showing the suitability of the commitments offered to remove the significant impediment of effective competition identified by the Commission.

**SECTION 3**

**Deviation from Model Texts**

3. Identify any deviations of the commitments offered from the pertinent Model Commitments texts published by the Commission's services, as revised from time-to-time, and explain the reasons for the deviations.

**SECTION 4**

**Summary of the commitments**

4. Provide a non-confidential summary of the nature and scope of the commitments offered and why, in your view, they are suitable to remove any significant impediment to effective competition. The Commission may use this summary for the market test of the commitments offered with third parties.

**SECTION 5**

**Information on a business to be divested**

5. Where the commitments offered consist in the divestiture of a business, provide the following information and documents.

▼ M2

*General information on the business to be divested*

The following information should be provided as to the current operation of the business to be divested and changes already planned for the future:

- 5.1. Describe the business to be divested generally, including the entities belonging to it, their registered place of business and place of management, other locations for production or provisions of services, the general organisational structure and any other relevant information relating to the administrative structure of the business to be divested.
- 5.2. State whether there are and describe any legal obstacles for the transfer of the business to be divested or the assets, including third party rights and administrative approvals required.
- 5.3. List and describe the products manufactured or services provided, in particular their technical and other characteristics, the brands involved, the turnover generated with each of these products or services, and any innovations or new products or services planned.
- 5.4. Describe the level on which the essential functions of the business to be divested are operated if they are not operated on the level of the business to be divested itself, including such functions as research and development, production, marketing and sales, logistics, relations with customers, relations with suppliers, IT systems, etc. The description should contain the role performed by those other levels, the relations with the business to be divested and the resources (personnel, assets, financial resources, etc.) involved in the function.
- 5.5. Describe in detail the links between the business to be divested and other undertakings controlled by the notifying parties (irrespective of the direction of the link), such as:
  - supply, production, distribution, service or other contracts,
  - shared tangible or intangible assets,
  - shared or seconded personnel,
  - shared IT systems or other systems, and
  - shared customers.
- 5.6. Describe in general terms all relevant tangible and intangible assets used and/or owned by the business to be divested, including, in any case, IP rights and brands.
- 5.7. Submit an organisational chart identifying the number of personnel currently working in each of the functions of the business to be divested and a list of those employees who are indispensable for the operation of the business to be divested, describing their functions.
- 5.8. Describe the customers of the business to be divested, including a list of customers, a description of the corresponding records available, and provide the total turnover generated by the business to be divested with each of these customers (in EUR and as percentage of the total turnover of business to be divested).
- 5.9. Provide financial data for the business to be divested, including the turnover and the EBITDA achieved in the last two years, and the forecast for the next two years.
- 5.10. Identify and describe any changes that have occurred in the last two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.
- 5.11. Identify and describe any changes, planned for the next two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.

*General information on the business to be divested as described in the commitments*

- 5.12. Describe any areas where the business to be divested as set out in the commitments offered differs from the nature and scope of the business as currently operated.

▼ M2

*Acquisition by a suitable purchaser*

- 5.13. Explain the reasons why, in your view, the business will be acquired by a suitable purchaser in the time-frame proposed in the commitments offered.

14. Commission Consolidated Jurisdictional Notice, OJ 2008 C 95/1

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





16.4.2008

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C 95/1

## II

(Information)

### INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

## COMMISSION

### **Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings**

(2008/C 95/01)

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**A. INTRODUCTION**

- (1) The purpose of this Notice is to provide guidance as to jurisdictional issues under Council Regulation (EC) No 139/2004, OJ L 24, 29.1.2003, page 1 (the Merger Regulation) <sup>(1)</sup>. This formal guidance should enable firms to establish more quickly, in advance of any contact with the Commission, whether and to what extent their operations may be covered by Community control of concentrations.
- (2) This Notice replaces the Notice on the concept of concentration <sup>(2)</sup>, the Notice on the concept of full-function joint ventures <sup>(3)</sup>, the Notice on the concept of undertakings concerned <sup>(4)</sup> and the Notice on calculation of turnover <sup>(5)</sup>.
- (3) This Notice deals with the concepts of a concentration and of a full-function joint venture, undertakings concerned and the calculation of turnover as set out in Articles 1, 3 and 5 of the Merger Regulation. Issues concerning referrals are dealt with in the Notice on referrals <sup>(6)</sup>. The Commission's interpretation of Articles 1, 3 and 5 in the present Notice is without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.
- (4) The guidance set out in this Notice reflects the Commission's experience in applying the recast Merger Regulation and the former Merger Regulation since the latter entered into force on 21 September 1990. The general principles governing the issues dealt with in this Notice have not been changed by the entry into force of Regulation (EC) No 139/2004, but where changes have occurred, the Notice deals with them explicitly. The principles contained in the Notice will be applied and further developed by the Commission in individual cases.
- (5) According to Article 1, the Merger Regulation only applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 3 of the Merger Regulation. Secondly, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 of the Regulation. The notion of a concentration (including the particular requirements for joint ventures), as the first condition, is dealt with under Part B; the identification of undertakings concerned and the calculation of their turnover as relevant for the second condition are dealt with under Part C.
- (6) The Commission addresses the question of its jurisdiction over a concentration in decisions according to Article 6 of the Merger Regulation <sup>(7)</sup>.

**B. THE CONCEPT OF CONCENTRATION**

- (7) According to Article 3(1) of the Merger Regulation, a concentration only covers operations where a change of control in the undertakings concerned occurs on a lasting basis. Recital 20 in the preamble to the Merger Regulation further explains that the concept of concentration is intended to relate to operations which bring about a lasting change in the structure of the market. Because the test in Article 3 is centred on the concept of control, the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria.

<sup>(1)</sup> Where it is necessary in this Notice to distinguish between Regulation 139/2004 and Council Regulation (EEC) No 4064/89 (OJ L 395, 30.12.1989, corrected version in OJ L 257, 21.9.1990, p. 13, Regulation last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p. 1, corrigendum in OJ L 40, 13.2.1998, p. 17), the former will be referred to as the 'recast Merger Regulation' whereas the latter will be referred to as the 'former Merger Regulation'. Articles without reference refer to the recast Merger Regulation.

<sup>(2)</sup> OJ C 66, 2.3.1998, p. 5.

<sup>(3)</sup> OJ C 66, 2.3.1998, p. 1.

<sup>(4)</sup> OJ C 66, 2.3.1998, p. 14.

<sup>(5)</sup> OJ C 66, 2.3.1998, p. 25.

<sup>(6)</sup> OJ C 56, 5.3.2005, p. 2.

<sup>(7)</sup> See also opinion of AG Kokott in Case C-202/06 *Cementbouw v Commission* of 26 April 2007, paragraph 56 (not yet reported).

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(8) Article 3(1) of the Merger Regulation defines two categories of concentrations:

- those arising from a merger between previously independent undertakings (point (a));
- those arising from an acquisition of control (point (b)).

These are treated respectively in Sections I and II below.

#### I. MERGERS BETWEEN PREVIOUSLY INDEPENDENT UNDERTAKINGS

- (9) A merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity. <sup>(8)</sup>
- (10) A merger within the meaning of Article 3(1)(a) may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit <sup>(9)</sup>. This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management <sup>(10)</sup> or the structure of a dual listed company <sup>(11)</sup>. If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger. A prerequisite for the determination of such a *de facto* merger is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing. The *de facto* amalgamation may be solely based on contractual arrangements <sup>(12)</sup>, but it can also be reinforced by cross-shareholdings between the undertakings forming the economic unit.

#### II. ACQUISITION OF CONTROL

##### 1. Concept of control

###### 1.1. Person or undertaking acquiring control

- (11) Article 3 (1)(b) provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly.

<sup>(8)</sup> See, for example, Case COMP/M. 1673 — Veba/VIAG of 13 June 2000; Case COMP/M.1806 — AstraZeneca/Novartis of 26 July 2000; Case COMP/M.2208 — Chevron/Texaco of 26 January 2001; and Case IV/M.1383 — Exxon/Mobil of 29 September 1999. A merger in the meaning of Article 3(1)(a) is not deemed to occur if a target company is merged with a subsidiary of the acquiring company to the effect that the parent company acquires control of the target undertaking under Article 3(1)(b), see Case COMP/M.2510 — Cendant/Galileo of 24 September 2001.

<sup>(9)</sup> In determining the previous independence of undertakings, the issue of control may be relevant as the merger might otherwise only be an internal restructuring within the group. In this specific context, the assessment of control also follows the general concept set out below and includes *de jure* as well as *de facto* control.

<sup>(10)</sup> This could apply for example in the case of a 'Gleichordnungskonzern' in German law, certain 'Groupements d'Intérêt Economique' in French law, and the amalgamation of partnerships, as in Case IV/M.1016 — Price Waterhouse/Coopers&Lybrand of 20 May 1998.

<sup>(11)</sup> Case IV/M.660 — RTZ/CRA of 7 December 1995; Case COMP/M.3071 — Carnival Corporation/P&O Princess II of 24 July 2002.

<sup>(12)</sup> See Case IV/M.1016 — Price Waterhouse/Coopers&Lybrand of 20 May 1998; Case COMP/M.2824 — Ernst & Young/Andersen Germany of 27 August 2002.

*Person controlling another undertaking*

- (12) Control may also be acquired by a person in circumstances where that person already controls (whether solely or jointly) at least one other undertaking or, alternatively, by a combination of persons (which control another undertaking) and undertakings. The term 'person' in this context extends to public bodies <sup>(13)</sup> and private entities, as well as natural persons. Acquisitions of control by natural persons are only considered to bring about a lasting change in the structure of the undertakings concerned if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking <sup>(14)</sup>.

*Acquirer of control*

- (13) Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned (Article 3(3)(a)). However, there are also situations where the formal holder of a controlling interest differs from the person or undertaking having in fact the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and has the power to exercise the rights conferring control through this person or undertaking, i.e. the latter is formally the holder of the rights, but acts only as a vehicle. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking (Article 3(3)(b)). The Court of First Instance concluded from this provision that control held by commercial companies can be attributed to their exclusive shareholder, their majority shareholders or to those jointly controlling the companies since these companies comply in any event with the decisions of those shareholders <sup>(15)</sup>. A controlling shareholding which is held by different entities in a group is normally attributed to the undertaking exercising control over the different formal holders of the rights. In other cases, the evidence needed to establish this type of indirect control may include, either separately or in combination and to be assessed on a case-by-case basis, factors such as shareholdings, contractual relations, source of financing or family links <sup>(16)</sup>.

*Acquisition of control by investment funds*

- (14) Specific issues may arise in the case of acquisitions of control by investment funds. The Commission will analyse structures involving investment funds on a case-by-case basis, but some general features of such structures can be set out on the basis of the Commission's past experience.
- (15) Investment funds are often set up in the legal form of limited partnerships, in which the investors participate as limited partners and normally do not exercise control, either individually or collectively. The investment funds usually acquire the shares and voting rights which confer control over the portfolio companies. Depending on the circumstances, control is normally exercised by the investment company which has set up the fund as the fund itself is typically a mere investment vehicle; in more exceptional circumstances, control may be exercised by the fund itself. The investment company usually exercises control by means of the organisational structure, e.g. by controlling the general partner of fund partnerships, or by contractual arrangements, such as advisory agreements, or by a combination of both. This may be the case even if the investment company itself does not own the company acting as a general partner, but their shares are held by natural persons (who may be linked to the investment company) or by a trust. Contractual arrangements with the investment company, in particular advisory agreements,

<sup>(13)</sup> Including the State itself, e.g. Case IV/M.157 — Air France/Sabena, of 5 October 1992 in relation to the Belgian State, or other public bodies such as the Treuhandanstalt in Case IV/M.308 — Kali und Salz/MDK/Treuhand, of 14 December 1993. See, however, recital 22 of the Merger Regulation.

<sup>(14)</sup> Case IV/M.82 — Asko/Jakobs/Adia of 16 May 1991 including a private individual as undertaking concerned.; Case COMP/M3762 — Apax/Travelex of 16 June 2005 in which a private individual acquiring joint control was not considered an undertaking concerned.

<sup>(15)</sup> Judgment in Case T-282/02 Cementbouw v Commission, paragraph 72, [2006] ECR II-319.

<sup>(16)</sup> See Case M.754 — Anglo American Corporation/Lonrho of 23 April 1997.

will become even more important if the general partner does not have any own resources and personnel for the management of the portfolio companies, but only constitutes a company structure whose acts are performed by persons linked to the investment company. In these circumstances, the investment company normally acquires indirect control within the meaning of Article 3(1)(b) and 3(3)(b) of the Merger Regulation, and has the power to exercise the rights which are directly held by the investment fund. <sup>(17)</sup>

## 1.2. *Means of control*

- (16) Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective. <sup>(18)</sup> Article 3(2) further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. A concentration therefore may occur on a legal or a *de facto* basis, may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings (cf. Article 3(1)(b)).

### *Control by the acquisition of shares or assets*

- (17) Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets.

### *Control on a contractual basis*

- (18) Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market. <sup>(19)</sup> Examples of such contracts are organisational contracts under national company law <sup>(20)</sup> or other types of contracts, e.g. in the form of agreements for the lease of the business, giving the acquirer control over the management and the resources despite the fact that property rights or shares are not transferred. In this respect, Article 3(2)(a) specifies that control may also be constituted by a right to use the assets of an undertaking. <sup>(21)</sup> Such contracts may also lead to a situation of joint control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions. <sup>(22)</sup>

<sup>(17)</sup> This structure also has an effect on how the turnover is calculated in situations involving investment funds, see paragraphs 189ff.

<sup>(18)</sup> Judgment in Case T-282/02 *Cementbouw v Commission*, paragraph 58, [2006] ECR II-319

<sup>(19)</sup> In Case COMP/M.3858 — *Lehman Brothers/SCG/Starwood/Le Meridien* of 20 July 2005 the management agreements had a duration of 10-15 years; in Case COMP/M.2632 — *Deutsche Bahn/ECT International/United Depots/JV* of 11 February 2002 the contract had a duration of 8 years.

<sup>(20)</sup> Examples of such specific contracts under national company law are the 'Beherrschungsvertrag' in German law or the 'Contrato de subordinação' in Portuguese law; such contracts do not exist in all Member States.

<sup>(21)</sup> See Case COMP/M.2060 — *Bosch/Rexroth* of 12 January 2001 concerning a control contract (Beherrschungsvertrag) in combination with a business lease; Case COMP/M.3136 — *GE/Agfa NDT* of 5 December 2003 concerning a specific contract to transfer control over entrepreneurial resources, management and risks; Case COMP/M.2632 — *Deutsche Bahn/ECT International/United Depots/JV* of 11 February 2002 concerning a business lease.

<sup>(22)</sup> Case COMP/M.3858 — *Lehman Brothers/SCG/Starwood/Le Meridien* of 20 July 2005; see also case IV/M.126 — *Accor/Wagon-Lits* of 28 April 1992 in the context of Article 5(4)(b) of the Merger Regulation.

*Control by other means*

- (19) In line with these considerations, franchising agreements as such do not normally confer control over the franchisee's business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor <sup>(23)</sup>. Furthermore, purely financial agreements, such as sale-and-lease-back transactions with arrangements for a buyback of the assets at the end of the term, do not normally constitute a concentration as they do not change control over the management and the resources.
- (20) Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a *de facto* basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence <sup>(24)</sup>. In such a situation, the Commission will carefully analyse whether such economic links, combined with other links, are sufficient to lead to a change of control on a lasting basis <sup>(25)</sup>.
- (21) There may be an acquisition of control even if it is not the declared intention of the parties or if the acquirer is only passive and the acquisition of control is triggered by action of third parties. Examples are situations where the change of control results from the inheritance of a shareholder or where the exit of a shareholder triggers a change of control, in particular a change from joint to sole control <sup>(26)</sup>. Article 3(1)(b) covers such scenarios in specifying that control may also be acquired 'by any other means'.

*Control and national company law*

- (22) National legislation within a Member State may provide specific rules on the structure of bodies representing the organization of decision-making within an undertaking. While such legislation may confer some power of control upon persons other than the shareholders, in particular on representatives of employees, the concept of control under the Merger Regulation is not related to such a means of influence as the Merger Regulation focuses on decisive influence enjoyed on the basis of rights, assets or contracts or equivalent *de facto* means. Restrictions in the articles of association or in general law concerning the persons eligible to sit on the board, such as provisions requiring the appointment of independent members or excluding persons holding office or employment in the parent companies, do not exclude the existence of control as long as the shareholders decide the composition of the decision-making bodies <sup>(27)</sup>. Similarly, despite provisions of national law foreseeing that decisions of a company must be taken by its company organs in its interests, those persons holding the voting rights have the power to adopt those decisions and therefore have the possibility to exercise decisive influence on the company <sup>(28)</sup>.

<sup>(23)</sup> Case M.940 — UBS/Mister Minit, in the context of Article 5(4)(b) of the Merger Regulation. For the treatment of franchising relationships in the competitive assessment, see Case COMP/M.4220 — Food Service Project/Tele Pizza of 6 June 2006. The situation in Case IV/M.126 — Accor/Wagon-Lits of 28 April 1992 has to be distinguished from franchising agreements. In this case, again in the context of Article 5(4)(b), the hotel company had a right to manage also hotels in which it only owned a minority stake as it had entered into long-term hotel management agreements giving it decisive influence over the day-to-day operations of these hotels, including decisions on budgetary matters.

<sup>(24)</sup> See Case IV/M.794 — Coca-Cola/Amalgamated Beverages GB of 22 January 1997; Case IV/ECSC.1031 — US/Sollac/Bamesa of 28 July 1993; Case IV/M.625 — Nordic Capital/Transpool of 23 August 1995; for the criteria see also Case IV/M.697 — Lockheed Martin Corporation/Loral Corporation, of 27 March 1996.

<sup>(25)</sup> See Case IV/M.258 — CCIE/GTE, of 25 September 1992 where the Commission did not find control due to the temporary nature of the commercial agreements involved.

<sup>(26)</sup> See Case COMP/M.3330 — RTL/M6 of 12 March 2004; Case COMP/M.452 — Avesta (II) of 9 June 1994.

<sup>(27)</sup> Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 70, 73, 74 [2006] ECR II-319.

<sup>(28)</sup> Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 79 [2006] ECR II-319.



*Control in other areas of legislation*

- (23) The concept of control under the Merger Regulation may be different from that applied in specific areas of Community and national legislation concerning, for example, prudential rules, taxation, air transport or the media. The interpretation of 'control' in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation

1.3. **Object of control**

- (24) The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed <sup>(29)</sup>. The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover <sup>(30)</sup>. A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. In any case, the transfer of licences for brands, patents or copyrights, without additional assets, can only fulfil these criteria if the licences are exclusive at least in a certain territory and the transfer of such licences will transfer the turnover-generating activity <sup>(31)</sup>. For non-exclusive licences it can be excluded that they may constitute on their own a business to which a market turnover is attached.
- (25) Specific issues arise in cases where an undertaking outsources in-house activities, such as the provision of services or the manufacturing of products, to a service provider. Typical cases are the outsourcing of IT services to specialised IT companies. Outsourcing contracts can take several forms; their common characteristic is that the outsourcing service supplier shall provide those services to the customer which the latter has performed in-house before. Cases of simple outsourcing do not involve any transfer of assets or employees to the outsourcing service suppliers, but it is usually the case that any assets or employees are retained by the customer. Such an outsourcing contract is akin to a normal service contract and even if the outsourcing service supplier acquires a right to direct those assets and employees of the customer, no concentration arises if the assets and employees will be used exclusively to service the customer.
- (26) The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market. This requires that the assets previously dedicated to in-house activities of the seller will enable the outsourcing service supplier to provide services not only to the outsourcing customer but also to third parties, either immediately or within a short period after the transfer. This will be the case if the transfer relates to an internal business unit or a subsidiary already engaged in the provision of services to third parties. If third parties are not yet supplied, the assets transferred in the case of manufacturing should contain production facilities, the product know-how (it is sufficient if the assets transferred allow the build-up of such capabilities in the near future) and, if there is no existing market access, the means for the purchaser to develop a market access within a short period

<sup>(29)</sup> See, e.g., Case COMP/M. 3867 — Vattenfall/Elsam and E2 Assets of 22 December 2005.

<sup>(30)</sup> Case COMP/M.2857 — ECS/IEH of 23 December 2002.

<sup>(31)</sup> In addition, the granting of licences and the transfer of patent licences will only constitute a concentration if this is done on a lasting basis. In this respect, similar considerations as set out above in paragraph 18 for the acquisition of control by (long-term) agreements apply.

of time (e.g. including existing contracts or brands) <sup>(32)</sup>. As regards the provision of services, the assets transferred should include the required know-how (e.g. the relevant personnel and intellectual property) and those facilities which allow market access (such as, e.g., marketing facilities) <sup>(33)</sup>. The assets transferred therefore have to include at least those core elements that would allow an acquirer to build up a market presence in a time-frame similar to the start-up period for joint ventures as set out below under paragraphs 97, 100. As in the case of joint ventures, the Commission will take account of substantiated business plans and general market features for assessing this.

- (27) If the assets transferred do not allow the purchaser to at least develop a market presence, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract. The transaction will not constitute a concentration. The specific requirements under which a joint venture for the provision of outsourcing services is qualified as a concentration are assessed in the present Notice in the section on full-function joint ventures.

#### 1.4. *Change of control on a lasting basis*

- (28) Article 3(1) of the Merger Regulation defines the concept of a concentration in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned and, as recital 20 adds, in the structure of the market. The Merger Regulation therefore does not deal with transactions resulting only in a temporary change of control. However, a change of control on a lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time, provided those agreements are renewable. A concentration may arise even in cases in which agreements envisage a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned <sup>(34)</sup>.
- (29) The question whether an operation results in a lasting change in the market structure is also relevant for the assessment of several operations occurring in succession, where the first transaction is only transitory in nature. Several scenarios can be distinguished in this respect.
- (30) In one scenario, several undertakings come together solely for the purpose of acquiring another company on the basis of an agreement to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction. In such circumstances, in a first step, the acquisition of the entire target company is carried out by one or several undertakings. In a second step, the acquired assets are divided among several undertakings. The question is then whether the first transaction is to be considered as a separate concentration, involving an acquisition of sole control (in the case of a single purchaser) or of joint control (in the case of a joint purchase) of the entire target undertaking, or whether only the acquisitions in the second step constitute concentrations, whereby each of the acquiring undertakings acquires its relevant part of the target undertaking.

<sup>(32)</sup> See Case COMP/M.1841 — Celestica/IBM of 25 February 2000; Case COMP/M.1849 — Soletron/Ericsson of 29 February 2000; Case COMP/M.2479 — Flextronics/Alcatel — of 29 June 2001; Case COMP/M.2629 — Flextronics/Xerox of 12 November 2001.

<sup>(33)</sup> See, in the context of joint ventures, Case IV/M.560 — EDS/Lufthansa of 11 May 1995; Case COMP/M.2478 — IBM Italia/Business Solutions/JV of 29 June 2001.

<sup>(34)</sup> See, in cases of joint ventures, Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years. The acquisition of control by the acquisition of shares or assets is not normally confined to a definite period of time and is therefore assumed to lead to a change of control on a lasting basis. Only in the scenarios set out in paragraphs 29 ff., will an acquisition of control by shares or assets be exceptionally considered to be transitory in nature and thus not to lead to a lasting change in the control of the undertakings concerned.

- (31) The Commission considers that the first transaction does not constitute a concentration, and examines the acquisitions of control by the ultimate acquirers, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time period after the first acquisition. The Commission considers that normally the maximum time-frame for the division of the assets should be one year <sup>(35)</sup>.
- (32) If both conditions are met, the first acquisition does not result in a structural change on a lasting basis. There is no effective concentration of economic power between the acquirer(s) and the target company as a whole since the acquired assets are not held in an undivided way on a lasting basis, but only for the time necessary to carry out the immediate split-up of the acquired assets. In those circumstances, only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisitions by different purchasers will constitute a separate concentration. This is irrespective of whether the first acquisition is carried out by only one undertaking <sup>(36)</sup> or jointly by the undertakings which are also involved in the second step. <sup>(37)</sup> In any case, it must be noted that the scope of a clearance decision will only allow for a takeover of the entire target if the break-up can proceed within a short time-frame afterwards and the different parts of the target undertaking are directly sold on to the respective ultimate buyer.
- (33) However, if these conditions are not fulfilled, in particular if it is not certain that the second step will proceed within a short time-frame after the first acquisition, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking. This, e.g., is the case if the first transaction may also proceed independently of the second transaction <sup>(38)</sup> or if a longer transitory period is needed to divide up the target undertaking <sup>(39)</sup>.
- (34) A second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control. In the past, the Commission accepted that such a start-up period could last up to three years <sup>(40)</sup>. Such a period seems to be too long to exclude that the joint control scenario has an impact on the structure of the market. The period therefore should, in general, not exceed one year and the joint control period should be only transitory in nature <sup>(41)</sup>. Only such a relatively short period will make it unlikely that the joint control period will have a distinct impact on the market structure and can therefore be considered as not leading to a change in control on a lasting basis.
- (35) In a third scenario, an undertaking is 'parked' with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares 'on behalf' of the ultimate acquirer, which often bears the major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. Contrary to the situation described in the first scenario in paragraphs 30-33, no other ultimate
- <sup>(35)</sup> See, e.g., Cases COMP/M. Case No COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005 and COMP/M.3813 — Fortune Brands/Allied Domecq of 10 June 2005, where the split-up of the assets was foreseen to become effective within 6 months after the acquisition.
- <sup>(36)</sup> For a first acquisition by only one undertaking see Case COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005 and Case COMP/M.3813 — Fortune Brands/Allied Domecq/Pernod Ricard of 10 June 2005; Case COMP/M.2060 — Bosch/Rexroth of 12 January 2001.
- <sup>(37)</sup> For a joint acquisition see Case COMP/M.1630 — Air Liquide/BOC of 18 January 2000; Case COMP/M.1922 — Siemens/Bosch/Atecs of 11 August 2000; Case COMP/M.2059 — Siemens/Dematic/VDO Sachs of 29 August 2000.
- <sup>(38)</sup> See Case COMP/M.2498 — UPM-Kymmene/Haindl of 21 November 2001 and Case COMP/M.2499 — Norske Skog/Parenco/Walsum of 21 November 2001.
- <sup>(39)</sup> Case COMP/M.3372 — Carlsberg/Holsten of 16 March 2004.
- <sup>(40)</sup> Case IV/M.425 — British Telecom/Santander of 28 March 1994.
- <sup>(41)</sup> See Case M.2389 — Shell/DEA of 20 December 2001 where the ultimate acquirer of sole control had a strong influence in the operational management during the joint control period; Case M.2854 — RAG/Degussa of 18 November 2002 where the transitional period was designed to facilitate internal post-merger restructuring.

acquirer is involved, the target business remains unchanged, and the sequence of transactions is initiated alone by the sole ultimate acquirer. From the date of the adoption of this Notice, the Commission will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties. The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer.

#### 1.5. *Interrelated transactions*

##### 1.5.1. Relation between Article 3 and Article 5(2) second subparagraph

- (36) Several transactions can be treated as a single concentration under the Merger Regulation either according to the general rule of Article 3 — as the transactions are interdependent — or according to the specific provision of Article 5(2) second subparagraph.
- (37) Article 5(2) second subparagraph governs a different question from that referred to by Article 3 of the Merger Regulation. Article 3 defines the existence of a 'concentration' in general and material terms, but does not directly determine the question of the Commission's competence in respect of concentrations. Article 5 intends to specify the scope of the Merger Regulation, in particular by defining the turnover to be taken into account for the purpose of determining whether a concentration has Community dimension, and Article 5(2) second subparagraph allows the Commission in this respect to consider two or more concentrative transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned. The assessment whether, in application of Article 3, a number of transactions give rise to a single concentration or whether those transactions must be regarded as giving rise to a number of concentrations, is thereby logically precedent to the question addressed in Article 5(2) second subparagraph <sup>(42)</sup>.

##### 1.5.2. Interdependent transactions under Article 3

- (38) The general and teleological definition of a concentration set out in Article 3(1) — the result being control of one or more undertakings — implies that it makes no difference whether control was acquired by one or several legal transactions, provided that the end result constitutes a single concentration. Two or more transactions constitute a single concentration for the purposes of Article 3 if they are unitary in nature. It should therefore be determined whether the result leads to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other <sup>(43)</sup>.
- (39) Recital 20 to the Merger Regulation explains in this respect that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition. The requirement that the transactions are interdependent as set out by the Court of First Instance in the *Cementbouw* judgment <sup>(44)</sup> thereby corresponds to the explanation set out in recital 20 that the transactions are linked by condition.
- (40) This general approach reflects, on the one hand, that under the Merger Regulation transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure. In these circumstances, the change of the market structure is brought about by these transactions together. On the other hand, if different transactions are not interdependent and if the parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Merger Regulation.

<sup>(42)</sup> Judgment in Case T-282/02 *Cementbouw v Commission*, paragraphs 113-119 [2006] ECR II-319.

<sup>(43)</sup> Judgment in Case T-282/02 *Cementbouw v Commission*, paragraphs 104-109 [2006] ECR II-319.

<sup>(44)</sup> Judgment in Case T-282/02 *Cementbouw v Commission*, paragraphs 106-109 [2006] ECR II-319.

- (41) However, several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s). Only in these circumstances two or more transactions can be considered to be unitary in nature and therefore to constitute a single concentration for the purposes of Article 3<sup>(45)</sup>. This excludes de-mergers of joint ventures by which different parts of an undertaking are split between its former parent companies. The Commission will consider those transactions as separate concentrations<sup>(46)</sup>. The same applies to transactions where two (or more) companies exchange assets in transactions involving de-mergers of joint ventures or assets swaps. Although the parties will normally consider those transactions as interdependent, the purpose of the Merger Regulation requires a separate assessment of the results of each of the transactions: Several undertakings acquire control of different assets; a separate combination of resources takes place for each of the acquiring undertakings; and the impact on the market of each of those acquisitions of control needs to be analysed separately under the Merger Regulation.
- (42) The acquisition of different degrees of control (for example joint control of one business and sole control of another business) raises specific questions. An operation involving the acquisition of joint control of one part of an undertaking and sole control of another part is in principle regarded as two separate concentrations under the Merger Regulation<sup>(47)</sup>. Those transactions constitute only one concentration if they are interdependent and if the undertaking acquiring sole control is also acquiring joint control. In any case, such a scenario is considered to constitute one concentration where a corporate entity is acquired to which both the solely controlled and the jointly controlled undertaking belong. On the basis of the interpretation in recital 20, the situation where the same undertaking acquires sole and joint control of other undertakings based on interdependent agreements is not to be treated differently. These transactions, if they are interdependent, therefore constitute a single concentration.

*Requirement of conditionality of transactions*

- (43) The required conditionality implies that none of the transactions would take place without the others and they therefore constitute a single operation<sup>(48)</sup>. Such conditionality is normally demonstrated if the transactions are linked *de jure*, i.e. the agreements themselves are linked by mutual conditionality. If *de facto* conditionality can be satisfactorily demonstrated, it may also suffice for treating the transactions as a single concentration. This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others<sup>(49)</sup>. Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. A conclusion of *de facto* interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally inter-conditional transactions may likewise put into doubt their true interdependence.
- (44) The principle that several transactions can be treated as a single concentration under the mentioned conditions only applies if the result is that control of one or more undertakings is acquired by the same person(s) or undertaking(s). First, this may be the case if a single business or undertaking is acquired via several legal transactions. Second, also the acquisition of control of several undertakings — which could constitute concentrations in themselves — can be linked in such a way that it constitutes a single concentration. However, it is not possible under the Merger Regulation to link different legal transactions which only partly concern the acquisition of control of undertakings, but partly also the acquisition of

<sup>(45)</sup> This also covers situations where an undertaking sells a business to a purchaser and then acquires the seller including the business sold, see Case COMP/M.4521 — LGI/Telenet of 26 February 2007.

<sup>(46)</sup> See parallel cases COMP/M.3293 — Shell/BEB and COMP/M.3294 — ExxonMobil/BEB of 20 November 2003; case IV/M.197 — Solvay/Laporte of 30 April 1992.

<sup>(47)</sup> See Case IV/M.409 ABB/Renault Automation of 9 March 1994.

<sup>(48)</sup> Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 127 et seq. [2006] ECR II-319.

<sup>(49)</sup> Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 131 et seq. [2006] ECR II-319. See Case COMP/M.4521 — LGI/Telenet of 26 February 2007, where the interdependence was based on the fact that two transactions were decided and carried out simultaneously and that, according to the economic aims of the parties, each of the transactions would not have been carried out without the other.

other assets, such as non-controlling minority stakes in other companies. It would not be in line with the general framework and the purpose of the Merger Regulation if different transactions, linked by conditionality, were assessed as a whole under the Merger Regulations if only some of these transactions lead to a change in control of a given target.

*Acquisition of a single business*

- (45) A single concentration may therefore exist if the same purchaser(s) acquire control of a single business, i.e. a single economic entity, via several legal transactions if those are inter-conditional. This is the case irrespective of whether the business is acquired in a corporate structure, consisting of one or several companies, or whether various assets are acquired which form a single business, i.e. a single economic entity managed for a common commercial purpose to which all the assets contribute. Such a business may comprise majority and minority stakes in companies as well as tangible and intangible assets. If several legal transactions which are interdependent are required to transfer such a business, these transactions constitute one concentration <sup>(50)</sup>.

*Parallel and serial acquisitions of control*

- (46) For the treatment of several acquisitions of control as a single concentration, several scenarios have arisen in the Commission's past decisional practice. One such scenario is a parallel acquisition of control, i.e. undertaking A acquires control of undertaking B and C in parallel from separate sellers on condition that A is not obliged to buy either and neither seller is obliged to sell, unless both transactions proceed <sup>(51)</sup>. Another scenario is a serial acquisition of control, i.e. undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of undertaking C, as illustrated by the Kingfisher case <sup>(52)</sup>.

*Serial acquisition of sole/joint control*

- (47) In the same way as the Kingfisher scenario, the Commission approaches cases where, in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target company. If both acquisitions are inter-conditional, the two transactions constitute a single concentration and only the acquisition of joint control, as the final result of the transactions, will be considered by the Commission <sup>(53)</sup>.

*1.5.3. Series of transactions in securities*

- (48) Recital 20 of the Merger Regulation further explains that a single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.

<sup>(50)</sup> See Case IV/M.470 — Gencor/Shell of 29 August 1994; COMP/M.3410 — Total/Gaz de France of 8 October 2004; Case IV/M.957 — L'Oreal/Procosa/Cosmetique Iberica/Albesa of 19 September 1997; Case IV/M.861 — Textron/Kautex of 18 December 1996 where all the assets were also used in the same product market. The same considerations apply if a joint venture is created by several companies, forming a single business, see Case M.4048 — Sonae Industria/Tarkett of 12 June 2006 where the interdependence of transactions establishing, respectively, a production and a distribution joint venture was necessary in order to demonstrate that there was a single concentration that would create a full-function joint venture.

<sup>(51)</sup> Case COMP/M.2926 — EQT/H&R/Dracoco — of 16 September 2002; the same considerations apply to the question when several mergers constitute one concentration in the meaning of Article 3(1)(a), Case COMP/M. 2824 — Ernst & Young/Andersen Germany of 27 August 2002.

<sup>(52)</sup> Case IV/M.1188 — Kingfisher/Wegert/ProMarkt of 18 June 1998; case COMP/M.2650 — Haniel/Cementbouw/JV (CVK) of 26 June 2002.

<sup>(53)</sup> Case COMP/M.2420 — Mitsui/CVRD/Caemi of 30 October 2001.

1.5.4. Article 5(2) subparagraph 2

- (49) Article 5(2) subparagraph 2 provides a specific rule which allows the Commission to consider successive transactions occurring in a fixed period of time a single concentration for the purposes of calculating the turnover of the undertakings concerned. The purpose of this provision is to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation <sup>(54)</sup>.
- (50) If two or more transactions (each of them bringing about an acquisition of control) take place within a two-year period between the same persons or undertakings, they shall be qualified as a single concentration <sup>(55)</sup>, irrespective of whether or not those transactions relate to parts of the same business or concern the same sector. This does not apply where the same persons or undertakings are joined by other persons or undertakings for only some of the transactions involved. It is sufficient if the transactions, although not carried out between the same companies, are carried out between companies belonging to the same respective groups. The provision also applies to two or more transactions between the same persons or undertakings if they are carried out simultaneously. Whenever they lead to acquisitions of control by the same undertaking, such simultaneous transactions between the same parties form a single concentration even if they are not conditional upon each other <sup>(56)</sup>. However, Article 5(2) subparagraph 2 would not appear to apply to different transactions at least one of which involves an undertaking concerned which is distinct from the common seller(s) and buyer(s). In situations involving two transactions where one transaction results in sole control and the other in joint control, Article 5(2) subparagraph 2 therefore does not apply unless the other jointly controlling parent(s) in the latter transaction are the seller(s) of the solely controlling stake in the former transaction.

1.6. **Internal restructuring**

- (51) A concentration within the meaning of the Merger Regulation is limited to changes in control. An internal restructuring within a group of companies does not constitute a concentration. This applies, e.g., to increases in shareholdings not accompanied by changes of control or to restructuring operations such as a merger of a dual listed company into a single legal entity or a merger of subsidiaries. A concentration could only arise if the operation leads to a change in the quality of control of one undertaking and therefore is no longer purely internal.

1.7. **Concentrations involving State-owned undertakings**

- (52) An exceptional situation exists where both the acquiring and acquired undertakings are companies owned by the same State (or by the same public body or municipality). In this case, whether the operation is to be regarded as an internal restructuring depends in turn on the question whether both undertakings were formerly part of the same economic unit. Where the undertakings were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring <sup>(57)</sup>. However, where the different economic units will continue to have an independent power of decision also after the operation, the operation is only to be regarded as an internal restructuring, even if the shares of the undertakings, constituting different economic units, should be held by a single entity, such as a pure holding company <sup>(58)</sup>.

<sup>(54)</sup> Judgment in Case T-282/02 *Cementbouw v Commission*, paragraph 118 [2006] ECR II-319.

<sup>(55)</sup> See Case COMP/M.3173 — *E.ON/Fortum Burghausen/Smaland/Endenderry* of 13 June 2003. This also applies to situations where sole control is acquired whereby only parts of the undertaking were previously jointly controlled by the acquiring undertaking, case COMP/M. 2679 — *EdF/TXU/Europe/24 Seven* of 20 December 2001.

<sup>(56)</sup> Case IV/M.1283 — *Volkswagen/RollsRoyce/Cosworth* of 24 August 1998.

<sup>(57)</sup> Case IV/M.097 — *Péchiney/Usinor*, of 24 June 1991; Case IV/M.216 — *CEA Industrie/France Telecom/SGS-Thomson*, of 22 February 1993; Case IV/M.931 — *Neste/IVO* of 2 June 1998. See also recital 22 of the Merger Regulation.

<sup>(58)</sup> Specific issues concerning the calculation of turnover for state-owned companies are dealt with in paragraphs 192-194.



- (53) However, the prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the Merger Regulation to the extent that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking <sup>(59)</sup>.

## 2. Sole control

- (54) Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control). In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly-controls a company, i.e. the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 3(2) and therefore control within the meaning of the Merger Regulation <sup>(60)</sup>.

- (55) Sole control can be acquired on a *de jure* and/or *de facto* basis.

### *De jure sole control*

- (56) Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital. Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.
- (57) Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure (e.g. as a general partner in a limited partnership which often does not even have a shareholding).
- (58) A typical situation of negative sole control occurs where one shareholder holds 50 % in an undertaking whilst the remaining 50 % is held by several other shareholders (assuming this does not lead to positive sole control on a *de facto* basis), or where there is a supermajority required for strategic decisions which in fact confers a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder <sup>(61)</sup>.

<sup>(59)</sup> Case IV/M.493 — Tractebel/Distrigaz II, of 1 September 1994.

<sup>(60)</sup> Since this shareholder is the only undertaking acquiring a controlling influence, only this shareholder is obliged to submit a notification under the Merger Regulation.

<sup>(61)</sup> See consecutive Cases COMP/M.3537 — BBVA/BNL of 20 August 2004 and M.3768 — BBVA/BNL of 27 April 2005; Case M.3198 — VW-Audi/VW-Audi Vertriebszentren of 29 July 2003; Case COMP/M.2777 — Cinven Limited/Angel Street Holdings of 8 May 2002; Case IV/M.258 — CCIE/GTE, of 25 September 1992. In Case COMP/M.3876 — Diester Industrie/Bunge/JV of 30 September 2005, there was the specific situation that a joint venture held a stake in a company by which it had negative sole control over this company.



*De facto sole control*

- (59) A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years <sup>(62)</sup>. Based on the past voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise in future following the operation <sup>(63)</sup>. The Commission will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis <sup>(64)</sup>. Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then that large minority shareholder is taken to have sole control <sup>(65)</sup>.
- (60) An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements <sup>(66)</sup>. However, in exceptional circumstances an option, together with other elements, may lead to the conclusion that there is *de facto* sole control <sup>(67)</sup>.

*Sole control acquired by other means than voting rights*

- (61) Apart from the acquisition of sole control on the basis of voting rights, the considerations outlined in section 1.2 concerning the acquisition of sole control by purchase of assets, by contract, or by any other means also apply.

### 3. Joint control

- (62) Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate <sup>(68)</sup>.
- (63) As in the case of sole control, the acquisition of joint control can also be established on a *de jure* or *de facto* basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).

<sup>(62)</sup> Case IV/M.343 — Société Générale de Belgique/Générale de Banque, of 3 August 1993; Case COMP/M.3330 — RTL/M6 of 12 March 2004; Case IV/M.159 — Mediobanca/Generali of 19 December 1991.

<sup>(63)</sup> See Case COMP/M.4336 — MAN/Scania of 20 December 2006 as regards the question whether Volkswagen had acquired control of MAN.

<sup>(64)</sup> Case IV/M.754 — Anglo American/Lonrho of 23 April 1997; Case IV/M.025 — Arjomari/Wiggins Teape, of 10 February 1990.

<sup>(65)</sup> See also Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.1519 — Renault/Nissan of 12 May 1999.

<sup>(66)</sup> Judgment in Case T 2/93, *Air France v Commission* [1994] ECR II-323. Even though an option does normally not in itself lead to a concentration, it can be taken into account for the substantive assessment in a related concentration, see Case COMP/M.3696 — E.ON/MOL of 21 December 2005, at paragraphs 12-14, 480, 762 *et subsequa*.

<sup>(67)</sup> Case IV/M.397 — Ford/Hertz of 7 March 1994.

<sup>(68)</sup> See also Judgment in Case T-282/02 *Cementbouw v Commission*, paragraphs 42, 52, 67 [2006] ECR II-319.

3.1. *Equality in voting rights or appointment to decision-making bodies*

- (64) The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote<sup>(69)</sup>. Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

3.2. *Veto rights*

- (65) Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture<sup>(70)</sup>. These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of directors to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body, e.g. supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.
- (66) These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned<sup>(71)</sup>.
- (67) In contrast, veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.
- (68) In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

<sup>(69)</sup> Case COMP/M.3097 — Maersk Data/Eurogate IT; Global Transport Solutions JV of 12 March 2003; Case IV/M.272 — Matra/CAP Gemini Sogeti, of 17 March 1993.

<sup>(70)</sup> Case T 2/93, Air France v Commission [1994] ECR II-323; Case IV/M.010 — Conagra/Idea, of 3 May 1991.

<sup>(71)</sup> Case IV/M.062 — Eridania/ISI, of 30 July 1991.

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*Appointment of senior management and determination of budget*

- (69) Very important are the veto rights concerning decisions on the appointment and dismissal of the senior management and the approval of the budget. The power to co-determine the structure of the senior management, such as the members of the board, usually confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

*Business plan*

- (70) The business plan normally provides details of the aims of a company together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

*Investments*

- (71) In the case of a veto right on investments, the importance of this right depends, first, on the level of investments which are subject to the approval of the parent companies and, secondly, on the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first criterion, where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial policy of the joint venture. With regard to the second, the investment policy of an undertaking is normally an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

*Market-specific rights*

- (72) Apart from the typical veto rights mentioned above, there exist a number of other possible veto rights related to specific decisions which are important in the context of the particular market of the joint venture. One example is the decision on the technology to be used by the joint venture where technology is a key feature of the joint venture's activities. Another example relates to markets characterized by product differentiation and a significant degree of innovation. In such markets, a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control.

*Overall context*

- (73) In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of whether or not joint control exists is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to strategic commercial policy, to the appointment of senior management or to the budget or business plan cannot be regarded as giving joint control to its owner <sup>(72)</sup>.

**3.3. Joint exercise of voting rights**

- (74) Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising

<sup>(72)</sup> Case IV/M.295 — SITA-RPC/SCORI, of 19 March 1993.

these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.

- (75) The legal means to ensure the joint exercise of voting rights can be in the form of a (jointly controlled) holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).
- (76) Very exceptionally, collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.
- (77) Indicative for such a commonality of interests is a high degree of mutual dependency as between the parent companies to reach the strategic objectives of the joint venture. This is in particular the case when each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreements) <sup>(73)</sup>. In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can operate the joint venture successfully only with each other's agreement on the strategic decisions even if there is no express provision for any veto rights. The parent companies will therefore be required to cooperate <sup>(74)</sup>. Further factors are decision making procedures which are tailored in such a way as to allow the parent companies to exercise joint control even in the absence of explicit agreements granting veto rights or other links between the minority shareholders related to the joint venture <sup>(75)</sup>.
- (78) Such a scenario may not only occur in a situation where two or more minority shareholders jointly control an undertaking on a *de facto* basis, but also where there is high degree of dependency of a majority shareholder on a minority shareholder. This may be the case where the joint venture economically and financially depends on the minority shareholder or where only the minority shareholder has the required know-how for, and will play a major role in, the operation of the joint undertaking whereas the majority shareholder is a mere financial investor <sup>(76)</sup>. In such circumstances, the majority shareholder will not be able to enforce its position, but the joint venture partner may be able to block strategic decisions so that both parent undertakings will be required to cooperate permanently. This leads to a situation of *de facto* joint control which prevails over a pure *de jure* assessment according to which the majority shareholder could have been considered to have sole control.
- (79) These criteria apply to the formation of a new joint venture as well as to acquisitions of minority shareholdings, together conferring joint control. In case of acquisitions of shareholdings, there is a higher probability of a commonality of interests if the shareholdings are acquired by means of concerted action. However, an acquisition by way of a concerted action is not alone sufficient for the purposes of establishing *de facto* joint control. In general, a common interest as financial investors (or creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of *de facto* joint control.

<sup>(73)</sup> Case COMP/JV.55 Hutchison/RCPM/ECT of 3 July 2001; see also Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995.

<sup>(74)</sup> Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 42, 52, 67 [2006] ECR II-319.

<sup>(75)</sup> Case COMP/JV.55 Hutchison/RCPM/ECT of 3 July 2001. See also Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995.

<sup>(76)</sup> Case IV/M. 967 — KLM/Air UK of 22 September 1997; Case COMP/M.4085 — Arcelor/Oyak/Erdemir of 13 February 2006.

- (80) In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders (or a certain group thereof) will jointly control the undertaking<sup>(77)</sup>. In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties, where these fall short of strategic veto rights. For example, in the case of an undertaking where three shareholders each own one-third of the share capital and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority.

### 3.4. *Other considerations related to joint control*

#### *Unequal role of the parent companies*

- (81) Joint control is not incompatible with the fact that one of the parent companies enjoys specific knowledge of and experience in the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term-strategy, brand image or general policy nature. Nevertheless, it must always retain the real possibility of contesting the decisions taken by the other parent company on the basis of equality in voting rights or rights of appointment to decision making bodies or of veto rights related to strategic issues. Without this, there would be sole control.

#### *Casting vote*

- (82) For joint control to exist, there should not be a casting vote for one parent company only as this would lead to sole control of the company enjoying the casting vote. However, there can be joint control when this casting vote is in practice of limited relevance and effectiveness. This may be the case when the casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field or if the exercise of the casting vote triggers a put option implying a serious financial burden or if the mutual interdependence of the parent companies would make the exercise of the casting vote unlikely<sup>(78)</sup>.

## III. CHANGES IN THE QUALITY OF CONTROL

- (83) The Merger Regulation covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the quality of control. First, such a change in the quality of control, resulting in a concentration, occurs if there is a change between sole and joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders. However, there is no change in the quality of control if a change from negative to positive sole control occurs. Such a change affects neither the incentives of the negatively controlling shareholder nor the nature of the control structure, as the controlling shareholder did not necessarily have to cooperate with specific shareholders at the time when it enjoyed negative control. In any case, mere changes in the level of shareholdings of the same controlling shareholders, without changes of the powers they hold in a company and of the composition of the control structure of the company, do not constitute a change in the quality of control and therefore are not a notifiable concentration.

<sup>(77)</sup> Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998.

<sup>(78)</sup> Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001; Case IV/M.553 — RTL/Veronica/Endemol of 20 September 1995; Case IV/M.425 — British Telecom/Banco Santander, of 28 March 1994.

- (84) These changes in the quality of control will be discussed in two categories: first, an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders and, second, a reduction of the number of controlling shareholders.

#### 1. Entry of controlling shareholders

- (85) An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole to joint control, or from the entry of an additional shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.

- (86) A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture. First, there is a new acquisition of control for the shareholder entering the controlled undertaking. Second, only the new acquisition of control makes the controlled undertaking to a joint venture which changes decisively also the situation for the remaining controlling undertaking under the Merger Regulation: In the future, it has to take into account the interests of one or more other controlling shareholder(s) and it is required to cooperate permanently with the new shareholder(s). Before, it could either determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) or was not forced to take into account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.

- (87) The entry of a new shareholder in a jointly controlled undertaking — either in addition to the already controlling shareholders or in replacement of one of them — also constitutes a notifiable concentration, although the undertaking is jointly controlled before and after the operation<sup>(79)</sup>. First, also in this scenario there is a shareholder newly acquiring control of the joint venture. Second, the quality of control of the joint venture is determined by the identity of all controlling shareholders. It lies in the nature of joint control that, since each shareholder alone has a blocking right concerning strategic decisions, the jointly controlling shareholders have to take into account each others interests and are required to cooperate for the determination of the strategic behaviour of the joint venture<sup>(80)</sup>. The nature of joint control therefore does not exhaust itself in a pure mathematical addition of the blocking rights exercised by several shareholders, but is determined by the composition of the jointly controlling shareholders. One of the most obvious scenarios leading to a decisive change in the nature of the control structure of a jointly controlled undertaking is a situation where in a joint venture, jointly controlled by a competitor of the joint venture and a financial investor, the financial investor is replaced by another competitor. In these circumstances, the control structure and the incentives of the joint venture may entirely change, not only because of the entry of the new controlling shareholder, but also due to the change in the behaviour of the remaining shareholder. The replacement of a controlling shareholder or the entry of a new shareholder in a jointly controlled undertaking therefore constitutes a change in the quality of control<sup>(81)</sup>.

<sup>(79)</sup> See, e.g., Case COMP/M.3440 — ENI/EDP/GdP of 9 December 2004.

<sup>(80)</sup> Judgment in Case T-282/02 *Cementbouw v Commission*, paragraph 67 [2006] ECR II-319.

<sup>(81)</sup> Generally, it should be noted that the Commission will not assess as a separate concentration the indirect replacement of a controlling shareholder in a joint control scenario which takes place via an acquisition of control of one of its parent undertakings. The Commission will assess any changes occurring in the competitive situation of the joint venture in the framework of the overall acquisition of control of its parent undertaking. In those circumstances, the other controlling shareholders in the joint venture will therefore not be undertakings concerned by the concentration which relates to its parent undertaking.

- (88) However, the entry of new shareholders only results in a notifiable concentration if one or several shareholders acquire sole or joint control by virtue of the operation. The entry of new shareholders may lead to a situation where joint control can neither be established on a *de jure* basis nor on a *de facto* basis as the entry of the new shareholder leads to the consequence that changing coalitions between minority shareholders are possible <sup>(82)</sup>.

## 2. Reduction in the number of shareholders

- (89) A reduction in the number of controlling shareholders constitutes a change in the quality of control and is thus to be considered as a concentration if the exit of one or more controlling shareholders results in a change from joint to sole control. Decisive influence exercised alone is substantially different from decisive influence exercised jointly, since in the latter case the jointly controlling shareholders have to take into account the potentially different interests of the other party or parties involved <sup>(83)</sup>.
- (90) Where the operation involves a reduction in the number of jointly controlling shareholders, without leading to a change from joint to sole control, the transaction will normally not lead to a notifiable concentration.

## IV. JOINT VENTURES — THE CONCEPT OF FULL-FUNCTIONALITY

- (91) Article 3(1)(b) provides that a concentration shall be deemed to arise where control is acquired by *one or more* undertakings of the whole or parts of another undertaking. The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (e.g. because it will sell exclusively to the parent undertakings in future). Thus, a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion <sup>(84)</sup>.
- (92) Article 3(4) provides in addition that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a 'greenfield operation' or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a concentration.
- (93) The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with <sup>(85)</sup>. It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect.

<sup>(82)</sup> Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998.

<sup>(83)</sup> See Case IV/M023 — ICI/Tioxide, of 28 November 1990; see also paragraph 5 (d) of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

<sup>(84)</sup> These considerations do not apply to Article 2(4) in the same way. Whereas the interpretation of Article 3, paragraphs (1) and (4) relates to the applicability of the Merger Regulation to joint ventures, Article 2(4) relates to the substantive analysis of joint ventures. The 'creation of a joint venture constituting a concentration pursuant to Article 3', as provided for in Article 2(4), comprises the acquisition of joint control according to Article 3, paragraphs (1) and (4).

<sup>(85)</sup> Judgment in Case T-282/02 Cementbouw v Commission, paragraph 62 [2006] ECR II-319.



**1. Sufficient resources to operate independently on a market**

- (94) Full function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement <sup>(86)</sup>. The personnel do not necessarily need to be employed by the joint venture itself. If it is standard practice in the industry where the joint venture is operating, it may be sufficient if third parties envisage the staffing under an operational agreement or if staff is assigned by an interim employment agency. The secondment of personnel by the parent companies may also be sufficient if this is done either only for a start-up period or if the joint venture deals with the parent companies in the same way as with third parties. The latter case requires that the joint venture deals with the parents at arm's length on the basis of normal commercial conditions and that the joint venture is also free to recruit its own employees or to obtain staff via third parties.

**2. Activities beyond one specific function for the parents**

- (95) A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without its own access to or presence on the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as 'full-function' as long as the parent companies are acting only as agents of the joint venture <sup>(87)</sup>.
- (96) A frequent example where this question arises are joint ventures involved in the holding of real estate property, which are typically set up for tax and other financial reasons. As long as the purpose of the joint venture is limited to the acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents, it will not usually be considered to be full-function, as it lacks an autonomous, long term business activity on the market and will typically also lack the necessary resources to operate independently. This has to be distinguished from joint ventures that are actively managing a real estate portfolio and who act on their own behalf on the market, which typically indicates full-functionality <sup>(88)</sup>.

**3. Sale/purchase relations with the parents**

- (97) The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence results in substantial sales or purchases between the parent companies and the joint venture. The fact that, for an

<sup>(86)</sup> Case IV/M.527 — Thomson CSF/Deutsche Aerospace, of 2 December 1994 — intellectual rights, Case IV/M.560 EDS/Lufthansa of 11 May 1995 — outsourcing, Case IV/M.585 — Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, of 7 September 1995 — joint venture's right to demand additional expertise and staff from its parent companies, Case IV/M.686 — Nokia/Autoliv, of 5 February 1996, joint venture able to terminate 'service agreements' with parent company and to move from site retained by parent company, Case IV/M.791 — British Gas Trading Ltd/Group 4 Utility Services Ltd, of 7 October 1996, joint venture's intended assets will be transferred to leasing company and leased by joint venture.

<sup>(87)</sup> Case IV/M.102 — TNT/Canada Post etc. of 2 December 1991.

<sup>(88)</sup> See Case IV/M.929 — DIA/Veba Immobilien/Deutschbau of 23 June 1997; Case COMP/M. 3325 — Morgan Stanley/Glick/Canary Wharf of 23 January 2004.



initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parent companies does not normally affect its full-function character. Such a start-up period may be necessary in order to establish the joint venture on a market. But the period will normally not exceed a period of three years, depending on the specific conditions of the market in question <sup>(89)</sup>.

*Sales to the parents*

(98) Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of sales made to its parents compared with the total production of the joint venture is an important factor. Due to the particularities of each individual case, it is impossible to define a specific turnover ratio which distinguishes full-function from other joint ventures. If the joint venture achieves more than 50 % of its turnover with third parties, this will typically be an indication of full-functionality. Below this indicative threshold, a case-by-case analysis is required, whereby, for the finding of operational autonomy, the relationship between the joint venture and its parents must be truly commercial in character. For this purpose, it is to be demonstrated that the joint venture will supply its goods or services to the purchaser who values them most and will pay most and that the joint venture will also deal with its parents' companies at arm's length on the basis of normal commercial conditions <sup>(90)</sup>. Under these circumstances, i.e. if the joint venture will treat its parent companies in the same commercial way as third parties, it may be sufficient that at least 20 % of the joint venture's predicted sales will go to third parties. However, the greater the proportion of sales likely to be made to the parents, the greater will be the need for clear evidence of the commercial character of the relationship.

(99) For the determination of the proportion between sales to the parents and to third parties, the Commission will take past accounts and substantiated business plans into account. However, especially where substantial third-party sales cannot be readily foreseen, the Commission will base its finding also on the general market structure. This may be a relevant factor as well for the assessment whether the joint venture will deal with its parents on an arm's length basis.

(100) These issues frequently arise with regard to outsourcing agreements, where an undertaking creates a joint venture with a service provider <sup>(91)</sup> which will carry out functions that were previously dealt with by the undertaking in-house. The JV typically cannot be considered to be full-function in these scenarios: it provides its services exclusively to the client undertaking, and it is dependent for its services on input from the service provider. The fact that the joint venture's business plan often at least does not exclude that the joint venture can provide its services to third parties does not alter this assessment, as in the typical outsourcing setup any third party revenues are likely to remain ancillary to the joint venture's main activities for the client undertaking. However, this general rule does not exclude that there are outsourcing situations where the joint venture partners, for example for reasons of economies of scale, set up a joint venture with the perspective of significant market access. This could qualify the joint venture as full function if significant third-party sales are foreseen and if the relationship between the joint venture and its parent will be truly commercial in character and if the joint venture deals with its parents on the basis of normal commercial conditions.

<sup>(89)</sup> Case IV/M.560 — EDS/Lufthansa of 11 May 1995; Case IV/M.686 Nokia/Autoliv of 5 February 1996; to be contrasted with Case IV/M.904 — RSB/Tenex/Fuel Logistics of 2 April 1997 and Case IV/M.979 — Preussag/Voest-Alpine of 1 October 1997. A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture, see Case IV/M.468 — Siemens/Italtel of 17 February 1995, or where the sales to a parent company consist of by-products, which are of minor importance to the joint venture, see Case IV/M.550 — Union Carbide/Enichem of 13 March 1995.

<sup>(90)</sup> Case IV/M.556 — Zeneca/Vanderhave of 9 April 1996; Case IV/M.751 — Bayer/Hüls of 3 July 1996.

<sup>(91)</sup> The question under which circumstances an outsourcing arrangement qualifies as a concentration is dealt with in paragraphs 25ff. of this Notice.

*Purchases from the parents*

- (101) In relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency.

*Trade markets*

- (102) However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture. A trade market is characterised by the existence of companies which specialise in the selling and distribution of products without being vertically integrated in addition to those which are integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales and service personnel. In order to constitute a full-function joint venture in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies but also from other competing sources <sup>(92)</sup>.

#### 4. Operation on a lasting basis

- (103) Furthermore, the joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement as between the parent companies <sup>(93)</sup>. This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. This kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same is normally true where the agreement specifies a period for the duration of the joint venture where this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned <sup>(94)</sup>, or where the agreement provides for the possible continuation of the joint venture beyond this period.
- (104) By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.
- (105) A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity. Only decisions that go beyond mere formalities and the award of which is typically uncertain qualify for these scenarios. Examples are the award of a contract (e.g., in public tenders), licences (e.g., in the telecoms sector) or access rights to property (e.g., exploration rights for oil and gas). Pending the decision on such factors, it is unclear whether the joint venture will become operational at all. Thus, at that stage the joint venture cannot be considered to perform economic functions on a lasting

<sup>(92)</sup> Case IV/M.788 — AgrEVO/Marubeni of 3 September 1996.

<sup>(93)</sup> Case IV/M.891 — Deutsche Bank/Commerzbank/J.M. Voith of 23 April 1997.

<sup>(94)</sup> See Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years.

basis and consequently does not qualify as full function. However, once a decision has been taken in favour of the joint venture in question, this criterion is fulfilled and a concentration arises <sup>(95)</sup>.

## 5. Changes in the activities of the joint venture

- (106) The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the acquisition of the whole or part of another undertaking from the parents that would, considered in isolation, qualify as a concentration as explained in paragraph 24 of this Notice <sup>(96)</sup>.
- (107) A concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis or nucleus of an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis. As the transfer of the assets or rights shows that the parents are the real players behind the extension of the joint venture's scope, the enlargement of the activities of the joint venture can be considered in the same way as the creation of a new joint venture within the meaning of Article 3(4) <sup>(97)</sup>.
- (108) If the scope of a joint venture is enlarged without additional assets, contracts, know-how or rights being transferred, no concentration will be deemed to arise.
- (109) A concentration arises if a change in the activity of an existing non-full-function joint venture occurs so that a full-function joint venture within the meaning of Article 3(4) is created. The following examples may be given: a change of the organisational structure of a joint venture so that it fulfils the full functionality criterion <sup>(98)</sup>; a joint venture that used to supply only the parent companies, which subsequently starts a significant activity on the market; or scenarios, as described in paragraph 105 above, where a joint venture can only start its activity on the market once it has essential input (such as a licence for a joint venture in the telecoms sector). Such a change in the activity of the joint venture will frequently require a decision by its shareholders or its management. Once the decision is taken that leads to the joint venture meeting the full functionality criterion, a concentration arises.

## V. EXCEPTIONS

- (110) Article 3(5) sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.
- (111) First, the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these businesses and if the securities are held on only a temporary basis (Article 3(5)(a)). In order to fall within this exception, the following requirements must be fulfilled:
- the acquiring undertaking must be a credit or other financial institution or insurance company the normal activities of which are described above;

<sup>(95)</sup> Subject to the other criteria mentioned in this chapter of the Notice.

<sup>(96)</sup> See Case COMP/M.3039 — Soprol/Céréol/Lesieur of 30 January 2003.

<sup>(97)</sup> The triggering event for the notification in such a case will be the agreement or other legal act underlying the transfer of the assets, contracts, know-how or other rights.

<sup>(98)</sup> Case COMP/M.2276 — The Coca-Cola Company/Nestlé/JV of 27 September 2001.

- the securities must be acquired with a view to their resale;
  - the acquiring undertaking must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target company or must exercise these rights only with a view to preparing the total or partial disposal of the undertaking, its assets or the securities;
  - the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the Commission where the acquiring undertaking can show that the disposal was not reasonably possible within the one-year period.
- (112) Second, there is no change of control, and hence no concentration within the meaning of the Merger Regulation, where control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings (Article 3(5)(b));
- (113) Third, a concentration does not arise where a financial holding company within the meaning of Article 5(3) of the Council Directive 78/660/EEC <sup>(99)</sup> acquires control. The notion of 'financial holding company' is thus limited to companies whose sole purpose it is to acquire holdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. Such investment companies must be further structured in a way that compliance with these limitations can be supervised by an administrative or judicial authority. The Merger Regulation provides for an additional condition for this exception to apply: such companies may exercise the voting rights in the other undertakings only to maintain the full value of those investments and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking.
- (114) The exceptions under Article 3(5) of the Merger Regulation only apply to a very limited field. First, these exceptions only apply if the operation would otherwise be a concentration in its own right, but not if the transaction is part of a broader, single concentration, in circumstances in which the ultimate acquirer of control would not fall within the terms of Article 3(5) (see e.g. paragraph 35 above). Second, the exceptions under Article 3(5)(a) and (c) only apply to acquisitions of control by way of purchase of securities, not to acquisitions of assets.
- (115) The exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings. This would not be compatible with the requirement under both Article 3(5)(a) and (c) that the acquiring companies do not exercise the voting rights with a view to determine the competitive conduct of the other undertaking <sup>(100)</sup>.
- (116) The question may arise whether an operation to rescue an undertaking before or from insolvency proceedings constitutes a concentration under the Merger Regulation. Such a rescue operation typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned. Where such an operation meets the criteria for joint

<sup>(99)</sup> Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, OJ L 222, 14.8.1978, p. 11, as last amended by Directive 2003/51/EC of 18 June 2003, OJ L 178, 17.7.2003, p. 16. Article 5(3) of this Directive defines financial holding companies as 'those companies the sole objective of which is to acquire holdings in other undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. The limitations imposed on the activities of these companies must be such that compliance with them can be supervised by an administrative or judicial authority'.

<sup>(100)</sup> Case IV/M.669 — Charterhouse/Porterbrook, of 11 December 1995.

control, as outlined above, it will normally be considered to be a concentration<sup>(101)</sup>. Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in Article 3(5)(a) is normally not applicable to such an operation. In a similar way as set out for investment funds, the restructuring programme normally requires the controlling banks to determine the strategic commercial behaviour of the rescued undertaking. Furthermore, it is not normally a realistic proposition to transform a rescued company into a commercially viable entity and to resell it within the permitted one-year period. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an extension of the disposal period.

#### VI. ABANDONMENT OF CONCENTRATIONS

- (117) A concentration ceases to exist and the Merger Regulation ceases to be applicable if the undertakings concerned abandon the concentration.
- (118) In this respect, the revised Merger Regulation 139/2004 introduced a new provision related to the closure of procedures concerning the control of concentrations without a final decision after the Commission has initiated proceedings under Article 6(1)(c), first sentence. That sentence reads as follows: 'Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration'. Prior to the initiation of proceedings, such requirements do not apply.
- (119) As a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the nature of the latest act.
- (120) In line with this principle, in case of implementation of the concentration prior to a Commission decision, the re-establishment of the *status quo ante* has to be shown. The mere withdrawal of the notification is not considered as sufficient proof that the concentration has been abandoned in the sense of Article 6(1)(c). Likewise, minor modifications of a concentration which do not affect the change in control or the quality of that change, cannot be considered as an abandonment of the original concentration<sup>(102)</sup>.
- Binding agreement: proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by (one of) the parties will not be considered sufficient<sup>(103)</sup>.
  - Good faith intention to conclude an agreement: In case of a letter of intent or memorandum of understanding reflecting such good faith intention, documents proving that this basis for the good faith intention has been cancelled will be required. As for possible other forms that indicated the good faith intention, the abandonment must reverse this good faith intention and correspond in terms of form and intensity to the initial expression of intent.
  - Public announcement of a public bid or of the intention to make a public bid: a public announcement terminating the bidding procedure or renouncing to the intention to make a public bid will be required. The format and public reach of this announcement must be comparable to the initial announcement.

<sup>(101)</sup> Case IV/M.116 — Kelt/American Express, of 28 August 1991.

<sup>(102)</sup> This paragraph does not prejudice the assessment whether the modification requires submitting additional information to the Commission under Article 5(3) of Regulation (EC) No 802/2004.

<sup>(103)</sup> See Case COMP/M.4381 — JCI/VB/FIAMM of 10 May 2007, paragraph 15, where only one party did no longer wished to implement an agreement, whereas the other party still considered the agreement to be binding and enforceable.

- Implemented concentrations: In case the concentration has been implemented prior to a Commission decision, the parties will be required to show that the situation prevailing before the implementation of the concentration has been re-established.

(121) It is for the parties to submit the necessary documentation to meet these requirements in due time.

#### VII. CHANGES OF TRANSACTIONS AFTER A COMMISSION AUTHORISATION DECISION

(122) In some cases, parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the Commission. The question arises whether the Commission's authorisation decision still covers the changed structure of the transaction.

(123) Broadly speaking, if, before implementation of the authorised concentration, the transactional structure is changed from an acquisition of control, falling under Article 3(1)(b), to a merger according to Article 3(1)(a), or *vice versa*, then the change in the transactional structure is considered a different concentration under the Merger Regulation and a new notification is required<sup>(104)</sup>. However, less significant modifications of the transaction, for example minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price in the case of public bids or changes in the corporate structure by which the transaction is implemented without effects on the relevant control situation under the Merger Regulation, are considered as being covered by the Commission's authorisation decision.

### C. COMMUNITY DIMENSION

#### I. THRESHOLDS

(124) A two fold test defines the operations to which the Merger Regulation applies. The first test is that the operation must be a concentration within the meaning of Article 3. The second comprises the turnover thresholds contained in Article 1, designed to identify those operations which have an impact upon the Community and can be deemed to be of 'Community dimension'. Turnover is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources.

(125) Two sets of thresholds are set out in Article 1 to establish whether the operation has a Community dimension. Article 1(2) establishes three different criteria: The worldwide turnover threshold is intended to measure the overall dimension of the undertakings concerned; the Community turnover threshold seek to determine whether the concentration involves a minimum level of activities in the Community; and the two-thirds rule aims to exclude purely domestic transactions from Community jurisdiction.

(126) This second set of thresholds, contained in Article 1(3), is designed to tackle those concentrations which fall short of achieving Community dimension under Article 1(2), but would have a substantial impact in at least three Member States leading to multiple notifications under national competition rules of those Member States. For this purpose, Article 1(3) provides for lower turnover thresholds, both worldwide and Community-wide, and for a minimum level of activities of the undertakings concerned, jointly and individually, in at least three Member States. Similarly to Article 1(2), Article 1(3) also contains a two-thirds rule excluding predominantly domestic concentrations<sup>(105)</sup>.

<sup>(104)</sup> See cases COMP/M.2706 — Carnival Corporation/P&O Princess of 11 April 2002 and COMP/M.3071 — Carnival Corporation/P&O Princess of 10 February 2003. In such circumstances, the identity of the notifying parties changes, as both parties to a merger must notify, whereas only the party acquiring control must do so. However, if the parties implement an acquisition of control over a target company and only *subsequently* decide to merge with the newly acquired subsidiary, this would be regarded as an internal restructuring that does not give rise to a change in control and would thus not fall within the terms of Article 3 of the Merger Regulation.

<sup>(105)</sup> A concentration is further deemed to have a Community dimension if it is referred to the Commission under Article 4(5) of the Merger Regulation. These cases are dealt with in the Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2.

- (127) The thresholds as such are designed to govern jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation. In so doing they include turnover derived from, and thus the resources devoted to, all areas of activity of the parties, and not just those directly involved in the concentration. The thresholds are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria. They pursue the objective to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable.
- (128) Whereas Article 1 sets out the numerical thresholds to establish jurisdiction, the purpose of Article 5 is to explain how turnover should be calculated to ensure that the resulting figures are a true representation of economic reality.

## II. NOTION OF UNDERTAKING CONCERNED

### 1. General

- (129) From the point of view of determining jurisdiction, the undertakings concerned are those participating in a concentration, i.e. a merger or an acquisition of control as foreseen in Article 3(1). The individual and aggregate turnover of those undertakings will be decisive in determining whether the thresholds are met.
- (130) Once the undertakings concerned have been identified in a given transaction, their turnover for the purposes of determining jurisdiction is to be calculated according to the rules set out in Article 5. Article 5(4) sets out detailed criteria to identify undertakings whose turnover may be attributed to the undertaking concerned because of certain direct or indirect links with the latter. The legislator's intention was to lay down concrete rules which, seen together, can be taken to establish the notion of a 'group' for the purposes of the turnover thresholds in the Merger Regulation. The term 'group' will be used in the following sections exclusively to refer to the collection of undertakings whose relations with an undertaking concerned come within the terms of one or more of the sub-paragraphs of Article 5(4) of the Merger Regulation.
- (131) It is important, when referring to the various undertakings which may be involved in a procedure, not to confuse the concept of 'undertakings concerned' under Articles 1 and 5 with the terminology used elsewhere in the Merger Regulation and in Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter referred to as the 'Implementing Regulation')<sup>(106)</sup> referring to the various undertakings which may be involved in a procedure. This terminology refers to the notifying parties, other involved parties, third parties and parties who may be subject to fines or periodic penalty payments, and they are defined in Chapter IV of the Implementing Regulation, along with their respective rights and duties.

### 2. Mergers

- (132) In a merger the undertakings concerned are each of the merging entities.

### 3. Acquisition of control

- (133) In the remaining cases, it is the concept of 'acquiring control' that will determine which are the undertakings concerned. On the acquiring side, there can be one or more undertakings acquiring sole or joint control. On the acquired side, there can be one or more undertakings as a whole or parts thereof. As a general rule, each of these undertakings will be an undertaking concerned within the meaning of the Merger Regulation.

#### *Acquisition of sole control*

- (134) Acquisition of sole control of the whole undertaking is the most straightforward case of acquisition of control. The undertakings concerned will be the acquiring undertaking and the target undertaking.

<sup>(106)</sup> OJ L 133, 30.4.2004, p. 1.



- (135) Where the target undertaking is acquired by a group through one of its subsidiaries, the undertakings concerned are the target undertaking and the acquiring subsidiary if this is not a mere acquisition vehicle. However, even though the subsidiary is normally the undertaking concerned for the purpose of calculating turnover, the turnover of all undertakings with which the undertaking concerned has the links as specified in Article 5(4) shall be included in the threshold calculations. In this respect, the group is considered to be a single economic unit and the different companies belonging to the same group cannot be considered as different undertakings concerned for jurisdictional purposes under the Merger Regulation. The actual notification can be made by the subsidiary concerned or by its parent company.

*Acquisition of parts of an undertaking and staggered operations — Article 5(2)*

- (136) The first subparagraph of Article 5(2) of the Merger Regulation provides that when the operation concerns the acquisition of parts of one or more undertakings, only those parts which are the subject of the transaction shall be taken into account with regard to the seller. The possible impact of the transaction on the market will depend only on the combination of the economic and financial resources that are the subject of the transaction with those of the acquirer and not on the remaining business of the seller. In this case, the undertakings concerned will be the acquirer(s) and the acquired part(s) of the target undertaking, but the remaining businesses of the seller will be ignored.

- (137) The second subparagraph of Article 5(2) includes a special provision on staggered operations or follow-up deals. The previous concentrations (within two years) involving the same parties become (re)notifiable with the most recent transaction, provided this constitutes a concentration, if the thresholds are met whether for one or more of the transactions taken in isolation or cumulatively. In this case, the undertakings concerned are the acquirer(s) and the different acquired part(s) of the target company taken as a whole.

*Change from joint to sole control*

- (138) If the acquisition of control occurs by way of a change from joint control to sole control, one shareholder normally acquires the stake previously held by the other shareholder(s). In this situation, the undertakings concerned are the acquiring shareholder and the joint venture. As is the case for any other seller, the 'exiting' shareholder is not an undertaking concerned <sup>(107)</sup>.

*Acquisition of joint control*

- (139) In the case of acquisition of joint control of a newly-created undertaking, the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture (which, as it does not yet exist, cannot be considered to be an undertaking concerned and moreover, as yet, has no turnover of its own). The same rule applies where one undertaking contributes a pre-existing subsidiary or a business (over which it previously exercised sole control) to a newly created joint venture. In these circumstances, each of the jointly-controlling undertakings is considered an undertaking concerned whereas any company or business contributed to the joint venture is not an undertaking concerned, and its turnover is part of the turnover of the initial parent company.
- (140) The situation is different if undertakings newly acquire joint control of a pre-existing undertaking or business. The undertakings concerned are each of the undertakings acquiring joint control on the one hand, and the pre-existing acquired undertaking or business on the other.
- (141) The acquisition of a company with a view to immediately split up the assets is, as explained above in paragraph 32, mostly not considered as an acquisition of joint control of the entire target company, but as the acquisition of sole control by each of the ultimate acquirers of the respective parts of the target company. In line with the considerations for the acquisition of sole control, undertakings concerned are the acquiring undertakings and the acquired parts in each of the transactions.

<sup>(107)</sup> Case IV/M.023 — ICI/Tioxide, of 28 November 1990.



*Changes of controlling shareholders in cases of joint control of an existing joint venture*

(142) A notifiable concentration may arise, as explained above, where a change in the quality of control occurs in a joint control structure due to the entrance of new controlling shareholders, irrespective of whether or not they replace existing controlling shareholders.

(143) In the case where one or more shareholders acquire control, either by entry or by substitution of one or more shareholders, in a situation of joint control both before and after the operation, the undertakings concerned are the shareholders (both existing and new) who exercise joint control and the joint venture itself<sup>(108)</sup>. On the one hand, similar to the acquisition of joint control of an existing company, the joint venture itself can be considered as an undertaking concerned as it is an already pre-existing undertaking. On the other hand, as set out above, the entry of a new shareholder is not only in itself a new acquisition of control, but also leads to a change in the quality of control for the remaining controlling shareholders as the quality of control of the joint venture is determined by the identity and composition of the controlling shareholders and therefore also by the relationship between them. Furthermore, the Merger Regulation considers a joint venture as a combination of the economic resources of the parent companies, together with the joint venture if it already generates turnover on the market. For these reasons, the newly entering controlling shareholders are undertakings concerned alongside with the remaining controlling shareholders. Due to the change of the quality in control, all of them are considered to undertake an acquisition of control.

(144) As Article 4(2) first sentence of the Merger Regulation foresees that all acquisitions of joint control shall be notified jointly by the undertakings acquiring joint control, existing and new shareholders in principle have to notify concentrations arising from such changes in joint control scenarios jointly.

*Acquisition of control by a joint venture*

(145) In transactions where a joint venture acquires control of another company, the question arises whether or not the joint venture should be regarded as the undertaking concerned (the turnover of which would include the turnover of its parent companies), or whether each of its parent companies should individually be regarded as undertakings concerned. This question may be decisive for jurisdictional purposes<sup>(109)</sup>. Whereas, in principle, the undertaking concerned is the joint venture as the direct participant in the acquisition of control, there may be circumstances where companies set up 'shell' companies and the parent companies will individually be considered as undertakings concerned. In this type of situation, the Commission will look at the economic reality of the operation to determine which are the undertakings concerned.

(146) Where the acquisition is carried out by a full-function joint venture, with the features set out above, and already operates on the same market, the Commission will normally consider the joint venture itself and the target undertaking to be the undertakings concerned (and not the joint venture's parent companies).

<sup>(108)</sup> See Case IV/M.376 — Synthomer/Yule Catto, of 22 October 1993.

<sup>(109)</sup> Assume the following scenario: The target company has an aggregate Community turnover of less than EUR 250 million, and the acquiring parties are two (or more) undertakings, each with a Community turnover exceeding EUR 250 million. If the target is acquired by a 'shell' company set up between the acquiring undertakings, there would only be one undertaking (the 'shell' company) with a Community turnover exceeding EUR 250 million, and thus one of the cumulative threshold conditions for Community jurisdiction, namely, the existence of at least two undertakings with a Community turnover exceeding EUR 250 million, would not be fulfilled. Conversely, if instead of acting through a 'shell' company, the acquiring undertakings acquire the target undertaking themselves, then the turnover threshold would be met and the Merger Regulation would apply to this transaction. The same considerations apply to the national turnover thresholds referred to in Article 1(3).

- (147) Conversely, where the joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company or has not yet started to operate, where an existing joint venture has no full-function character as referred to above or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the operation. In those cases, the parent companies are regarded as undertakings concerned.

*Break-up of joint ventures and exchange of assets*

- (148) When two (or more) undertakings break up a joint venture and split the assets (constituting businesses) between them, this will normally be considered as more than one acquisition of control, as explained above in paragraph 41. For example, undertakings A and B form a joint venture and subsequently split it up, in particular with a new asset configuration. The break-up of the joint venture involves a change from joint control over the joint venture's entire assets to sole control over the divided assets by each of the acquiring undertakings <sup>(110)</sup>.

- (149) For each break-up operation, and in line with the consideration to the acquisition of sole control, the undertakings concerned will be, on the one hand, the acquiring party and, on the other, the assets that this undertaking will acquire.

- (150) Similar to the break-up scenario is the situation where two (or more) companies exchange assets constituting a business on each side. In this case, each acquisition of control is considered an independent acquisition of sole control. The undertakings concerned will be, for each transaction, the acquiring companies and the acquired undertaking or assets.

*Acquisitions of control by natural persons*

- (151) Control may also be acquired by natural persons, within the meaning of Article 3 of the Merger Regulation, if those persons themselves carry out further economic activities (and are therefore classified as economic undertakings in their own right) or if they control one or more other economic undertakings. In such a situation, the undertakings concerned are the target undertaking and the individual acquirer (with the turnover of the undertaking(s) controlled by that natural person being included in the calculation of the natural person's turnover to the extent that the terms of Article 5(4) are satisfied) <sup>(111)</sup>.

- (152) An acquisition of control of an undertaking by its managers is also an acquisition by natural persons, and paragraph 151 above is also relevant. However, the managers may pool their interests through a 'vehicle company', so that it acts with a single voice and also to facilitate decision-making. Such a vehicle company may be, but is not necessarily, an undertaking concerned. The general guidance given above in paragraphs 145-147 on acquisitions of control by a joint venture also applies here.

<sup>(110)</sup> See parallel cases COMP/M.3293 — Shell/BEB and COMP/M.3294 — ExxonMobil/BEB of 20 November 2003; Case IV/M.197 — Solvay/Laporte of 30 April 1992.

<sup>(111)</sup> See Case IV/M.082 — Asko/Jacobs/Adia, of 16 May 1991 where a private individual with other economic activities acquired joint control of an undertaking and was considered an undertaking concerned.

*Acquisition of control by a State-owned undertaking*

- (153) As described above, a merger or an acquisition of control arising between two undertakings owned by the same State (or the same public body) may constitute a concentration if the undertakings were formerly part of different economic units having an independent power of decision. If this is the case, both of them will qualify as undertakings concerned although both are owned by the same State <sup>(112)</sup>.

III. RELEVANT DATE FOR ESTABLISHING JURISDICTION

- (154) The legal situation for establishing the Commission's jurisdiction has been changed under the recast Merger Regulation. Under the former Merger Regulation, the relevant date was the triggering event for a notification according to Article 4(1) of this Regulation — the conclusion of a final agreement or the announcement of a public bid or the acquisition of a controlling interest — or, at the latest, the time when the parties were obliged to notify (i.e. one week after a triggering event for a notification) <sup>(113)</sup>.
- (155) Under the recast Merger Regulation, there is no longer an obligation for the parties to notify within a certain time-frame (provided the parties do not implement the planned concentration before notification). Moreover, according to Article 4(1) second subparagraph, the undertakings concerned can already notify the transaction on the basis of a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid. At the time of the notification at the latest, the Commission — as well as national competition authorities — must be able to determine their jurisdiction. Article 4(1) subparagraph 1 of the Merger Regulation provides, generally, that concentrations shall be notified following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The dates of these events are therefore still decisive under the recast Merger Regulation in order to determine the relevant date for establishing jurisdiction, if a notification does not occur before such events on the basis of a good faith intention or an announced intention <sup>(114)</sup>.
- (156) The relevant date for establishing Community jurisdiction over a concentration is therefore the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier <sup>(115)</sup>. Regarding the date of notification, a notification to either the Commission or to a Member State authority is relevant. The relevant date needs in particular to be considered for the question whether acquisitions or divestitures which occur after the period covered by the relevant account, but before the relevant date, require adaptations to those accounts according to the principles set out in paragraphs 172 and 173.

IV. TURNOVER

1. The concept of turnover

- (157) The concept of turnover as used in Article 5 of the Merger Regulation comprises 'the amounts derived [...] from the sale of products and the provision of services'. Those amounts generally appear in company accounts under the heading 'sales'. In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.

<sup>(112)</sup> See recital 22 of the Merger Regulation, directly related to the calculation of turnover of a state-owned undertaking concerned in the context of Article 5(4).

<sup>(113)</sup> See Case COMP/M.1741 — MCI Worldcom/Sprint of 28 June 2000.

<sup>(114)</sup> The alternative possibility that turnover should be defined on the latest date when the relevant parties are obliged to notify (seven days after the 'triggering event' under the former Merger Regulation) cannot be retained under the recast merger Regulation, because there is no deadline for notification.

<sup>(115)</sup> See also opinion of AG Kokott in Case C-202/06 *Cementbouw v Commission* of 26 April 2007, paragraph 46 (not yet reported). Only the recast merger Regulation has provided for the possibility to take into account the first notification if this is earlier than the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest, see fn. 35 of the opinion.

(158) In the case of services, the method of calculating turnover in general does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year.

(159) In other areas, this general principle may have to be adapted to the specific conditions of the service provided. In certain sectors of activity (such as package holidays and advertising), the service may be sold through intermediaries <sup>(116)</sup>. Even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists solely of the amount of its commission. For package holidays, the entire amount paid by the final customer is then allocated to the tour operator which uses the travel agency as distribution network. In the case of advertising, only the amounts received (without the commission) are considered to constitute the turnover of the TV channel or the magazine since media agencies, as intermediaries, do not constitute the distribution channel for the sellers of advertising space, but are chosen by the customers, i.e. those undertakings wishing to place advertising.

(160) The examples mentioned show that, due to the diversity of services, many different situations may arise and the underlying legal and economic relations have to be carefully analysed. Similarly, specific situations for the calculation of turnover may arise in the areas of credit, financial services and insurance. These issues will be dealt with in Section VI.

## 2. Ordinary activities

(161) Article 5(1) provides that the amounts to be included in the calculation of turnover should correspond to the 'ordinary activities' of the undertakings concerned. This is the turnover achieved from the sale of products or the provision of services in the normal course of its business. It generally excludes those items which are listed under the headers 'financial income' or 'extraordinary income' in the company's accounts. Such extraordinary income may be derived from the sale of businesses or of fixed assets. However, company accounts do not necessarily delineate the revenues derived from ordinary activities in the way required for the purposes of turnover calculation under the Merger Regulation. In some cases, the qualification of the items in the accounts may have to be adapted to the requirements of the Merger Regulation <sup>(117)</sup>.

(162) The revenues do not necessarily have to be derived from the customer of the products or services. With regard to aid granted to undertakings by public bodies, any aid has to be included in the calculation of turnover if the undertaking is itself the recipient of the aid and if the aid is directly linked to the sale of products and the provision of services by the undertaking. The aid is therefore an income of the undertaking from the sale of products or provision of services in addition to the price paid by the consumer <sup>(118)</sup>.

(163) Specific issues have arisen for the calculation of turnover of a business unit which only had internal revenues in the past. This may in particular apply for transactions involving the outsourcing of services by transfer of a business unit. If such a transaction constitutes a concentration on the basis of the considerations outlined in paragraphs 25 ff. of this Notice, the Commission's practice is that the turnover should normally be calculated on the basis of the previously internal turnover or of publicly quoted

<sup>(116)</sup> An undertaking will normally not act as an intermediary if it sells products via a commercial act which involves a transfer of ownership, Judgment in Case T-417/05, *Endesa v Commission*, paragraph 213, [2006] ECR II-2533.

<sup>(117)</sup> In Case IV/M.126 — *Accor/Wagons-Lits*, of 28 April 1992, the Commission decided to consider certain income from car-hire activities as revenues from ordinary activities although they were included as 'other operating proceeds' in Wagons-Lits' profit and loss account.

<sup>(118)</sup> See Case IV/M.156 — *Cereol/Continentale Italiana* of 27 November 1991. In this case, the Commission excluded Community aid from the calculation of turnover because the aid was not intended to support the sale of products manufactured by one of the undertakings involved in the merger, but the producers of the raw materials (grain) used by the undertaking, which specialised in the crushing of grain.

prices where such prices exist (e.g. in the oil industry). Where the previously internal turnover does not appear to correspond to a market valuation of the activities in question (and, thus, to the expected future turnover on the market), the forecast revenues to be received on the basis of an agreement with the former parent may be a suitable proxy.

### 3. 'Net' turnover

- (164) The turnover to be taken into account is 'net' turnover, after deduction of a number of components specified in the Regulation. The aim is to adjust turnover in such a way as to enable it to reflect the real economic strength of the undertaking.

#### 3.1. *Deduction of rebates and taxes*

- (165) Article 5(1) provides for the 'deduction of sales rebates and of value added tax and other taxes directly related to turnover'. 'Sales rebates' mean all rebates or discounts which are granted by the undertakings to their customers and which have a direct influence on the amounts of sales.
- (166) As regards the deduction of taxes, the Merger Regulation refers to VAT and 'other taxes directly related to turnover'. The concept of 'taxes directly related to turnover' refers to indirect taxation linked to turnover, such as, for example, taxes on alcoholic beverages or cigarettes.

#### 3.2. *The treatment of 'internal' turnover*

- (167) The first subparagraph of Article 5(1) states that 'the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4', i.e. the group to which the undertaking concerned belongs. The aim is to exclude the proceeds of business dealings within a group so as to take account of the real economic weight of each entity in the form of market turnover. Thus, the 'amounts' taken into account by the Merger Regulation reflect only the transactions which take place between the group of undertakings on the one hand and third parties on the other.
- (168) Article 5(5)(a) of the Merger Regulation applies the principle that double counting is to be avoided specifically to the situation where two or more undertakings concerned in a concentration jointly have the rights or powers listed in Article 5(4)(b) in another company. According to this provision, the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned (or any other undertaking connected with any one of them in the sense of Article 5(4)) should be excluded. As regards joint ventures between undertakings concerned and third parties, insofar as their turnover is taken into account according to Article 5(4)(b) as set out in paragraph 181 below, the turnover generated by sales between the joint venture and the undertaking concerned (as well as undertakings linked to the undertaking concerned in accordance with the criteria set out in Article 5(4)) is not taken into account according to Article 5(1).

### 4. Turnover calculation and financial accounts

#### 4.1. *The general rule*

- (169) The Commission seeks to base itself upon the most accurate and reliable figures available. Generally, the Commission will refer to accounts which relate to the closest financial year to the date of the transaction and which are audited under the standard applicable to the undertaking in question and compulsory for the relevant financial year<sup>(119)</sup>. An adjustment of the audited figures should only take place if this is required by the provisions of the Merger Regulation, including the cases explained in more detail in paragraph 172.

<sup>(119)</sup> See Case COMP/M.3986 — Gas Natural/Endesa of 15 November 2005; confirmed by Judgment in Case T-417/05, *Endesa v Commission*, paragraphs 128, 131, [2006] ECR II-2533.

(170) The Commission is reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances <sup>(120)</sup>. Where a concentration takes place within the first months of the year and audited accounts are not yet available for the most recent financial year, the figures to be taken into account are those relating to the previous year. Where there is a major divergence between the two sets of accounts, due to significant and permanent changes in the undertaking concerned, and, in particular, when the final draft figures for the most recent year have been approved by the board of management, the Commission may decide to take those figures into account.

(171) Despite the general rule, in cases where major differences between the Community's accounting standards and those of a non-member country are observed, the Commission may consider it necessary to restate these accounts in accordance with Community standards in respect of turnover.

#### 4.2. *Adjustments after the date of the last audited accounts*

(172) Notwithstanding the foregoing paragraphs, an adjustment must always be made to account for permanent changes in the economic reality of the undertakings concerned, such as acquisitions or divestments which are not or not fully reflected in the audited accounts. Such changes have to be taken into account in order to identify the true resources being concentrated and to better reflect the economic situation of the undertakings concerned. Those adjustments are only selective in nature and do not endanger the principle that there should be a simple and objective mechanism to determine the Commission's jurisdiction as they do not require a complete revision of the audited accounts <sup>(121)</sup>. First, this applies to acquisitions, divestments or closure of part of its business subsequent to the date of the audited accounts. This is relevant if a company closes a transaction concerning the divestment and closure of part of its business at any time before the relevant date for establishing jurisdiction (see paragraph 154) or where such a divestment or closure of a business is a pre-condition for the operation <sup>(122)</sup>. In this case, the turnover to be attributed to that part of the business must be subtracted from the turnover of the notifying party as shown in its last audited accounts. If an agreement for the sale of part of its business is signed, but the closing of the sale (in other words, its legal implementation and the transfer of the legal title to the shares or assets acquired) has not yet occurred, such a change is not taken into account <sup>(123)</sup>, unless the sale is a pre-condition for the notified operation. Conversely, the turnover of those businesses whose acquisition has been closed subsequent to the preparation of the most recent audited accounts, but before the relevant date for establishing jurisdiction, must be added to a company's turnover for notification purposes.

(173) Second, an adjustment may also be necessary for acquisitions, divestments or closure of part of the business which have taken place during the financial year for which the audited accounts are drawn up. If acquisitions, divestments or closure of part of the business within this period are made, the changes in the economic resources may only partly be reflected in the audited accounts of the undertaking concerned. As the turnover of the businesses acquired may be included in the accounts only from the time of their acquisition, this may not reflect the full annual turnover of the acquired business. Conversely, the turnover of the businesses divested or closed may still be included in the audited accounts up to the point in time of their actual divestment or closure. In these cases, adjustments have to be made to remove the turnover generated by the divested or closed businesses from the audited accounts until the time of de-consolidation and to add the turnover which the acquired businesses have generated in the year until the time they have been consolidated in the accounts. As a result, the turnover of the businesses divested or closed must be excluded in full and the full annual turnover of the businesses acquired must be included.

<sup>(120)</sup> See Case COMP/M.3986 — Gas Natural/Endesa of 15 November 2005; confirmed by Judgment in Case T-417/05, *Endesa v Commission*, paragraphs 176, 179, [2006] ECR II-2533.

<sup>(121)</sup> Judgment in Case T-417/05, *Endesa v Commission*, paragraph 209, [2006] ECR II-2533.

<sup>(122)</sup> See Judgment in Case T-3/93, *Air France v Commission*, [1994] ECR II-121 paragraphs 100 et seq. in relation to Case IV/M.278 — *British Airways/Dan Air*; Case IV/M.588 — *Ingersoll-Rand/Clark Equipment*.

<sup>(123)</sup> Case IV/M.632 — *Rhône-Poulenc Rorer/Fisons* of 21 September 1995; Case COMP/M.1741 — *MCI Worldcom/Sprint* of 28 June 2000.

- (174) Other factors that may affect turnover on a temporary basis such as a decrease in orders for the product or a slow-down in the production process within the period prior to the transaction will be ignored for the purposes of calculating turnover. No adjustment to the definitive accounts will be made to incorporate them.

## **5. Attribution of turnover under Article 5(4)**

### **5.1. Identification of undertakings whose turnover is taken into account**

- (175) When an undertaking concerned by a concentration belongs to a group, not only the turnover of the undertaking concerned is considered, but the Merger Regulation requires to also take into account the turnover of those undertakings with which the undertaking concerned has links consisting in the rights or powers listed in Article 5(4) in order to determine whether the thresholds contained in Article 1 of the Merger Regulation are met. The aim is again to capture the total volume of the economic resources that are being combined through the operation irrespective of whether the economic activities are carried out directly by the undertaking concerned or whether they are undertaken indirectly via undertakings with which the undertaking concerned possesses the links described in Article 5(4).

- (176) The Merger Regulation does not delineate the concept of a group in a single abstract definition, but sets out in Article 5(4)(b) certain rights or powers. If an undertaking concerned directly or indirectly has such links with other companies, those are to be regarded as part of its group for purposes of turnover calculation under the Merger Regulation.

- (177) Article 5(4) of the Merger Regulation provides the following:

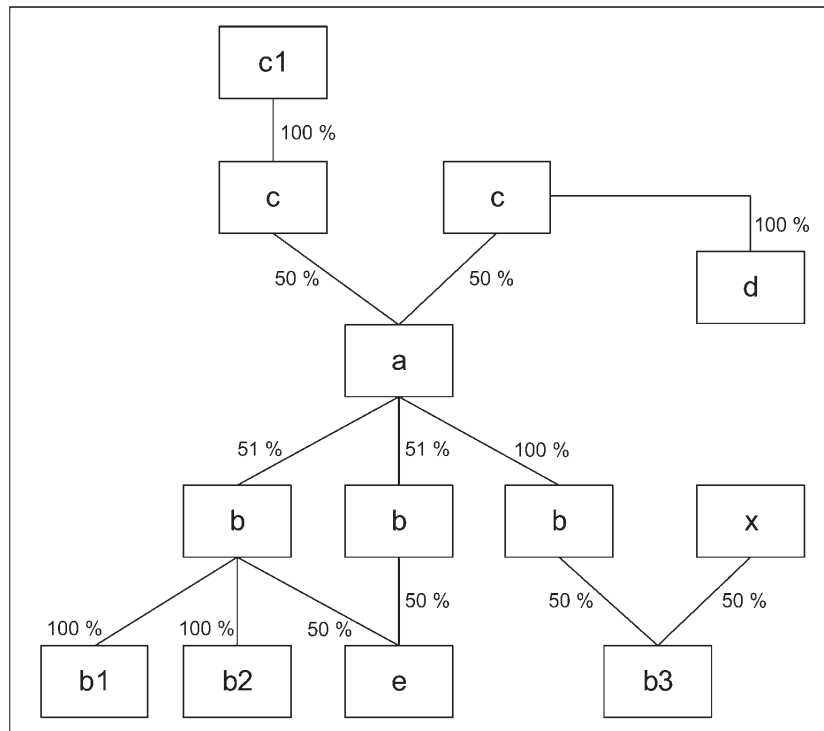
‘Without prejudice to paragraph 2 [acquisitions of parts], the aggregate turnover of an undertaking concerned within the meaning of Article 1(2) and (3) shall be calculated by adding together the respective turnovers of the following:

- (a) the undertaking concerned;
- (b) those undertakings in which the undertaking concerned directly or indirectly:
  - (i) owns more than half the capital or business assets, or
  - (ii) has the power to exercise more than half the voting rights, or
  - (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
  - (iv) has the right to manage the undertaking’s affairs;
- (c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);
- (d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
- (e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).’

An undertaking which has in another undertaking the rights and powers mentioned in Article 5(4)(b) will be referred to as the ‘parent’ of the latter in the present section of this Notice dealing with the calculation of turnover, whereas the latter is referred to as ‘subsidiary’ of the former. In short, Article 5(4) therefore provides that the turnover of the undertaking concerned by the concentration (point (a)) should include its subsidiaries (point (b)), its parent companies (point (c)), the other subsidiaries of its parent undertakings (point (d)) and any other subsidiary jointly held by two or more of the undertakings identified under (a)-(d) (point (e)).

(178) A graphic example is as follows:

The undertaking concerned and its group:



- a: The undertaking concerned <sup>(124)</sup>
- b: Its subsidiaries, jointly held companies together with third parties (b3) and their own subsidiaries (b1 and b2)
- c: Its parent companies and their own parent companies (c1)
- d: Other subsidiaries of the parent companies of the undertaking concerned
- e: Companies jointly held by two (or more) companies of the group
- x: Third party

Note: the letters a — e correspond to the relevant points of Article 5(4). Percentages set out in the graph relate to the percentage of voting rights held by the respective parent company.

(179) The rights or powers listed in Article 5(4)(b)(i)-(iii) can be identified in a rather straightforward way as they refer to quantitative thresholds. These thresholds are fulfilled if the undertaking concerned owns more than half of the capital or business assets of other undertakings, has more than half of the voting rights or has legally the power to appoint more than half of the board members in other undertakings. However, the thresholds are also met if the undertaking concerned *de facto* has the power to exercise more than half of the voting rights in the shareholders' assembly or the power to appoint more than half of the board members in other undertakings <sup>(125)</sup>.

<sup>(124)</sup> For the graph it is assumed that the joint venture itself is the undertaking concerned according to the criteria set out in paragraph 146 (acquisition by a full-function JV operating on the same market).

<sup>(125)</sup> Case IV/M.187 — Ifint/Exor of 2 March 1992; Case IV/M.062 — Eridania/ISI of 30 July 1991.



- (180) The provision contained in Article 5(4)(b)(iv) refers to the right to manage the undertaking's affairs. Such a right to manage exists under company law in particular on the basis of organisational contracts such as a 'Beherrschungsvertrag' under German law, on the basis of business lease agreements or on the basis of the organisation structure for the general partner in a limited partnership <sup>(126)</sup>. However, the 'right to manage' may also result from the holding of voting rights (alone or in combination with contractual arrangements, such as a shareholders' agreement) which enable, on a stable, *de jure* basis, to determine the strategic behaviour of an undertaking.
- (181) The right to manage also covers situations in which the undertaking concerned jointly has the right to manage an undertaking's affairs together with third parties <sup>(127)</sup>. The underlying consideration is that the undertakings exercising joint control have jointly the right to manage the controlled undertakings' affairs even if each of them individually may have those rights only in a negative sense, i.e. in the form of veto rights. In the example, the undertaking (b3) which is jointly controlled by the undertaking concerned (a) and a third party (x) is taken into account as both (a) and (x) have veto rights in (b3) on the basis of their equal shareholding in (b3) <sup>(128)</sup>. Under Article 5(4)(b)(iv) the Commission only takes into account those joint ventures in which the undertaking concerned and third parties have *de jure* rights that give rise to a clear-cut right to manage. The inclusion of joint ventures is therefore limited to situations where the undertaking concerned and third parties have a joint right to manage on the basis of an agreement, e.g. a shareholders' agreement, or where the undertaking concerned and a third party have an equality of voting rights to the effect that they have the right to appoint an equal number of members to the decision-making bodies of the joint venture.
- (182) In the same way, where two or more companies jointly control the undertaking concerned in the sense that the agreement of each and all of them is needed in order to manage the undertaking affairs, the turnover of all of them is included. In the example, the two parent companies (c) of the undertaking concerned (a) would be taken into account as well as their own parent companies (c1 in the example). This interpretation results from the referral from Article 5(4)(c), dealing with this case, to Article 5(4)(b), which is applicable to jointly controlled companies as set out in the preceding paragraph.
- (183) When any of the companies identified on the basis of Article 5(4) also has links as defined in Article 5(4) with other undertakings, these should also be brought into the calculation. In the example, one of the subsidiaries of the undertaking concerned a (called b) has in turn its own subsidiaries b1 and b2 and one of the parent companies (called c) has its own subsidiary (d).
- (184) Article 5(4) sets out specific criteria for identifying undertakings whose turnover can be attributed to the undertaking concerned. These criteria, including the 'right to manage the undertaking's affairs', are not coextensive with the notion of 'control' under Article 3(2). There are significant differences between Articles 3 and 5, as those provisions fulfil different roles. The differences are most apparent in the field of *de facto* control. Whereas under Article 3(2) even a situation of economic dependence may lead to control on a *de facto* basis (see in detail above), a solely controlled subsidiary is only taken into account on a *de facto* basis under Article 5(4)(b) if it is clearly demonstrated that the undertaking concerned has the power to exercise more than half of the voting rights or to appoint more than half of the board members. Concerning joint control scenarios, Article 5(4)(b)(iv) covers those scenarios where the controlling undertakings jointly have a right to manage on the basis of individual veto rights. However, Article 5(4) would not cover situations where joint control occurs on a *de facto* basis due to strong common interests between different minority shareholders of the joint venture company on the basis of shareholders' attendance. The difference is reflected in the fact that Article 5(4)(b)(iv) refers to the *right* to manage, and not a *power* (as in subparagraph (b)(ii) and (iii)) and is explained by the need for precision and certainty in the criteria used for calculating turnover so that jurisdiction can be readily verified.

<sup>(126)</sup> Case IV/M.126 — Accor/WagonLits of 28 April 1992.

<sup>(127)</sup> Case COMP/M.1741 — MCI Worldcom/Sprint; Case IV/M. 187 — Ifint/Exor; Case IV/M.1046 — Ameritech/Tele Danmark.

<sup>(128)</sup> However, only half of the turnover generated by b3 is taken into account, see paragraph 187.

Under Article 3(3), however, the question whether a concentration arises can be much more comprehensively investigated. In addition, situations of negative sole control are only exceptionally covered (if the conditions of Article 5(4)(b)(i)-(iii) are met in the specific case); the 'right to manage' under Article 5(4)(b)(iv) does not cover negative control scenarios. Finally, Article 5(4)(b)(i), for example, covers situations where 'control' under Article 3(2) may not exist.

### 5.2. *Allocation of turnover of the undertakings identified*

- (185) In general, as long as the test under Article 5(4)(b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding which the undertaking concerned holds in the subsidiary. In the chart, the whole turnover of the subsidiaries called b of the undertaking concerned will be taken into account.
- (186) However, the Merger Regulation includes specific rules for joint ventures. Article 5(5)(b) provides that for joint ventures between two or more undertakings concerned, the turnover of the joint venture (as far as the turnover is generated from activities with third parties as set out above in paragraph 168) should be apportioned equally amongst the undertakings concerned, irrespective of their share of the capital or the voting rights.
- (187) The principle contained in Article 5(5)(b) is followed by analogy for the allocation of turnover for joint ventures between undertakings concerned and third parties if their turnover is taken into account according to Article 5(4)(b) as set out above in paragraph 181. The Commission's practice has been to allocate to the undertaking concerned the turnover of the joint venture on a per capita basis according to the number of undertakings exercising joint control. In the example, half of the turnover of b3 is taken into account.
- (188) The rules of Article 5(4) also have to be adapted in situations involving a change from joint to sole control in order to avoid double counting of the turnover of the joint venture. Even if the acquiring undertaking has rights or powers in the joint venture which satisfy the requirements of Article 5(4), the turnover of the acquiring shareholder has to be calculated without the turnover of the joint venture, and the turnover of the joint venture has to be taken without the turnover of the acquiring shareholder.

### 5.3. *Allocation of turnover in case of investment funds*

- (189) The investment company, as set out above in paragraph 15, normally acquires indirect control over portfolio companies held by an investment fund. In the same way, the investment company may be considered to indirectly have the powers and rights which are set out in Article 5(4)(b), in particular to indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies.
- (190) The same considerations, as set out above in the framework of Article 3 (paragraph 15), may also apply if an investment company sets up several investment funds with possibly different investors. Typically, on the basis of the organisational structure, in particular links between the investment company and the general partner(s) of the different funds organised as limited partnerships, or contractual arrangements, especially advisory agreements between the general partner or the investment fund and the investment company, the investment company will indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies or indirectly have one of the other powers or rights set out in Article 5(4)(b). In these circumstances, the investment company may exercise a common control structure over the different funds which it has set up and the common operation of the different funds by the investment company is often indicated by a common brand for the funds.

- (191) Consequently, such an organisation of the different funds by the investment company may lead to the result that the turnover of all portfolio companies held by different funds is taken into account for the purpose of assessing whether the turnover thresholds in Article 1 are met if the investment company acquires indirect control of a portfolio company via one of the funds.

#### 5.4. *Allocation of turnover for State-owned undertakings*

- (192) As regards the calculation of turnover of State-owned undertakings, Article 5(4) should be read in conjunction with recital 22 of the Merger Regulation. This recital declares that, in order to avoid discrimination between the public and private sectors, 'in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them' <sup>(129)</sup>.
- (193) This recital clarifies that Member States (or other public bodies) are not considered as 'undertakings' under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4). Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision.
- (194) Thus, where a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, several State-owned companies are under the same independent centre of commercial decision-making, then the turnover of those businesses should be considered part of the group of the undertaking concerned for the purposes of Article 5.

### V. GEOGRAPHIC ALLOCATION OF TURNOVER

- (195) The thresholds concerning Community-wide and Member State turnover in Article 1(2) and (3) aim to identify cases which have sufficient turnover within the Community in order to be of Community interest and which are primarily cross-border in nature. They require turnover to be allocated geographically to the Community and to individual Member States. Since audited accounts often do not provide a geographical breakdown as required by the Merger Regulation, the Commission will rely on the best figures available provided by the undertakings. The second subparagraph of Article 5(1) provides that the location of turnover is determined by the location of the customer at the time of the transaction:

'Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.'

#### *General rule*

- (196) The Merger Regulation does not discriminate between 'products sold' and 'services provided' for the geographic allocation of turnover. In both cases, the general rule is that turnover should be attributed to the place where the customer is located. The underlying principle is that turnover should be allocated to the location where competition with alternative suppliers takes place. This location is normally also the place where the characteristic action under the contract in question is to be performed, i.e. where the service is actually provided and the product is actually delivered. In the case of Internet transactions, it may be difficult for the undertakings to determine the location of the customer at the time when the contract is concluded via the Internet. If the product or the service itself is not supplied via the Internet, focusing on the place where the characteristic action under the contract is performed may avoid those difficulties. In the following, the sale of goods and the provision of services are dealt with separately as they exhibit certain different features in terms of allocation of turnover.

<sup>(129)</sup> See also Case IV/M.216 — CEA Industrie/France Telecom/Finmeccanica/SGS-Thomson, of 22 February 1993.

*Sale of goods*

(197) For the sale of goods, particular situations may arise in situations in which the place where the customer was located at the time of concluding the purchase agreement is different from the billing address and/or the place of delivery. In these situations, the place where the purchase agreement was entered into and the place of delivery are more important than the billing address. As the delivery is in general the characteristic action for the sale of goods, the place of delivery may even be prevailing over the place where the customer was located at the time when the purchase agreement was concluded. This will depend on whether the place of delivery is to be considered the place where competition takes place for the sale of goods or whether competition rather takes place at the residence of the customer. In the case of a sale of mobile goods, such as a motor car, to a final consumer, the place where the car is delivered to the customer is decisive even if the agreement was concluded via the phone or the Internet before.

(198) A specific situation arises in cases where a multinational corporation has a Community buying strategy and sources all its requirements for a good from one location. As a central purchasing organisation can take different forms, it is necessary to consider its concrete form since this may determine how to allocate the turnover. Where goods are purchased by and delivered to the central purchasing organisation and are subsequently re-distributed internally to different plants in a variety of Member States, turnover is allocated only to the Member State where the central purchasing organisation is located. In this case, competition takes place at the location of the central purchasing organisation and this is also the place where the characteristic action under the sales contract is performed. The situation is different in case of direct links between the seller and the different subsidiaries. This comprises the case where the central purchasing organisation concludes a mere framework agreement, but the individual orders are placed by and the products are directly delivered to the subsidiaries in different Member States as well as the case where the individual orders are placed via the central purchasing organisation, but the products are directly delivered to the subsidiaries. In both cases, turnover is to be allocated to the different Member States in which the subsidiaries are located, irrespective of whether the central purchasing organisation or the subsidiaries receive the bills and effect the payment. The reason is that in both cases competition with alternative suppliers takes place for the delivery of products to the different subsidiaries even though the contract is concluded centrally. In the first case, in addition, the subsidiaries actually decide upon the quantities to be delivered and on an element essential for competition on their own.

*Provision of services*

(199) For services, the Merger Regulation foresees that the place of their provision to the customer is relevant. Services containing cross-border elements can be considered to fall into three general categories. The first category comprises cases where the service provider travels, the second category cases where the customer travels. The third category comprises those cases where a service is provided without either the service provider or the customer having to travel. In the first two categories, the turnover generated is to be allocated to the place of destination of the traveller, i.e. the place where the service is actually provided to the customer. In the third category, the turnover is generally to be allocated to the location of the customer. For the central sourcing of services the above outlined principles for the central purchasing of goods apply in an analogous way.

(200) An example of the first category would be a situation where a non-European company provides special airplane maintenance services to a carrier in a Member State. In this case, the service provider travels to the Community where the service is actually provided and where also competition for this service takes place. If a European tourist hires a car or books a hotel directly in the United States, this falls into the second category as the service is provided outside the Community and also competition takes place between hotels and rental car companies at the location chosen. However, the case is different for package holidays. For this kind of holiday, the service starts with the sale of the package through a travel agent at the customer's location and competition for the sale of holidays through travel agents takes place locally, as with retail shopping, even though parts of the service may be provided in a number of distant locations. The case therefore falls into the third category and the turnover generated is to be allocated to the customer's location. The third category also comprises cases like the supply of software or the distribution of films which are made outside the Community, but are supplied to a customer in a Member State so that the service is actually provided to the customer within the Community.

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(201) Cases concerning the transport of goods are different as the customer, to whom those services are provided, does not travel, but the transport service is provided to the customer at its location. Those cases fall into the third category and the location of the customer is the relevant criterion for the allocation of the turnover.

(202) In telecom cases, the qualification of call termination services may raise problems. Although call termination would appear to fall into the third category, there are reasons to treat it differently. Call termination services are provided, e.g., in situations where a call, originating from a European operator, is being terminated in the United States. Although neither the European nor the US operator travels, the signal travels and the service is provided by the US network to the European operator in the United States. This is also the place where competition takes place (if any). The turnover is therefore to be considered as non-Community turnover <sup>(130)</sup>.

#### *Specific sectors*

(203) Certain sectors do, however, pose very particular problems with regard to the geographical allocation of turnover. These will be dealt with in Section VI below.

### VI. CONVERSION OF TURNOVER INTO EURO

(204) When converting turnover figures into euro great care should be taken with the exchange rate used. The annual turnover of a company should be converted at the average rate for the twelve months concerned. This average can be obtained via DG Competition's website <sup>(131)</sup>. The audited annual turnover figures should be converted as such and not be broken down into quarterly or monthly figures which would then be converted individually.

(205) When a company has sales in a range of currencies, the procedure is no different. The total turnover given in the consolidated audited accounts and in that company's reporting currency is converted into euros at the yearly average rate. Local currency sales should not be converted directly into euros since these figures are not from the consolidated audited accounts of the company.

### VII. PROVISIONS FOR CREDIT AND OTHER FINANCIAL INSTITUTIONS AND INSURANCE UNDERTAKINGS

#### 1. Scope of application

(206) Due to the specific nature of the sector, Article 5(3) contains specific rules for the calculation of turnover of credit and other financial institutions as well as insurance undertakings.

(207) In order to define the terms 'credit institutions and other financial institutions' under the Merger Regulation, the Commission in its practice has consistently adopted the definitions provided in the applicable European regulation in the banking sector. The Directive on the taking up and pursuit of the business of credit institutions foresees that <sup>(132)</sup>:

— 'Credit institution shall mean an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.'

— 'Financial institution shall mean an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Annex I.'

<sup>(130)</sup> This does not affect the turnover which the European telephony operator generates vis-à-vis its own customer with this call.

<sup>(131)</sup> See [http://europa.eu.int/comm/competition/mergers/others/exchange\\_rates.html#footnote\\_1](http://europa.eu.int/comm/competition/mergers/others/exchange_rates.html#footnote_1). The website makes reference to the European Central Bank's Monthly Bulletin.

<sup>(132)</sup> The definitions are to be found in Article 1 (1) and (5) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1).

(208) Financial institutions within the meaning of Article 5(3) of the Merger Regulation are, accordingly, on the one hand holding companies and, on the other hand, undertakings which perform on a regular basis as a principal activity one or more activities expressly mentioned in points 2 to 12 of the Annex of the banking Directive. These activities include:

- lending (comprising activities such as consumer credit, mortgage credit, factoring);
- financial leasing;
- money transmission services;
- issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts);
- guarantees and commitments;
- trading for own account or for account of customers in money market instruments, (cheques, bills, certificates of deposit, etc.), foreign exchange, financial futures and options, exchange and interest-rate instruments, transferable securities;
- participation in securities issues and the provision of services related to such issues;
- money broking;
- portfolio management and advice; and
- safekeeping and administration of securities.

## 2. Calculation of turnover

(209) Article 5(3) of the Merger Regulation sets out the methods of calculation of turnover for credit and other financial institutions and for insurance undertakings. In the following Section, some supplementary questions related to turnover calculation for the abovementioned types of undertakings are addressed.

### 2.1. *Calculation of turnover of credit and financial institutions (other than financial holding companies)*

#### 2.1.1. General

(210) There are normally no particular difficulties in applying the banking income criterion for the definition of the worldwide turnover to credit institutions and other kinds of financial institutions.

For the geographic allocation of turnover to the Community and to individual Member States, the specific provision of Article 5 (3)(a) second subparagraph applies. It specifies that the turnover is to be allocated to the branch or division established in the Community or in the Member State which receives this income.

#### 2.1.2. Turnover of leasing companies

(211) There is a fundamental distinction to be made between financial leases and operating leases. Basically, financial leases are made for longer periods than operating leases and ownership is generally transferred to the lessee at the end of the lease term by means of a purchase option included in the lease contract. Under an operating lease, on the contrary, ownership is not transferred to the lessee at the end of the lease term and the costs of maintenance, repair and insurance of the leased equipment are included in the lease payments. A financial lease therefore functions as a loan by the lessor to enable the lessee to purchase a given asset.

- (212) As already mentioned above, a company performing as its principal activity financial leasing is a financial institution within the meaning of Article 5(3)(a) and its turnover is to be calculated according to the specific rules set out in this provision. All payments on financial leasing contracts, except for the redemption part, are to be taken into account; a sale of future leasing payments at the beginning of the contract for re-financing purposes is not relevant.
- (213) Operational leasing activities are, however, not considered to be carried out by financial institutions, and therefore the general turnover calculation rules of Article 5(1) apply <sup>(133)</sup>.

## 2.2. *Insurance undertakings*

- (214) In order to measure the turnover of insurance undertakings, Article 5(3)(b) of the Merger Regulation provides that gross premiums written are taken into account. The gross premiums written are the sum of received premiums, including any received reinsurance premiums if the undertaking concerned has activities in the field of reinsurance. Outgoing or outward reinsurance premiums, i.e. all amounts paid and payable by the undertaking concerned to get reinsurance cover, are only costs related to the provision of insurance coverage and are not to be deducted from the gross premiums written.
- (215) The premiums to be taken into account are not only related to new insurance contracts made during the accounting year being considered but also to all premiums related to contracts made in previous years which remain in force during the period taken into consideration.
- (216) In order to constitute appropriate reserves allowing for the payment of claims, insurance undertakings, usually hold a portfolio of investments in shares, interest-bearing securities, land and property and other assets providing annual revenues. The annual revenues coming from those sources are not considered as turnover for insurance undertakings under Article 5(3)(b). However, a distinction has to be made between pure financial investments, which do not confer the rights and powers specified in Article 5(4) to the insurance undertaking in the undertakings in which the investment has been made, and those investments leading to the acquisition of an interest which meets the criteria specified in Article 5(4)(b). In the latter case, Article 5(4) of the Merger Regulation applies, and the turnover of this undertaking has to be added to the turnover of the insurance undertaking, as calculated according to Article 5(3)(b), for the determination of the thresholds laid down in the Merger Regulation <sup>(134)</sup>.

## 2.3. *Financial holding companies*

- (217) As an 'other financial institution' within the meaning of Article 5(3)(a) of the Merger Regulation, the turnover of a financial holding company has to be calculated according to the specific rules set out in this provision. However, in the same way as mentioned above for insurance undertakings, Article 5(4) applies to those participations which meet the criteria specified in Article 5(4)(b). Thus, the turnover of a financial holding is to be basically calculated according to Article 5(3), but it may be necessary to add turnover of undertakings falling within the categories set out in Article 5(4) ('Art. 5(4) companies') <sup>(135)</sup>.

<sup>(133)</sup> See Case IV/M.234 — GECC/Avis Lease, 15 July 1992.

<sup>(134)</sup> See Case IV/M.018 — AG/AMEV, of 21 November 1990.

<sup>(135)</sup> The principles for financial holding companies may to a certain extent be applied to fund management companies.

(218) In practice, the turnover of the financial holding company (non-consolidated) must first be taken into account. Then the turnover of the Art. 5(4) companies must be added, whilst taking care to deduct dividends and other income distributed by those companies to the financial holdings. The following provides an example for this kind of calculation:

(EUR million)	
1. Turnover related to financial activities (from non-consolidated P&L)	3 000
2. Turnover related to insurance Art. 5(4) companies (gross premiums written)	300
3. Turnover of industrial Article 5(4) companies	2 000
4. Deduct dividends and other income derived from Art. 5(4) companies 2 and 3	<200>
Total turnover financial holding and its group	5 100

(219) In such calculations different accounting rules may need to be taken into consideration. Whilst this consideration applies to any type of undertaking concerned by the Merger Regulation, it is particularly important in the case of financial holding companies<sup>(136)</sup> where the number and the diversity of enterprises controlled and the degree of control the holding holds on its subsidiaries, affiliated companies and other companies in which it has shareholding requires careful examination.

(220) Turnover calculation for financial holding companies as described above may in practice prove onerous. Therefore a strict and detailed application of this method will be necessary only in cases where it seems that the turnover of a financial holding company is likely to be close to the Merger Regulation thresholds; in other cases it may well be obvious that the turnover is far from the thresholds of the Merger Regulation, and therefore the published accounts are adequate for the establishment of jurisdiction.

<sup>(136)</sup> See for example Case IV/M.166 — Torras/Sarrió, of 24 February 1992.





### III. State aid

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





**a. Regarding Art 107(1) TFEU, de minimis**

15. Commission Regulation 1998/2006/EC of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, OJ 2006 L 379/5

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



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**COMMISSION REGULATION (EC) No 1998/2006**

**of 15 December 2006**

**on the application of Articles 87 and 88 of the Treaty to *de minimis* aid**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

conditions laid down in Regulation (EC) No 69/2001 and to replace that Regulation.

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid <sup>(1)</sup>, and in particular Article 2 thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

After consulting the Advisory Committee on State aid,

Whereas:

(1) Regulation (EC) No 994/98 empowers the Commission to set out in a Regulation a threshold under which aid measures are deemed not to meet all the criteria of Article 87(1) of the Treaty and therefore do not fall under the notification procedure provided for in Article 88(3) of the Treaty.

(2) The Commission has applied Articles 87 and 88 of the Treaty and has, in particular, clarified in numerous decisions the notion of aid within the meaning of Article 87(1) of the Treaty. The Commission has also stated its policy with regard to a *de minimis* ceiling, below which Article 87(1) can be considered not to apply, initially in its notice on the *de minimis* rule for State aid <sup>(3)</sup> and subsequently in Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid <sup>(4)</sup>. In the light of the experience gained in applying that Regulation and in order to take account of the evolution of inflation and gross domestic product in the Community up to and including 2006 and of the likely developments through the period of validity of this Regulation, it appears appropriate to revise some of the

(3) In view of the special rules which apply in the sectors of primary production of agricultural products, fisheries and aquaculture and of the risk that smaller amounts of aid than those set out in this Regulation could fulfil the criteria of Article 87(1) of the Treaty in those sectors, this Regulation should not apply to those sectors. Given the evolution of the transport sector, in particular the restructuring of many transport activities following their liberalisation, it is no longer appropriate to exclude the transport sector from the scope of the *de minimis* Regulation. The scope of this Regulation should therefore be extended to the whole of the transport sector. The general *de minimis* ceiling should however be adapted in order to take account of the average small size of undertakings active in the road freight and passengers transport sector. For the same reasons, and also in view of the overcapacity of the sector and of the objectives of transport policy as regards road congestion and freight transports, aid for the acquisition of road freight transport vehicles by undertakings performing road freight transport for hire and reward should be excluded. This does not call into question the Commission's favourable approach with regard to State aid for cleaner and more environmentally friendly vehicles in Community instruments other than this Regulation. In view of Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry <sup>(5)</sup>, this Regulation should not apply to the coal sector.

(4) Considering the similarities between the processing and marketing of agricultural products, on the one hand, and of non-agricultural products, on the other hand, this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met. Neither on-farm activities necessary for preparing a product for the first sale, such as harvesting, cutting and threshing of cereals, packing of eggs etc., nor the first sale to resellers or processors should be considered as processing or marketing in this respect. As from the entry into force of this Regulation, aid granted in favour of undertakings active in the processing or marketing of agricultural products should no longer be subject to Commission Regulation (EC) No 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the agriculture and fisheries sector <sup>(6)</sup>. Regulation (EC) No 1860/2004 should therefore be amended accordingly.

<sup>(1)</sup> OJ L 142, 14.5.1998, p. 1.

<sup>(2)</sup> OJ C 137, 10.6.2006, p. 4.

<sup>(3)</sup> OJ C 68, 6.3.1996, p. 9.

<sup>(4)</sup> OJ L 10, 13.1.2001, p. 30.

<sup>(5)</sup> OJ L 205, 2.8.2002, p. 1.

<sup>(6)</sup> OJ L 325, 28.10.2004, p. 4.

- (5) The Court of Justice of the European Communities has established that, once the Community has legislated for the establishment of a common organisation of the market in a given sector of agriculture, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. For this reason, this Regulation should not apply to aid, the amount of which is fixed on the basis of price or quantity of products purchased or put on the market. Nor should it apply to *de minimis* support which is linked to an obligation to share the aid with primary producers.
- (6) This Regulation should not apply to *de minimis* export aid or *de minimis* aid favouring domestic over imported products. In particular, it should not apply to aid financing the establishment and operation of a distribution network in other countries. Aid towards the cost of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market does not normally constitute export aid.
- (7) This Regulation should not apply to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(1)</sup> in view of the difficulties linked to determining the gross grant equivalent of aid granted to this type of undertakings.
- (8) In the light of the Commission's experience, it can be established that aid not exceeding a ceiling of EUR 200 000 over any period of three years does not affect trade between Member States and/or does not distort or threaten to distort competition and therefore does not fall under Article 87(1) of the Treaty. As regards undertakings active in the road transport sector, this ceiling should be set at EUR 100 000.
- (9) The years to take into account for this purpose are the fiscal years as used for fiscal purposes by the undertaking in the Member State concerned. The relevant period of three years should be assessed on a rolling basis so that, for each new grant of *de minimis* aid, the total amount of *de minimis* aid granted in the fiscal year concerned, as well as during the previous two fiscal years, needs to be determined. Aid granted by a Member State should be taken into account for this purpose even when financed entirely or partly by resources of Community origin. It should not be possible for aid measures exceeding the *de minimis* ceiling to be broken down into a number of smaller parts in order to bring such parts within the scope of this Regulation.
- (10) In accordance with the principles governing aid falling within Article 87(1) of the Treaty, *de minimis* aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime.
- (11) In order to avoid circumvention of maximum aid intensities provided in different Community instruments, *de minimis* aid should not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in the specific circumstances of each case by a block exemption Regulation or Decision adopted by the Commission.
- (12) For the purposes of transparency, equal treatment and the correct application of the *de minimis* ceiling, all Member States should apply the same method of calculation. In order to facilitate this calculation and in accordance with the present practice of application of the *de minimis* rule, aid amounts not taking the form of a cash grant should be converted into their gross grant equivalent. Calculation of the grant equivalent of transparent types of aid other than grants or of aid payable in several instalments requires the use of market interest rates prevailing at the time of granting such aid. With a view to a uniform, transparent and simple application of the State aid rules, the market rates for the purposes of this Regulation should be deemed to be the reference rates periodically fixed by the Commission on the basis of objective criteria and published in the *Official Journal of the European Union* or on the Internet. It may, however, be necessary to add additional basis points on top of the floor rate in view of the securities provided or the risk associated with the beneficiary.
- (13) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to *de minimis* aid which is transparent. Transparent aid is aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without a need to undertake a risk assessment. Such precise calculation can, for instance, be realised as regards grants, interest rate subsidies and capped tax exemptions. Aid comprised in capital injections should not be considered as transparent *de minimis* aid, unless the total amount of the public injection is lower than the *de minimis* ceiling. Aid comprised in risk capital measures as referred to in the
- <sup>(1)</sup> OJ C 244, 1.10.2004, p. 2.

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Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises<sup>(1)</sup> should not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital only up to the *de minimis* ceiling to each target undertaking. Aid comprised in loans should be treated as transparent *de minimis* aid when the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time of grant.

- (14) This Regulation does not exclude the possibility that a measure, adopted by a Member State, might not be considered as State aid within the meaning of Article 87(1) of the Treaty on the basis of other grounds than those set out in this Regulation, for instance, in the case of capital injections, because such measure has been decided in conformity with the market investor principle.
- (15) It is necessary to provide legal certainty for guarantee schemes which do not have the potential to affect trade and distort competition and in respect of which sufficient data is available to assess any potential effects reliably. This Regulation should therefore transpose the general *de minimis* ceiling of EUR 200 000 into a guarantee-specific ceiling based on the guaranteed amount of the individual loan underlying such guarantee. It is appropriate to calculate this specific ceiling using a methodology assessing the State aid amount included in guarantee schemes covering loans in favour of viable undertakings. The methodology and the data used to calculate the guarantee-specific ceiling should exclude undertakings in difficulty as referred to in the Community guidelines on State aid for rescuing and restructuring firms in difficulty. This specific ceiling should therefore not apply to ad hoc individual aid granted outside the scope of a guarantee scheme, to aid granted to undertakings in difficulty, or to guarantees on underlying transactions not constituting a loan, such as guarantees on equity transactions. The specific ceiling should be determined on the basis of the fact that taking account of a cap rate (net default rate) of 13 %, representing a worst case scenario for guarantee schemes in the Community, a guarantee amounting to EUR 1 500 000 can be considered as having a gross grant equivalent identical to the general *de minimis* ceiling. This amount should be reduced to EUR 750 000 as regards undertakings active in the road transport sector. Only guarantees covering up to 80 % of the underlying loan should be covered by these specific ceilings. A methodology accepted by the Commission following notification of such methodology on the basis of a Commission Regulation in the State aid area, like Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid<sup>(2)</sup>, may also be used by Member States for the purpose of
- assessing the gross grant equivalent contained in a guarantee, if the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of the present Regulation.
- (16) Upon notification by a Member State, the Commission may examine whether an aid measure which does not consist in a grant, loan, guarantee, capital injection or risk capital measure leads to a gross grant equivalent that does not exceed the *de minimis* ceiling and could therefore be covered by the provisions of this Regulation.
- (17) The Commission has a duty to ensure that State aid rules are respected and in particular that aid granted under the *de minimis* rules adheres to the conditions thereof. In accordance with the cooperation principle laid down in Article 10 of the Treaty, Member States should facilitate the achievement of this task by establishing the necessary machinery in order to ensure that the total amount of *de minimis* aid, granted to the same undertaking under the *de minimis* rule, does not exceed the ceiling of EUR 200 000 over a period of three fiscal years. To that end, when granting a *de minimis* aid, Member States should inform the undertaking concerned of the amount of the aid and of its *de minimis* character, by referring to this Regulation. Moreover, prior to granting such aid the Member State concerned should obtain from the undertaking a declaration about other *de minimis* aid received during the fiscal year concerned and the two previous fiscal years and carefully check that the *de minimis* ceiling will not be exceeded by the new *de minimis* aid. Alternatively it should be possible to ensure that the ceiling is respected by means of a central register, or, in the case of guarantee schemes set up by the European Investment Fund, the latter may establish itself a list of beneficiaries and require Member States to inform the beneficiaries of the *de minimis* aid received.
- (18) Regulation (EC) No 69/2001 expires on 31 December 2006. This Regulation should therefore apply from 1 January 2007. In view of the fact that Regulation (EC) No 69/2001 did not apply to the transport sector, which was not subject to *de minimis* so far; given also the very limited *de minimis* amount applicable in the sector of processing and marketing of agricultural products, and provided that certain conditions are met, this Regulation should apply to aid granted before its entry into force to undertakings active in the transport sector, and in the sector of processing and marketing of agricultural products. Moreover, any individual aid granted in accordance with Regulation (EC) No 69/2001 during the period of application of that Regulation should remain unaffected by this Regulation.

<sup>(1)</sup> OJ C 194, 18.8.2006, p. 2.

<sup>(2)</sup> OJ L 302, 1.11.2006, p. 29.

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(19) Having regard to the Commission's experience and in particular the frequency with which it is generally necessary to revise State aid policy, it is appropriate to limit the period of application of this Regulation. Should this Regulation expire without being extended, Member States should have an adjustment period of six months with regard to *de minimis* aid covered by this Regulation,

(h) aid granted to undertakings in difficulty.

2. For the purposes of this Regulation:

HAS ADOPTED THIS REGULATION:

(a) 'agricultural products' means products listed in Annex I to the EC Treaty, with the exception of fishery products;

#### Article 1

##### Scope

1. This Regulation applies to aid granted to undertakings in all sectors, with the exception of:

(b) 'processing of agricultural products' means any operation on an agricultural product resulting in a product which is also an agricultural product, except on farm activities necessary for preparing an animal or plant product for the first sale;

(a) aid granted to undertakings active in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000<sup>(1)</sup>;

(b) aid granted to undertakings active in the primary production of agricultural products as listed in Annex I to the Treaty;

(c) 'marketing of agricultural products' means holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale; a sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose.

(c) aid granted to undertakings active in the processing and marketing of agricultural products as listed in Annex I to the Treaty, in the following cases:

(i) when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned,

(ii) when the aid is conditional on being partly or entirely passed on to primary producers;

(d) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;

(e) aid contingent upon the use of domestic over imported goods;

(f) aid granted to undertakings active in the coal sector, as defined in Regulation (EC) No 1407/2002;

(g) aid for the acquisition of road freight transport vehicles granted to undertakings performing road freight transport for hire or reward;

#### Article 2

##### De minimis aid

1. Aid measures shall be deemed not to meet all the criteria of Article 87(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 88(3) of the Treaty, if they fulfil the conditions laid down in paragraphs 2 to 5 of this Article.

2. The total *de minimis* aid granted to any one undertaking shall not exceed EUR 200 000 over any period of three fiscal years. The total *de minimis* aid granted to any one undertaking active in the road transport sector shall not exceed EUR 100 000 over any period of three fiscal years. These ceilings shall apply irrespective of the form of the *de minimis* aid or the objective pursued and regardless of whether the aid granted by the Member State is financed entirely or partly by resources of Community origin. The period shall be determined by reference to the fiscal years used by the undertaking in the Member State concerned.

When an overall aid amount provided under an aid measure exceeds this ceiling, that aid amount cannot benefit from this Regulation, even for a fraction not exceeding that ceiling. In such a case, the benefit of this Regulation cannot be claimed for this aid measure either at the time the aid is granted or at any subsequent time.

<sup>(1)</sup> OJ L 17, 21.1.2000, p. 22.



3. The ceiling laid down in paragraph 2 shall be expressed as a cash grant. All figures used shall be gross, that is, before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid.

Aid payable in several instalments shall be discounted to its value at the moment of its being granted. The interest rate to be used for discounting purposes and to calculate the gross grant equivalent shall be the reference rate applicable at the time of grant.

4. This Regulation shall apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid *ex ante* without need to undertake a risk assessment ('transparent aid'). In particular:

- (a) Aid comprised in loans shall be treated as transparent *de minimis* aid when the gross grant equivalent has been calculated on the basis of market interest rates prevailing at the time of the grant.
- (b) Aid comprised in capital injections shall not be considered as transparent *de minimis* aid, unless the total amount of the public injection does not exceed the *de minimis* ceiling.
- (c) Aid comprised in risk capital measures shall not be considered as transparent *de minimis* aid, unless the risk capital scheme concerned provides capital only up to the *de minimis* ceiling to each target undertaking.
- (d) Individual aid provided under a guarantee scheme to undertakings which are not undertakings in difficulty shall be treated as transparent *de minimis* aid when the guaranteed part of the underlying loan provided under such scheme does not exceed EUR 1 500 000 per undertaking. Individual aid provided under a guarantee scheme in favour of undertakings active in the road transport sector which are not undertakings in difficulty shall be treated as transparent *de minimis* aid when the guaranteed part of the underlying loan provided under such scheme does not exceed EUR 750 000 per undertaking. If the guaranteed part of the underlying loan only accounts for a given proportion of this ceiling, the gross grant equivalent of that guarantee shall be deemed to correspond to the same proportion of the applicable ceiling laid down in Article 2(2). The guarantee shall not exceed 80 % of the underlying loan. Guarantee schemes shall also be considered as transparent if (i) before the implementation of the scheme, the methodology to calculate the gross grant equivalent of the guarantees has been accepted following notification of this methodology to the Commission under another Regulation adopted by the Commission in the State aid area and (ii) the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake in the context of the application of this Regulation.

5. *De minimis* aid shall not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in the specific circumstances of each case by a block exemption Regulation or Decision adopted by the Commission.

### Article 3

#### Monitoring

1. Where a Member State intends to grant *de minimis* aid to an undertaking, it shall inform that undertaking in writing of the prospective amount of the aid (expressed as gross grant equivalent) and of its *de minimis* character, making express reference to this Regulation, and citing its title and publication reference in the *Official Journal of the European Union*. Where the *de minimis* aid is granted to different undertakings on the basis of a scheme and different amounts of individual aid are granted to those undertakings under the scheme, the Member State concerned may choose to fulfil this obligation by informing the undertakings of a fixed sum corresponding to the maximum aid amount to be granted under the scheme. In such case, the fixed sum shall be used for determining whether the ceiling laid down in Article 2(2) is met. Prior to granting the aid, the Member State shall also obtain a declaration from the undertaking concerned, in written or electronic form, about any other *de minimis* aid received during the previous two fiscal years and the current fiscal year.

The Member State shall only grant the new *de minimis* aid after having checked that this will not raise the total amount of *de minimis* aid received by the undertaking during the period covering the fiscal year concerned, as well as the previous two fiscal years in that Member State, to a level above the ceiling laid down in Article 2(2).

2. Where a Member State has set up a central register of *de minimis* aid containing complete information on all *de minimis* aid granted by any authority within that Member State, the first subparagraph of paragraph 1 shall cease to apply from the moment the register covers a period of three years.

Where an aid is provided by a Member State on the basis of a guarantee scheme providing a guarantee which is financed from the EU budget under mandate through the European Investment Fund, the first subparagraph of paragraph 1 of this Article may cease to apply.

In such cases, the following monitoring system shall apply:

- (a) the European Investment Fund shall establish, on a yearly basis, on the basis of information that financial intermediaries must provide to the EIF, a list of beneficiaries of aid and of the gross grant equivalent received by each of them. The European Investment Fund shall send this information to the Member State concerned and to the Commission; and

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- (b) the Member State concerned shall disseminate that information to the final beneficiaries within three months of receipt of such information from the European Investment Fund; and
- (c) the Member State concerned shall obtain a declaration from each beneficiary that the overall *de minimis* aid it has received does not exceed the ceiling laid down in Article 2(2). In case the ceiling is exceeded with respect to one or more beneficiaries, the Member State concerned shall ensure that the aid measure leading to the ceiling being exceeded is either notified to the Commission or recovered from the beneficiary.

3. Member States shall record and compile all the information regarding the application of this Regulation. Such records shall contain all information necessary to demonstrate that the conditions of this Regulation have been complied with. Records regarding individual *de minimis* aid shall be maintained for 10 years from the date on which it was granted. Records regarding a *de minimis* aid scheme shall be maintained for 10 years from the date on which the last individual aid was granted under such scheme. On written request the Member State concerned shall provide the Commission, within a period of 20 working days, or such longer period as may be fixed in the request, with all the information that the Commission considers necessary for assessing whether the conditions of this Regulation have been complied with, in particular the total amount of *de minimis* aid received by any undertaking.

#### Article 4

##### Amendment

Article 2 of Regulation (EC) No 1860/2004 is amended as follows:

- (a) in point 1, the words 'processing and marketing' are deleted;
- (b) point 3 is deleted.

#### Article 5

##### Transitional measures

1. This Regulation shall apply to aid granted before its entry into force to undertakings active in the transport sector and undertakings active in the processing and marketing of agricultural products if the aid fulfils all the conditions laid down in Articles 1 and 2. Any aid which does not fulfil those conditions will be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.

2. Any individual *de minimis* aid granted between 2 February 2001 and 30 June 2007, which fulfils the conditions of Regulation (EC) No 69/2001, shall be deemed not to meet all the criteria of Article 87(1) of the Treaty and shall therefore be exempt from the notification requirement of Article 88(3) of the Treaty.

3. At the end of the period of validity of this Regulation, any *de minimis* aid which fulfils the conditions of this Regulation may be validly implemented for a further period of six months.

#### Article 6

##### Entry into force and period of validity

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

It shall apply from 1 January 2007 until 31 December 2013.

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

Done at Brussels, 15 December 2006.

For the Commission

Neelie KROES

Member of the Commission



## **b. Notification and standstill**

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





16. Council Regulation 659/1999/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83/1

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



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COUNCIL REGULATION (EC) No 659/1999  
of 22 March 1999  
laying down detailed rules for the application of Article 93 of the EC Treaty  
(OJ L 83, 27.3.1999, p. 1)

Amended by:

		Official Journal		
		No	page	date
► <u>M1</u>	Council Regulation (EC) No 1791/2006 of 20 November 2006	L 363	1	20.12.2006

Amended by:

► <u>A1</u>	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003
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**COUNCIL REGULATION (EC) No 659/1999**

**of 22 March 1999**

**laying down detailed rules for the application of Article 93 of the  
EC Treaty**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and  
in particular Article 94 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

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

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

- (1) Whereas, without prejudice to special procedural rules laid down in regulations for certain sectors, this Regulation should apply to aid in all sectors; whereas, for the purpose of applying Articles 77 and 92 of the Treaty, the Commission has specific competence under Article 93 thereof to decide on the compatibility of State aid with the common market when reviewing existing aid, when taking decisions on new or altered aid and when taking action regarding non-compliance with its decisions or with the requirement as to notification;
- (2) Whereas the Commission, in accordance with the case-law of the Court of Justice of the European Communities, has developed and established a consistent practice for the application of Article 93 of the Treaty and has laid down certain procedural rules and principles in a number of communications; whereas it is appropriate, with a view to ensuring effective and efficient procedures pursuant to Article 93 of the Treaty, to codify and reinforce this practice by means of a regulation;
- (3) Whereas a procedural regulation on the application of Article 93 of the Treaty will increase transparency and legal certainty;
- (4) Whereas, in order to ensure legal certainty, it is appropriate to define the circumstances under which aid is to be considered as existing aid; whereas the completion and enhancement of the internal market is a gradual process, reflected in the permanent development of State aid policy; whereas, following these developments, certain measures, which at the moment they were put into effect did not constitute State aid, may since have become aid;
- (5) Whereas, in accordance with Article 93(3) of the Treaty, any plans to grant new aid are to be notified to the Commission and should not be put into effect before the Commission has authorised it;
- (6) Whereas, in accordance with Article 5 of the Treaty, Member States are under an obligation to cooperate with the Commission and to provide it with all information required to allow the Commission to carry out its duties under this Regulation;
- (7) Whereas the period within which the Commission is to conclude the preliminary examination of notified aid should be set at two

<sup>(1)</sup> OJ C 116, 16. 4. 1998, p. 13.

<sup>(2)</sup> Opinion delivered on 14 January 1999 (not yet published in the Official Journal).

<sup>(3)</sup> OJ C 284, 14. 9. 1998, p. 10.



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- months from the receipt of a complete notification or from the receipt of a duly reasoned statement of the Member State concerned that it considers the notification to be complete because the additional information requested by the Commission is not available or has already been provided; whereas, for reasons of legal certainty, that examination should be brought to an end by a decision;
- (8) Whereas in all cases where, as a result of the preliminary examination, the Commission cannot find that the aid is compatible with the common market, the formal investigation procedure should be opened in order to enable the Commission to gather all the information it needs to assess the compatibility of the aid and to allow the interested parties to submit their comments; whereas the rights of the interested parties can best be safeguarded within the framework of the formal investigation procedure provided for under Article 93(2) of the Treaty;
- (9) Whereas, after having considered the comments submitted by the interested parties, the Commission should conclude its examination by means of a final decision as soon as the doubts have been removed; whereas it is appropriate, should this examination not be concluded after a period of 18 months from the opening of the procedure, that the Member State concerned has the opportunity to request a decision, which the Commission should take within two months;
- (10) Whereas, in order to ensure that the State aid rules are applied correctly and effectively, the Commission should have the opportunity of revoking a decision which was based on incorrect information;
- (11) Whereas, in order to ensure compliance with Article 93 of the Treaty, and in particular with the notification obligation and the standstill clause in Article 93(3), the Commission should examine all cases of unlawful aid; whereas, in the interests of transparency and legal certainty, the procedures to be followed in such cases should be laid down; whereas when a Member State has not respected the notification obligation or the standstill clause, the Commission should not be bound by time limits;
- (12) Whereas in cases of unlawful aid, the Commission should have the right to obtain all necessary information enabling it to take a decision and to restore immediately, where appropriate, undistorted competition; whereas it is therefore appropriate to enable the Commission to adopt interim measures addressed to the Member State concerned; whereas the interim measures may take the form of information injunctions, suspension injunctions and recovery injunctions; whereas the Commission should be enabled in the event of non-compliance with an information injunction, to decide on the basis of the information available and, in the event of non-compliance with suspension and recovery injunctions, to refer the matter to the Court of Justice direct, in accordance with the second subparagraph of Article 93 (2) of the Treaty;
- (13) Whereas in cases of unlawful aid which is not compatible with the common market, effective competition should be restored; whereas for this purpose it is necessary that the aid, including interest, be recovered without delay; whereas it is appropriate that recovery be effected in accordance with the procedures of national law; whereas the application of those procedures should not, by preventing the immediate and effective execution of the Commission decision, impede the restoration of effective competition; whereas to achieve this result, Member States should take all necessary measures ensuring the effectiveness of the Commission decision;

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- (14) Whereas for reasons of legal certainty it is appropriate to establish a period of limitation of 10 years with regard to unlawful aid, after the expiry of which no recovery can be ordered;
- (15) Whereas misuse of aid may have effects on the functioning of the internal market which are similar to those of unlawful aid and should thus be treated according to similar procedures; whereas unlike unlawful aid, aid which has possibly been misused is aid which has been previously approved by the Commission; whereas therefore the Commission should not be allowed to use a recovery injunction with regard to misuse of aid;
- (16) Whereas it is appropriate to define all the possibilities in which third parties have to defend their interests in State aid procedures;
- (17) Whereas in accordance with Article 93(1) of the Treaty, the Commission is under an obligation, in cooperation with Member States, to keep under constant review all systems of existing aid; whereas in the interests of transparency and legal certainty, it is appropriate to specify the scope of cooperation under that Article;
- (18) Whereas, in order to ensure compatibility of existing aid schemes with the common market and in accordance with Article 93(1) of the Treaty, the Commission should propose appropriate measures where an existing aid scheme is not, or is no longer, compatible with the common market and should initiate the procedure provided for in Article 93(2) of the Treaty if the Member State concerned declines to implement the proposed measures;
- (19) Whereas, in order to allow the Commission to monitor effectively compliance with Commission decisions and to facilitate cooperation between the Commission and Member States for the purpose of the constant review of all existing aid schemes in the Member States in accordance with Article 93(1) of the Treaty, it is necessary to introduce a general reporting obligation with regard to all existing aid schemes;
- (20) Whereas, where the Commission has serious doubts as to whether its decisions are being complied with, it should have at its disposal additional instruments allowing it to obtain the information necessary to verify that its decisions are being effectively complied with; whereas for this purpose on-site monitoring visits are an appropriate and useful instrument, in particular for cases where aid might have been misused; whereas therefore the Commission must be empowered to undertake on-site monitoring visits and must obtain the cooperation of the competent authorities of the Member States where an undertaking opposes such a visit;
- (21) Whereas, in the interests of transparency and legal certainty, it is appropriate to give public information on Commission decisions while, at the same time, maintaining the principle that decisions in State aid cases are addressed to the Member State concerned; whereas it is therefore appropriate to publish all decisions which might affect the interests of interested parties either in full or in a summary form or to make copies of such decisions available to interested parties, where they have not been published or where they have not been published in full; whereas the Commission, when giving public information on its decisions, should respect the rules on professional secrecy, in accordance with Article 214 of the Treaty;
- (22) Whereas the Commission, in close liaison with the Member States, should be able to adopt implementing provisions laying down detailed rules concerning the procedures under this Regulation; whereas, in order to provide for cooperation between the Commission and the competent authorities of the Member States,

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it is appropriate to create an Advisory Committee on State aid to be consulted before the Commission adopts provisions pursuant to this Regulation,

HAS ADOPTED THIS REGULATION:

**CHAPTER I**  
**GENERAL**

*Article 1*

**Definitions**

For the purpose of this Regulation:

- (a) ‘aid’ shall mean any measure fulfilling all the criteria laid down in Article 92(1) of the Treaty;
- (b) ‘existing aid’ shall mean:

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- (i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, to Annex IV, point 3 and the Appendix to said Annex of the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, and to Annex V, point 2 and 3(b) and the Appendix to said Annex of the Act of Accession of Bulgaria and Romania, all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

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- (ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;
- (iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;
- (iv) aid which is deemed to be existing aid pursuant to Article 15;
- (v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;
- (c) ‘new aid’ shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;
- (d) ‘aid scheme’ shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;
- (e) ‘individual aid’ shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

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- (f) 'unlawful aid' shall mean new aid put into effect in contravention of Article 93(3) of the Treaty;
- (g) 'misuse of aid' shall mean aid used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of this Regulation;
- (h) 'interested party' shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

**CHAPTER II**

**PROCEDURE REGARDING NOTIFIED AID**

*Article 2*

**Notification of new aid**

1. Save as otherwise provided in regulations made pursuant to Article 94 of the Treaty or to other relevant provisions thereof, any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned. The Commission shall inform the Member State concerned without delay of the receipt of a notification.
2. In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7 (hereinafter referred to as 'complete notification').

*Article 3*

**Standstill clause**

Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid.

*Article 4*

**Preliminary examination of the notification and decisions of the Commission**

1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.
2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.
3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article 92(1) of the Treaty, it shall decide that the measure is compatible with the common market (hereinafter referred to as a 'decision not to raise objections'). The decision shall specify which exception under the Treaty has been applied.
4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article 93(2) of the Treaty (hereinafter referred to as a 'decision to initiate the formal investigation procedure').

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5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. The period can be extended with the consent of both the Commission and the Member State concerned. Where appropriate, the Commission may fix shorter time limits.

6. Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.

*Article 5*

**Request for information**

1. Where the Commission considers that information provided by the Member State concerned with regard to a measure notified pursuant to Article 2 is incomplete, it shall request all necessary additional information. Where a Member State responds to such a request, the Commission shall inform the Member State of the receipt of the response.

2. Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or provides incomplete information, the Commission shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

3. The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period, unless before the expiry of that period, either the period has been extended with the consent of both the Commission and the Member State concerned, or the Member State concerned, in a duly reasoned statement, informs the Commission that it considers the notification to be complete because the additional information requested is not available or has already been provided. In that case, the period referred to in Article 4(5) shall begin on the day following receipt of the statement. If the notification is deemed to be withdrawn, the Commission shall inform the Member State thereof.

*Article 6*

**Formal investigation procedure**

1. The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.

2. The comments received shall be submitted to the Member State concerned. If an interested party so requests, on grounds of potential damage, its identity shall be withheld from the Member State concerned. The Member State concerned may reply to the comments submitted within a prescribed period which shall normally not exceed one

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month. In duly justified cases, the Commission may extend the prescribed period.

*Article 7*

**Decisions of the Commission to close the formal investigation procedure**

1. Without prejudice to Article 8, the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this Article.
2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.
3. Where the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the common market have been removed, it shall decide that the aid is compatible with the common market (hereinafter referred to as a 'positive decision'). That decision shall specify which exception under the Treaty has been applied.
4. The Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored (hereinafter referred to as a 'conditional decision').
5. Where the Commission finds that the notified aid is not compatible with the common market, it shall decide that the aid shall not be put into effect (hereinafter referred to as a 'negative decision').
6. Decisions taken pursuant to paragraphs 2, 3, 4 and 5 shall be taken as soon as the doubts referred to in Article 4(4) have been removed. The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned.
7. Once the time limit referred to in paragraph 6 has expired, and should the Member State concerned so request, the Commission shall, within two months, take a decision on the basis of the information available to it. If appropriate, where the information provided is not sufficient to establish compatibility, the Commission shall take a negative decision.

*Article 8*

**Withdrawal of notification**

1. The Member State concerned may withdraw the notification within the meaning of Article 2 in due time before the Commission has taken a decision pursuant to Article 4 or 7.
2. In cases where the Commission initiated the formal investigation procedure, the Commission shall close that procedure.

*Article 9*

**Revocation of a decision**

The Commission may revoke a decision taken pursuant to Article 4(2) or (3), or Article 7(2), (3), (4), after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure

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which was a determining factor for the decision. Before revoking a decision and taking a new decision, the Commission shall open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7 and 10, Article 11(1), Articles 13, 14 and 15 shall apply *mutatis mutandis*.

CHAPTER III

PROCEDURE REGARDING UNLAWFUL AID

Article 10

**Examination, request for information and information injunction**

1. Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.
2. If necessary, it shall request information from the Member State concerned. Article 2(2) and Article 5(1) and (2) shall apply *mutatis mutandis*.
3. Where, despite a reminder pursuant to Article 5(2), the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided (hereinafter referred to as an 'information injunction'). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.

Article 11

**Injunction to suspend or provisionally recover aid**

1. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (hereinafter referred to as a 'suspension injunction').
2. The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (hereinafter referred to as a 'recovery injunction'), if the following criteria are fulfilled:
  - according to an established practice there are no doubts about the aid character of the measure concerned
  - and
  - there is an urgency to act
  - and
  - there is a serious risk of substantial and irreparable damage to a competitor.

Recovery shall be effected in accordance with the procedure set out in Article 14(2) and (3). After the aid has been effectively recovered, the Commission shall take a decision within the time limits applicable to notified aid.

The Commission may authorise the Member State to couple the refunding of the aid with the payment of rescue aid to the firm concerned.

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The provisions of this paragraph shall be applicable only to unlawful aid implemented after the entry into force of this Regulation.

*Article 12*

**Non-compliance with an injunction decision**

If the Member State fails to comply with a suspension injunction or a recovery injunction, the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice of the European Communities direct and apply for a declaration that the failure to comply constitutes an infringement of the Treaty.

*Article 13*

**Decisions of the Commission**

1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.
2. In cases of possible unlawful aid and without prejudice to Article 11(2), the Commission shall not be bound by the time-limit set out in Articles 4(5), 7(6) and 7(7).
3. Article 9 shall apply *mutatis mutandis*.

*Article 14*

**Recovery of aid**

1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision'). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.
2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.
3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 185 of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.

*Article 15*

**Limitation period**

1. The powers of the Commission to recover aid shall be subject to a limitation period of ten years.
2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or



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as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.

CHAPTER IV

**PROCEDURE REGARDING MISUSE OF AID**

*Article 16*

**Misuse of aid**

Without prejudice to Article 23, the Commission may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7, 9 and 10, Article 11(1), Articles 12, 13, 14 and 15 shall apply *mutatis mutandis*.

CHAPTER V

**PROCEDURE REGARDING EXISTING AID SCHEMES**

*Article 17*

**Cooperation pursuant to Article 93(1) of the Treaty**

1. The Commission shall obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes pursuant to Article 93(1) of the Treaty.

2. Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend this period.

*Article 18*

**Proposal for appropriate measures**

Where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular:

- (a) substantive amendment of the aid scheme,  
or
- (b) introduction of procedural requirements,  
or
- (c) abolition of the aid scheme.

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*Article 19*

**Legal consequences of a proposal for appropriate measures**

1. Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures.
2. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4). Articles 6, 7 and 9 shall apply *mutatis mutandis*.

CHAPTER VI

**INTERESTED PARTIES**

*Article 20*

**Rights of interested parties**

1. Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.
2. Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.
3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11.

CHAPTER VII

**MONITORING**

*Article 21*

**Annual reports**

1. Member States shall submit to the Commission annual reports on all existing aid schemes with regard to which no specific reporting obligations have been imposed in a conditional decision pursuant to Article 7(4).
2. Where, despite a reminder, the Member State concerned fails to submit an annual report, the Commission may proceed in accordance with Article 18 with regard to the aid scheme concerned.

*Article 22*

**On-site monitoring**

1. Where the Commission has serious doubts as to whether decisions not to raise objections, positive decisions or conditional decisions with regard to individual aid are being complied with, the Member State concerned, after having been given the opportunity to submit its

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comments, shall allow the Commission to undertake on-site monitoring visits.

2. The officials authorised by the Commission shall be empowered, in order to verify compliance with the decision concerned:

- (a) to enter any premises and land of the undertaking concerned;
- (b) to ask for oral explanations on the spot;
- (c) to examine books and other business records and take, or demand, copies.

The Commission may be assisted if necessary by independent experts.

3. The Commission shall inform the Member State concerned, in good time and in writing, of the on-site monitoring visit and of the identities of the authorised officials and experts. If the Member State has duly justified objections to the Commission's choice of experts, the experts shall be appointed in common agreement with the Member State. The officials of the Commission and the experts authorised to carry out the on-site monitoring shall produce an authorisation in writing specifying the subject-matter and purpose of the visit.

4. Officials authorised by the Member State in whose territory the monitoring visit is to be made may be present at the monitoring visit.

5. The Commission shall provide the Member State with a copy of any report produced as a result of the monitoring visit.

6. Where an undertaking opposes a monitoring visit ordered by a Commission decision pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials and experts authorised by the Commission to enable them to carry out the monitoring visit. To this end the Member States shall, after consulting the Commission, take the necessary measures within eighteen months after the entry into force of this Regulation.

*Article 23*

**Non-compliance with decisions and judgments**

1. Where the Member State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 14, the Commission may refer the matter to the Court of Justice of the European Communities direct in accordance with Article 93(2) of the Treaty.

2. If the Commission considers that the Member State concerned has not complied with a judgment of the Court of Justice of the European Communities, the Commission may pursue the matter in accordance with Article 171 of the Treaty.

CHAPTER VIII

**COMMON PROVISIONS**

*Article 24*

**Professional secrecy**

The Commission and the Member States, their officials and other servants, including independent experts appointed by the Commission, shall not disclose information which they have acquired through the application of this Regulation and which is covered by the obligation of professional secrecy.

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*Article 25*

**Addressee of decisions**

Decisions taken pursuant to Chapters II, III, IV, V and VII shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay and give the latter the opportunity to indicate the Commission which information it considers to be covered by the obligation of professional secrecy.

*Article 26*

**Publication of decisions**

1. The Commission shall publish in the *Official Journal of the European Communities* a summary notice of the decisions which it takes pursuant to Article 4(2) and (3) and Article 18 in conjunction with Article 19(1). The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.

2. The Commission shall publish in the *Official Journal of the European Communities* the decisions which it takes pursuant to Article 4(4) in their authentic language version. In the Official Journal published in languages other than the authentic language version, the authentic language version will be accompanied by a meaningful summary in the language of that Official Journal.

3. The Commission shall publish in the *Official Journal of the European Communities* the decisions which it takes pursuant to Article 7.

4. In cases where Article 4(6) or Article 8(2) applies, a short notice shall be published in the *Official Journal of the European Communities*.

5. The Council, acting unanimously, may decide to publish decisions pursuant to the third subparagraph of Article 93(2) of the Treaty in the *Official Journal of the European Communities*.

*Article 27*

**Implementing provisions**

The Commission, acting in accordance with the procedure laid down in Article 29, shall have the power to adopt implementing provisions concerning the form, content and other details of notifications, the form, content and other details of annual reports, details of time-limits and the calculation of time-limits, and the interest rate referred to in Article 14(2).

*Article 28*

**Advisory Committee on State aid**

An Advisory Committee on State aid (hereinafter referred to as the 'Committee') shall be set up. It shall be composed of representatives of the Member States and chaired by the representative of the Commission.

*Article 29*

**Consultation of the Committee**

1. The Commission shall consult the Committee before adopting any implementing provision pursuant to Article 27.

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2. Consultation of the Committee shall take place at a meeting called by the Commission. The drafts and documents to be examined shall be annexed to the notification. The meeting shall take place no earlier than two months after notification has been sent. This period may be reduced in the case of urgency.
3. The Commission representative shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver an opinion on the draft, within a time-limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.
4. The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes. The Committee may recommend the publication of this opinion in the *Official Journal of the European Communities*.
5. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee on the manner in which its opinion has been taken into account.

*Article 30*

**Entry into force**

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

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

17. Commission Regulation 794/2004/EC of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 2004 L 140/1

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



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**COMMISSION REGULATION (EC) No 794/2004**

**of 21 april 2004**

**implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application  
of Article 93 of the EC Treaty**

(OJ L 140, 30.4.2004, p. 1)

Amended by:

		Official Journal		
		No	page	date
► <b><u>M1</u></b>	Commission Regulation (EC) No 1627/2006 of 24 October 2006	L 302	10	1.11.2006
► <b><u>M2</u></b>	Commission Regulation (EC) No 1935/2006 of 20 December 2006	L 407	1	30.12.2006
► <b><u>M3</u></b>	Commission Regulation (EC) No 271/2008 of 30 January 2008	L 82	1	25.3.2008
► <b><u>M4</u></b>	Commission Regulation (EC) No 1147/2008 of 31 October 2008	L 313	1	22.11.2008
► <b><u>M5</u></b>	Commission Regulation (EC) No 257/2009 of 24 March 2009	L 81	15	27.3.2009
► <b><u>M6</u></b>	Commission Regulation (EC) No 1125/2009 of 23 November 2009	L 308	5	24.11.2009

Corrected by:

- **C1** Corrigendum, OJ L 25, 28.1.2005, p. 74 (794/2004)
- **C2** Corrigendum, OJ L 131, 25.5.2005, p. 45 (794/2004)
- **C3** Corrigendum, OJ L 44, 15.2.2007, p. 3 (1935/2006)

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**COMMISSION REGULATION (EC) No 794/2004  
of 21 april 2004**

**implementing Council Regulation (EC) No 659/1999 laying down  
detailed rules for the application of Article 93 of the EC Treaty**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(1)</sup>, and in particular Article 27 thereof,

After consulting the Advisory Committee on State Aid,

Whereas:

- (1) In order to facilitate the preparation of State aid notifications by Member States, and their assessment by the Commission, it is desirable to establish a compulsory notification form. That form should be as comprehensive as possible.
- (2) The standard notification form as well as the summary information sheet and the supplementary information sheets should cover all existing guidelines and frameworks in the state aid field. They should be subject to modification or replacement in accordance with the further development of those texts.
- (3) Provision should be made for a simplified system of notification for certain alterations to existing aid. Such simplified arrangements should only be accepted if the Commission has been regularly informed on the implementation of the existing aid concerned.
- (4) In the interests of legal certainty it is appropriate to make it clear that small increases of up to 20 % of the original budget of an aid scheme, in particular to take account of the effects of inflation, should not need to be notified to the Commission as they are unlikely to affect the Commission's original assessment of the compatibility of the scheme, provided that the other conditions of the aid scheme remain unchanged.
- (5) Article 21 of Regulation (EC) No 659/1999 requires Member States to submit annual reports to the Commission on all existing aid schemes or individual aid granted outside an approved aid scheme in respect of which no specific reporting obligations have been imposed in a conditional decision.
- (6) For the Commission to be able to discharge its responsibilities for the monitoring of aid, it needs to receive accurate information from Member States about the types and amounts of aid being granted by them under existing aid schemes. It is possible to simplify and improve the arrangements for the reporting of State aid to the Commission which are currently described in the joint procedure for reporting and notification under the EC Treaty and under the World Trade Organisation (WTO) Agreement set out in the Commission's letter to Member States of 2 August 1995. The part of that joint procedure relating to Member States reporting obligations for subsidy notifications under Article 25 of the WTO Agreement on Subsidies and Countervailing measures and under Article XVI of GATT 1994, adopted on 21 July 1995 is not covered by this Regulation.
- (7) The information required in the annual reports is intended to enable the Commission to monitor overall aid levels and to form a general view of the effects of different types of aid on

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.



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competition. To this end, the Commission may also request Member States to provide, on an ad hoc basis, additional data for selected topics. The choice of subject matter should be discussed in advance with Member States.

- (8) The annual reporting exercise does not cover the information, which may be necessary in order to verify that particular aid measures respect Community law. The Commission should therefore retain the right to seek undertakings from Member States, or to attach to decisions conditions requiring the provision of additional information.
- (9) It should be specified that time-limits for the purposes of Regulation (EC) No 659/1999 should be calculated in accordance with Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits <sup>(1)</sup>, as supplemented by the specific rules set out in this Regulation. In particular, it is necessary to identify the events, which determine the starting point for time-limits applicable in State aid procedures. The rules set out in this Regulation should apply to pre-existing time-limits which will continue to run after the entry into force of this Regulation.
- (10) The purpose of recovery is to re-establish the situation existing before aid was unlawfully granted. To ensure equal treatment, the advantage should be measured objectively from the moment when the aid is available to the beneficiary undertaking, independently of the outcome of any commercial decisions subsequently made by that undertaking.
- (11) In accordance with general financial practice it is appropriate to fix the recovery interest rate as an annual percentage rate.
- (12) The volume and frequency of transactions between banks results in an interest rate that is consistently measurable and statistically significant, and should therefore form the basis of the recovery interest rate. The inter-bank swap rate should, however, be adjusted in order to reflect general levels of increased commercial risk outside the banking sector. On the basis of the information on inter-bank swap rates the Commission should establish a single recovery interest rate for each Member State. In the interest of legal certainty and equal treatment, it is appropriate to fix the precise method by which the interest rate should be calculated, and to provide for the publication of the recovery interest rate applicable at any given moment, as well as relevant previously applicable rates.
- (13) A State aid grant may be deemed to reduce a beneficiary undertaking's medium-term financing requirements. For these purposes, and in line with general financial practice, the medium-term may be defined as five years. The recovery interest rate should therefore correspond to an annual percentage rate fixed for five years.
- (14) Given the objective of restoring the situation existing before the aid was unlawfully granted, and in accordance with general financial practice, the recovery interest rate to be fixed by the Commission should be annually compounded. For the same reasons, the recovery interest rate applicable in the first year of the recovery period should be applied for the first five years of the recovery period, and the recovery interest rate applicable in the sixth year of the recovery period for the following five years.
- (15) This Regulation should apply to recovery decisions notified after the date of entry into force of this Regulation,

<sup>(1)</sup> OJ L 124, 8.6.1971, p. 1.

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HAS ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT MATTER AND SCOPE

*Article 1*

**Subject matter and scope**

1. This Regulation sets out detailed provisions concerning the form, content and other details of notifications and annual reports referred to in Regulation (EC) No 659/1999. It also sets out provisions for the calculation of time limits in all procedures concerning State aid and of the interest rate for the recovery of unlawful aid.
2. This Regulation shall apply to aid in all sectors.

CHAPTER II

NOTIFICATIONS

*Article 2*

**Notification forms**

Without prejudice to Member States' obligations to notify state aids in the coal sector under Commission Decision 2002/871/CE <sup>(1)</sup>, notifications of new aid pursuant to Article 2(1) of Regulation (EC) No 659/1999, other than those referred to in Article 4(2), shall be made on the notification form set out in Part I of Annex I to this Regulation.

Supplementary information needed for the assessment of the measure in accordance with regulations, guidelines, frameworks and other texts applicable to State aid shall be provided on the supplementary information sheets set out in Part III of Annex I.

Whenever the relevant guidelines or frameworks are modified or replaced, the Commission shall adapt the corresponding forms and information sheets.

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*Article 3*

**Transmission of notifications**

1. The notification shall be transmitted to the Commission by means of the electronic validation carried out by the person designated by the Member State. Such validated notification shall be considered as sent by the Permanent Representative.
  2. The Commission shall address its correspondence to the Permanent Representative of the Member State concerned, or to any other address designated by that Member State.
  3. As from 1 July 2008, notifications shall be transmitted electronically via the web application State Aid Notification Interactive (SANI).
- All correspondence in connection with a notification shall be transmitted electronically via the secured e-mail system Public Key Infrastructure (PKI).
4. In exceptional circumstances and upon the agreement of the Commission and the Member State concerned, an agreed communication channel other than those referred to in paragraph 3 may be

<sup>(1)</sup> OJ L 300, 5.11.2002, p. 42.

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used for submission of a notification or any correspondence in connection with a notification.

In the absence of such an agreement, any notification or correspondence in connection with a notification sent to the Commission by a Member State through a communication channel other than those referred to in paragraph 3 shall not be considered as submitted to the Commission.

5. Where the notification or correspondence in connection with a notification contains confidential information, the Member State concerned shall clearly identify such information and give reasons for its classification as confidential.

6. The Member States shall refer to the State aid identification number allocated to an aid scheme by the Commission in each grant of aid to a final beneficiary.

The first subparagraph shall not apply to aid granted through fiscal measures.

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*Article 4*

**Simplified notification procedure for certain alterations to existing aid**

1. For the purposes of Article 1(c) of Regulation (EC) No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.

2. The following alterations to existing aid shall be notified on the simplified notification form set out in Annex II:

- (a) increases in the budget of an authorised aid scheme exceeding 20 %;
- (b) prolongation of an existing authorised aid scheme by up to six years, with or without an increase in the budget;
- (c) tightening of the criteria for the application of an authorised aid scheme, a reduction of aid intensity or a reduction of eligible expenses;

The Commission shall use its best endeavours to take a decision on any aid notified on the simplified notification form within a period of one month.

3. The simplified notification procedure shall not be used to notify alterations to aid schemes in respect of which Member States have not submitted annual reports in accordance with Article 5, 6, and 7, unless the annual reports for the years in which the aid has been granted are submitted at the same time as the notification.

CHAPTER III

ANNUAL REPORTS

*Article 5*

**Form and content of annual reports**

1. Without prejudice to the second and third subparagraphs of this Article and to any additional specific reporting requirements laid down in a conditional decision adopted pursuant to Article 7(4) of Regulation (EC) No 659/1999, or to the observance of any undertakings provided by the Member State concerned in connection with a decision to

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approve aid, Member States shall compile the annual reports on existing aid schemes referred to in Article 21(1) of Regulation (EC) No 659/1999 in respect of each whole or part calendar year during which the scheme applies in accordance with the standardised reporting format set out in Annex IIIA.

Annex IIIB sets out the format for annual reports on existing aid schemes relating to the production, processing and marketing of agricultural products listed in Annex I of the Treaty.

Annex IIIC sets out the format for annual reports on existing aid schemes for state aid relating to the production, processing or marketing of fisheries products listed in Annex I of the Treaty.

2. The Commission may ask Member States to provide additional data for selected topics, to be discussed in advance with Member States.

*Article 6*

**Transmission and publication of annual reports**

1. Each Member State shall transmit its annual reports to the Commission in electronic form no later than 30 June of the year following the year to which the report relates.

In justified cases Member States may submit estimates, provided that the actual figures are transmitted at the very latest with the following year's data.

2. Each year the Commission shall publish a State aid synopsis containing a synthesis of the information contained in the annual reports submitted during the previous year.

*Article 7*

**Status of annual reports**

The transmission of annual reports shall not be considered to constitute compliance with the obligation to notify aid measures before they are put into effect pursuant to Article 88(3) of the Treaty, nor shall such transmission in any way prejudice the outcome of an investigation into allegedly unlawful aid in accordance with the procedure laid down in Chapter III of Regulation (EC) No 659/1999.

CHAPTER IV

**TIME-LIMITS**

*Article 8*

**Calculation of time-limits**

1. Time-limits provided for in Regulation (EC) No 659/1999 and in this Regulation or fixed by the Commission pursuant to Article 88 of the Treaty shall be calculated in accordance with Regulation (EEC, Euratom) No 1182/71, and the specific rules set out in paragraphs 2 to 5 of this Article. In case of conflict, the provisions of this regulation shall prevail.

2. Time limits shall be specified in months or in working days.

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3. With regard to timelimits for action by the Commission, the receipt of the notification or subsequent correspondence in accordance with Article 3(1) and Article 3(3) of this Regulation shall be the relevant event for the purpose of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.

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4. With regard to timelimits for action by Member States, the receipt of the relevant notification or correspondence from the Commission in accordance with Article 3(2) of this Regulation shall be the relevant event for the purposes of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.

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5. With regard to the time-limit for the submission of comments following initiation of the formal investigation procedure referred to in Art. 6(1) of Regulation (EC) No 659/1999 by third parties and those Member States which are not directly concerned by the procedure, the publication of the notice of initiation in the *Official Journal of the European Union* shall be the relevant event for the purposes of Article 3(1) of Regulation (EEC, Euratom) No 1182/71.

6. Any request for the extension of a time-limit shall be duly substantiated, and shall be submitted in writing to the address designated by the party fixing the time-limit at least two working days before expiry.

CHAPTER V

INTEREST RATE FOR THE RECOVERY OF UNLAWFUL AID

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*Article 9*

**Method for fixing the interest rate**

1. Unless otherwise provided for in a specific decision, the interest rate to be used for recovering State aid granted in breach of Article 88 (3) of the Treaty shall be an annual percentage rate which is fixed by the Commission in advance of each calendar year.

2. The interest rate shall be calculated by adding 100 basis points to the one-year money market rate. Where those rates are not available, the three-month money market rate will be used, or in the absence thereof, the yield on State bonds will be used.

3. In the absence of reliable money market or yield on stock bonds or equivalent data or in exceptional circumstances the Commission may, in close co-operation with the Member State(s) concerned, fix a recovery rate on the basis of a different method and on the basis of the information available to it.

4. The recovery rate will be revised once a year. The base rate will be calculated on the basis of the one-year money market recorded in September, October and November of the year in question. The rate thus calculated will apply throughout the following year.

5. In addition, to take account of significant and sudden variations, an update will be made each time the average rate, calculated over the three previous months, deviates more than 15 % from the rate in force. This new rate will enter into force on the first day of the second month following the months used for the calculation.

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*Article 10*

**Publication**

The Commission shall publish current and relevant historical State aid recovery interest rates in the *Official Journal of the European Union* and for information on the Internet.

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*Article 11*

**Method for applying interest**

1. The interest rate to be applied shall be the rate applicable on the date on which unlawful aid was first put at the disposal of the beneficiary.
2. The interest rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.

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3. The interest rate referred to in paragraph 1 shall be applied throughout the whole period until the date of recovery. However, if more than one year has elapsed between the date on which the unlawful aid was first put at the disposal of the beneficiary and the date of the recovery of the aid, the interest rate shall be recalculated at yearly intervals, taking as a basis the rate in force at the time of recalculation.

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CHAPTER VI

**FINAL PROVISIONS**

*Article 12*

**Review**

The Commission shall in consultation with the Member States, review the application of this Regulation within four years after its entry into force.

*Article 13*

**Entry into force**

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

Chapter II shall apply only to those notifications transmitted to the Commission more than five months after the entry into force of this Regulation.

Chapter III shall apply to annual reports covering aid granted from 1 January 2003 onwards.

Chapter IV shall apply to any time limit, which has been fixed but which has not yet expired on the date of entry into force of this Regulation.

Articles 9 and 11 shall apply in relation to any recovery decision notified after the date of entry into force of this Regulation.

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

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*ANNEX I*

**STANDARD FORM FOR NOTIFICATION OF STATE AIDS PURSUANT TO ARTICLE 88 (3) EC TREATY  
AND FOR THE PROVISION OF INFORMATION ON UNLAWFUL AID**

This form shall be used by Member States for the notification pursuant to Article 88(3) EC Treaty of new aid schemes and individual aid. It shall also be used when a non-aid measure is notified to the Commission for reasons of legal certainty.

Member States are also requested to use this form when the Commission requests comprehensive information on alleged unlawful aid.

The present form consists of three parts:

- I. **General Information:** to be completed in all cases
- II. **Summary Information for publication in the Official Journal**
- III. **Supplementary Information Sheet depending on the type of aid**

Please note that failure to complete this form correctly may result in the notification being returned as incomplete. The completed form shall be transmitted on paper to the Commission by the Permanent Representative of the Member State concerned. It shall be addressed to the Secretary General of the Commission.

If the Member State intends to avail itself of a specific procedure laid down in any regulations, guidelines, frameworks and other texts applicable to State aid, a copy of the notification shall be as well addressed to the Director General of the Commission department responsible.

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PART I

**GENERAL INFORMATION**

STATUS OF THE NOTIFICATION

Does the information transmitted on this form concern:

- ☐ **a notification pursuant to Article 88(3) of the EC Treaty?**
- ☐ **a possible unlawful aid <sup>(1)</sup>?**

If yes, please specify the date of putting into effect of the aid. Please complete this form, as well as the relevant supplementary forms.

- ☐ **a non-aid measure which is notified to the Commission for reasons of legal certainty?**

Please indicate below the reasons why the notifying Member State considers that the measure does not constitute State aid in the meaning of Article 87(1) of the EC Treaty. Please complete the relevant parts of this form and provide all necessary supporting documentation.

A measure will not constitute State aid if one of the conditions laid down in Article 87(1) EC Treaty is not fulfilled. Please provide a full assessment of the measure in the light of the following criteria focusing in particular on the criterion which you consider not to be met:

- no transfer of public resources (For example, if you consider the measure is not imputable to the State or where you consider that regulatory measures without transfer of public resources will be put in place),
- no advantage (For example, where the private market investor principle is respected),
- no selectivity/specificity (For example, where the measure is available to all enterprises, in all sectors of the economy and without any territorial limitation and without discretion),
- no distortion of competition/no affectation of intra-community trade (For example, where the activity is not of an economic nature or where the economic activity is purely local).

1. **Identification of the aid grantor**

1.1. Member State concerned: .....

1.2. Region(s) concerned (if applicable): .....

1.3. Responsible contact person:

Name: .....

Address: .....

Telephone: .....

Fax: .....

E-mail: .....

1.4. Responsible contact person at the Permanent Representation:

Name: .....

Telephone: .....

Fax: .....

E-mail: .....

1.5. If you wish that a copy of the official correspondence sent by the Commission to the Member State should be forwarded to other national authorities, please indicate here their name and address:

Name: .....

Address: .....

.....

.....

<sup>(1)</sup> According to Article 1(f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1) (hereinafter 'Procedural Regulation'), unlawful aid shall mean new aid put into effect in contravention of Article 88(3) of the EC-Treaty.



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1.6. Indicate Member State reference you wish to be included in the correspondence from the Commission:

.....

1.7. Please indicate the name and the address of the granting authority:

.....

.....

.....

.....

2. **Identification of the aid**

2.1. Title of the aid (or name of company beneficiary in case of individual aid)

.....

2.2. Brief description of the objective of the aid.

Please indicate primary objective and, if applicable, secondary objective(s):

	Primary objective	Secondary objective <sup>(2)</sup>
	<i>(please tick one only)</i>	
Regional development	<input type="checkbox"/>	<input type="checkbox"/>
Research and development	<input type="checkbox"/>	<input type="checkbox"/>
Innovation	<input type="checkbox"/>	<input type="checkbox"/>
Environmental protection	<input type="checkbox"/>	<input type="checkbox"/>
Energy saving	<input type="checkbox"/>	<input type="checkbox"/>
Rescuing firms in difficulty	<input type="checkbox"/>	<input type="checkbox"/>
Restructuring firms in difficulty	<input type="checkbox"/>	<input type="checkbox"/>
Closure aid	<input type="checkbox"/>	<input type="checkbox"/>
SMEs	<input type="checkbox"/>	<input type="checkbox"/>
Employment	<input type="checkbox"/>	<input type="checkbox"/>
Training	<input type="checkbox"/>	<input type="checkbox"/>
Risk capital	<input type="checkbox"/>	<input type="checkbox"/>
Promotion of export and internationalisation	<input type="checkbox"/>	<input type="checkbox"/>
Services of general economic interest	<input type="checkbox"/>	<input type="checkbox"/>
Sectoral development <sup>(3)</sup>	<input type="checkbox"/>	<input type="checkbox"/>
Social support to individual consumers	<input type="checkbox"/>	<input type="checkbox"/>
Compensation of damage caused by natural disasters or exceptional occurrences	<input type="checkbox"/>	<input type="checkbox"/>
Execution of an important project of common European interest	<input type="checkbox"/>	<input type="checkbox"/>
Remedy for a serious disturbance in the economy	<input type="checkbox"/>	<input type="checkbox"/>
Heritage conservation	<input type="checkbox"/>	<input type="checkbox"/>
Culture	<input type="checkbox"/>	<input type="checkbox"/>

<sup>(2)</sup> A secondary objective is one for which, in addition to the primary objective, the aid will be exclusively earmarked. For example, a scheme for which the primary objective is research and development may have as a secondary objective small and medium-sized enterprises (SMEs) if the aid is earmarked exclusively for SMEs. The secondary objective may also be sectoral, in the case for example of a research and development scheme in the steel sector.

<sup>(3)</sup> Please specify sector in point 4.2.

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▼ **M3**

2.3. Scheme — Individual aid <sup>(4)</sup>

2.3.1. Does the notification relate to an aid scheme?

☐ yes ☐ no

— If yes, does the scheme amend an existing aid scheme?

☐ yes ☐ no

— If yes, are the conditions laid down for the simplified notification procedure pursuant to Article 4(2) of the Implementation Regulation (EC) No 794/2004 fulfilled?

☐ yes ☐ no

— If yes, please use and complete the information requested by the simplified notification form (see Annex II).

— If no, please continue with this form and specify whether the original scheme which is being amended was notified to the Commission.

☐ yes ☐ no

— If yes, please specify:

Aid number: .....

Date of Commission approval (reference of the letter of the Commission (SG(..)D/...):

.../.../... .....

Duration of the original scheme: .....

.....

Please specify which conditions are being amended in relation to the original scheme and why:

.....

2.3.2. Does the notification relate to individual aid?

☐ yes ☐ no

— If yes, please tick the following appropriate box:

☐ aid based on a scheme which should be individually notified

Reference of the authorised scheme:

Title: .....

Aid number: .....

Letter of Commission approval: .....

☐ individual aid not based on a scheme

2.3.3. Does the notification relate to an individual aid or scheme notified pursuant to an exemption regulation?  
If yes, please tick the following appropriate box:

☐ Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 EC Treaty to State aid to small and medium-sized enterprises <sup>(5)</sup>. Please use the supplementary information sheet under part III, 1

☐ Commission Regulation No 68/2001 on the application of Articles 87 and 88 EC Treaty to training aid <sup>(6)</sup>. Please use the supplementary information sheet under part III, 2

<sup>(4)</sup> According to Article 1(e) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1), individual aid shall mean aid that is not awarded on the basis of an aid scheme and notifiable award of aid on the basis of a scheme.

<sup>(5)</sup> Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium sized enterprises, OJ L 10, 13.1.2001, p. 33, as amended by Commission Regulation (EC) No 364/2004 (OJ L 63, 28.2.2004, p. 22), Commission Regulation (EC) No 1857/2006 (OJ L 358, 16.12.2006, p. 3), and Commission Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

<sup>(6)</sup> Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to training aid (OJ L 10, 13.1.2001, p. 20) as amended by Commission Regulation (EC) No 363/2004 (OJ L 63, 28.2.2004, p. 20) and Commission Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

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▼ **M3**

- ☐ Commission Regulation (EC) No 2204/2002 on the application of Articles 87 and 88 EC Treaty to State aid for employment <sup>(7)</sup>. Please use the supplementary information sheet under part III, 3
- ☐ Commission Regulation (EC) No 1628/2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid <sup>(8)</sup>.
- ☐ Commission Regulation (EC) No 1857/2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 <sup>(9)</sup>

3. **National legal basis**

- 3.1. Please list the national legal basis including the implementing provisions and their respective sources of references:

Title: .....

.....

.....

Reference (where applicable): .....

.....

- 3.2. Please indicate the document(s) enclosed with this notification:

- ☐ A copy of the relevant extracts of the final text(s) of the legal basis (and a web link, if possible)
- ☐ A copy of the relevant extracts of the draft text(s) of the legal basis (and a web link, if existing)

- 3.3. In case of a final text, does the final text contain a clause whereby the aid granting body can only grant after the Commission has cleared the aid (stand still clause)?

☐ yes ☐ no

- 3.4. Access to full text of schemes — in case of an aid scheme please:

— undertake to publish the full text of the final aid schemes on the Internet,

☐ yes

Please provide the Internet address: .....

— confirm that the scheme will not be applied before the information is published on the Internet,

☐ yes

4. **Beneficiaries**

- 4.1. Location of the beneficiary(ies):

☐ in (an) unassisted region(s): .....

☐ in (a) region(s) eligible for assistance under Article 87(3)(c) of the EC Treaty (specify at NUTS-level 3 or lower): .....

☐ in (a) region(s) eligible for assistance under Article 87(3)(a) of the EC Treaty (specify at NUTS-level 2 or lower): .....

☐ mixed: specify .....

<sup>(7)</sup> Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ L 337, 13.12.2002, p. 3 and OJ L 349, 24.12.2002, p. 126) as amended by Commission Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

<sup>(8)</sup> Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29).

<sup>(9)</sup> Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p. 3).

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▼ **M3**

4.2. Sector(s) of the beneficiary(ies):

- ☐ Not sector specific
- ☐ Sector specific, please specify according to NACE rev. 2 classification <sup>(10)</sup>: .....

4.3. In case of an individual aid:

Name of the beneficiary: .....

Type of beneficiary: .....

- ☐ SME

Number of employees: .....

Annual turnover: .....

Annual balance-sheet: .....

Independence: .....

(please attach a solemn declaration in line with the Commission Recommendation on SME <sup>(11)</sup>  
or provide any other evidence to demonstrate the above criteria): .....

- ☐ large enterprise

- ☐ firm in difficulties <sup>(12)</sup>

4.4. In case of an aid scheme:

Type of beneficiaries:

- ☐ all firms (large firms and small and medium-sized enterprises)
- ☐ only large enterprises
- ☐ small and medium-sized enterprises <sup>(13)</sup>
- ☐ medium-sized enterprises
- ☐ small enterprises
- ☐ micro enterprises
- ☐ the following beneficiaries: .....

Estimated number of beneficiaries:

- ☐ under 10
- ☐ from 11 to 50
- ☐ from 51 to 100
- ☐ from 101 to 500
- ☐ from 501 to 1 000
- ☐ over 1 000

<sup>(10)</sup> NACE is the Statistical Classification of Economic Activities in the European Community. See Regulation (EC) No 1893/2006 of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 (OJ L 393, 30.12.2006, p. 1). NACE Revision 2 comes into force on 1 January 2008.

<sup>(11)</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) and Commission Regulation (EC) No 364/2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) or any subsequent legislation replacing it.

<sup>(12)</sup> As defined in Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

<sup>(13)</sup> As defined by Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) and Commission Regulation (EC) No 364/2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) or any subsequent legislation replacing it.

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▼ **M3**

5. **Amount of aid/Annual expenditure** <sup>(14)</sup>

In case of an individual aid, indicate the overall amount of each measure concerned:

.....

In case of a scheme, indicate the annual amount of the budget planned and the overall amount:

.....

For tax measures, please indicate the estimated annual and overall revenue losses due to tax concessions for the period covered by the notification:

.....

If the budget is not adopted annually, please specify what period it covers:

.....

If the notification concerns changes to an existing scheme, please give the budgetary effects of the notified changes to the scheme:

.....

6. **Form of the aid and means of funding**

Specify the form of the aid made available to the beneficiary (where appropriate, for each measure):

☐ Direct grant

☐ Reimbursable grant

☐ Soft loan (including details of how the loan is secured)

☐ Interest subsidy

☐ Tax advantage. Please specify:

☐ Tax allowance

☐ Tax base reduction

☐ Tax rate reduction

☐ Tax deferment

☐ Other: .....

☐ Reduction of social security contributions

☐ Provision of risk capital

☐ Other forms of equity intervention. Please specify: .....

☐ Debt write-off

☐ Guarantee (including amongst others information on the loan or other financial transaction covered by the guarantee, the security required and the premium to be paid)

☐ Other. Please specify: .....

For each instrument of aid, please give a precise description of its rules and conditions of application, including in particular the rate of award, its tax treatment and whether the aid is accorded automatically once certain objective criteria are fulfilled (if so, please mention the criteria) or whether there is an element of discretion by the awarding authorities.

.....

<sup>(14)</sup> All data should be provided in national currency.

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▼ **M3**

Specify the financing of the aid: if the aid is not financed through the general budget of the State/region/municipality, please explain its way of financing:

☐ Through parafiscal charges or taxes affected to a beneficiary, which is not the State. Please provide full details of the charges and the products/activities on which they are levied. Specify in particular whether products imported from other Member States are liable to the charges. Annex a copy of the legal basis for the imposition of the charges:

.....

☐ Accumulated reserves

☐ Public enterprises

☐ Other (please specify): .....

7. **Duration**

7.1. In the case of an individual aid:

Indicate the planned date to put into effect the aid. If the aid will be granted in *tranches*, indicate the planned date of each *tranche*:

.....

Specify the duration of the measure for which the aid is granted, if applicable:

.....

7.2. In the case of a scheme:

Indicate the planned date from which the aid may be granted:

.....

Indicate the planned last date until which aid may be granted:

.....

If the duration exceeds six years, please demonstrate that a longer time period is indispensable to achieve the objective(s) of the scheme:

.....

8. **Cumulation of different types of aid**

Can the aid be cumulated with aid received from other local, regional, national or Community schemes to cover the same eligible costs?

☐ yes

☐ no

If so, describe the mechanisms put in place in order to ensure that the cumulation rules are respected:

.....

9. **Professional confidentiality**

Does the notification contain confidential information which should not be disclosed to third parties?

☐ yes

☐ no

If so, please indicate which parts are confidential and explain why:

.....

.....

.....

Does the Member State submit a non confidential version of the notification on a voluntary basis?

☐ yes

☐ no

If yes, the Commission may publish this version without further asking the Member State to confirm its content.

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▼ **M3**

10. **Compatibility of the aid**

10.1. Please identify which of the existing Regulations, frameworks, guidelines and other texts applicable to State aid provide an explicit legal basis for the authorisation of the aid (where appropriate please specify for each measure) and complete the relevant supplementary information sheet(s) in part III:

- ☐ **SME aid**
  - ☐ Notification of an individual aid pursuant to Article 6 of Regulation (EC) No 70/2001, as amended by Regulation (EC) No 364/2004
  - ☐ Notification of an individual aid or an aid scheme pursuant to Article 6a of Regulation (EC) No 70/2001, as amended by Regulation (EC) No 364/2004
  - ☐ Notification for legal certainty
  - ☐ Aid for SMEs in the agricultural sector
- ☐ **Training aid**
  - ☐ Notification of an individual aid pursuant to Article 5 of Regulation (EC) No 68/2001, as amended by Regulation (EC) No 363/2004
  - ☐ Notification for legal certainty
- ☐ **Employment aid**
  - ☐ Notification of an individual aid pursuant to Article 9 of Regulation (EC) No 2204/2002
  - ☐ Notification of a scheme pursuant to Article 9 of Regulation (EC) No 2204/2002
  - ☐ Notification for legal certainty
- ☐ **Regional aid**
  - ☐ Notification of aid pursuant to Guidelines on national regional aid for 2007-2013 <sup>(15)</sup>
  - ☐ Notification of aid pursuant to point 64 of Guidelines on national regional aid for 2007-2013 (large investment projects)
  - ☐ Notification of aid pursuant to Article 7 of Regulation (EC) No 1628/2006
  - ☐ Notification for legal certainty
- ☐ **Research and development and innovation aid**
- ☐ **Aid for rescuing firms in difficulty**
- ☐ **Aid for restructuring firms in difficulty**
- ☐ **Aid for audiovisual production**
- ☐ **Environmental protection aid**
- ☐ **Risk capital aid**
- ☐ **Aid in the agricultural sector**
- ☐ **Aid in the fisheries sector**
- ☐ **Aid in the transport sector**
- ☐ **Shipbuilding aid**

10.2. Where the existing Regulations, frameworks, guidelines or other texts applicable to State aid do not provide an explicit basis for the approval of any of the aid covered by this form, please provide a fully reasoned justification as to why the aid could be considered as compatible with the EC Treaty, referring to the applicable exemption clause of the EC Treaty (Article 86(2), Article 87(2)(a) or (b), Article 87(3)(a), (b), (c) or (d)) as well as other specific provisions relating to Agriculture and Transport.

<sup>(15)</sup> Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

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▼ **M3**

10.3. Where the existing Regulations, frameworks, guidelines or other texts applicable to State aid do not provide an explicit basis for the approval and in so far that it is not requested by the relevant supplementary information sheet(s) in part III, please provide the following information concerning the likely impact of the notified measure on competition and trade between Member States.

This information is necessary to complete the assessment made by the Commission which balances the positive impact of the aid measure (reaching an objective of common interest) against its potentially negative side effects (distortions of trade and competition).

10.3.1. *For individual aid:*

(A) Impact on competition: Please specify and describe the product markets on which the aid is likely to have a significant impact, the structure and dynamics of those markets and the indicative market share of the beneficiary:

.....

(B) Impact on trade between Member States. Please provide information on the effects on trade (shift of trade flows and location of economic activity):

.....

10.3.2. *For aid schemes:*

(A) Impact on competition: Please specify and describe the product markets on which the aid scheme is likely to have a significant impact, the structure and dynamics of those markets:

.....

(B) Impact on trade between Member States. Please provide information on the effects on trade (shift of trade flows and location of economic activity):

.....

11. **Outstanding recovery orders**

11.1. In the case of individual aid:

The authorities of the Member State commit to suspend the payment of the notified aid if the beneficiary still has at its disposal an earlier unlawful aid that was declared incompatible by a Commission Decision (either concerning an individual aid or an aid scheme), until that beneficiary has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid and the corresponding recovery interest.

☐ yes

☐ no

11.2. In the case of aid schemes:

The authorities of the Member State commit to suspend the payment of any aid under the notified aid scheme to any undertaking that has benefited from earlier unlawful aid declared incompatible by a Commission Decision, until that undertaking has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid and the corresponding recovery interest.

☐ yes

☐ no

12. **Other information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under State aid rules.

13. **Attachments**

Please list here all documents which are attached to the notification and provide paper copies or direct Internet links to the documents concerned.

14. **Declaration**

I certify that to the best of my knowledge the information provided on this form, its annexes and its attachments is accurate and complete.

Date and place of signature: .....

Signature: .....

Name and position of person signing: .....

\_\_\_\_\_



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▼ **B**

**SUPPLEMENTARY INFORMATION SHEETS**

To be completed as necessary depending on the type of aid concerned:

1. SME aid
2. Training aid
3. Employment aid
4. Regional aid
5. Aid coming under the multisectoral framework
6. Research and development aid
  - a) in the case of a scheme
  - b) in the case of individual aid
7. Aid for rescuing firms in difficulty
  - a) in the case of a scheme
  - b) in the case of individual aid
8. Aid for restructuring firms in difficulty
  - a) in the case of a scheme
  - b) in the case of individual aid
9. Aid for audio-visual production
10. Environmental protection aid
11. Risk capital aid
12. Aid in the agricultural sector
  - a) Aid for agriculture
    - i. Aid for investment in agricultural holdings
    - ii. Aid for investments in connection with the processing and marketing of agricultural products
  - b) Agri-environmental aid
  - c) Aid to compensate for handicaps in the less favoured areas
  - d) Aid for the setting up of young farmers
  - e) Aid for early retirement or for the cessation of farming activities
  - f) Aid for closing production, processing and marketing capacity
  - g) Aid for producer groups
  - h) Aid to compensate for damage to agricultural production or the means of agricultural production
  - i) Aid for land reparation
  - j) Aid for the production and marketing of quality agricultural products
  - k) Aid for the provision of technical support in the agricultural sector
  - l) Aid for the livestock sector
  - m) Aid for the outermost regions and the Aegean Islands
  - n) Aid in the form of subsidised short-term loans
  - o) Aid for the promotion and advertising of agricultural and certain non-agricultural products
  - p) Aid for rescue and restructuring firms in difficulty
  - q) Aid for TSE tests; fallen stock and slaughterhouse waste
13. Aid in the transport sector
  - a) Individual aid for restructuring firms in difficulty in the aviation sector
  - b) Aid for transport infrastructure
  - c) Aid for maritime transport
  - d) Aid for combined transport

► <sup>(1)</sup> 14. Aid to the fisheries sector ◀

► <sup>(1)</sup> **C1**

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▼ **B**

PART III.1

**SUPPLEMENTARY INFORMATION SHEET ON SME AID**

*This supplementary information sheet must be used for the notification of any individual aid pursuant to Article 6 of Regulation (EC) 70/2001 <sup>(1)</sup> in its modified form <sup>(2)</sup>. It must also be used in the case of any individual aid or scheme, which is notified to the Commission for reasons of legal certainty.*

1. **Type of individual aid or scheme**

Does the individual aid or scheme relate to:

- 1.1. ☐ investment aid
- 1.2. ☐ consultancy and other services and activities including participation in fairs
- 1.3. ☐ R&D expenditure
- ☐ yes:
- for notifications of R & D aid to SMEs please complete:
  - supplementary information sheet for R & D 6 a for aid schemes
  - supplementary information sheet for R & D 6 b for individual aid

2. **Initial Investment Aid**

2.1. Does the aid cover investment in fixed capital relating to:

- ☐ the setting-up of a new establishment ?
- ☐ the extension of an existing establishment ?
- ☐ the starting-up of a new activity involving a fundamental change in the product or production process of an existing establishment (through rationalisation, diversification or modernisation)?
- ☐ the purchase of an establishment, which has closed, or which would have closed had it not been purchased?

Is replacement investment excluded?

☐ yes ☐ no

2.2. Is the aid calculated as percentage of:

- ☐ the investment's eligible costs
- ☐ the wage costs of employment created by the investment (aid to job creation )

2.3. a) ☐ investment in tangible assets: .....

Is the value of the investment established as a percentage on the basis of :

- ☐ land ?
- ☐ buildings ?
- ☐ plant/machinery (equipment)?

Please provide a short description:

.....

If the undertaking has its main economic activity in the transport sector, are transport means and transport equipment excluded from the eligible costs (except for railway rolling stock)?

☐ yes ☐ no

<sup>(1)</sup> Commission Regulation (EC) N° 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium sized enterprises, OJ L 10, 13.1.2001, p. 33.

<sup>(2)</sup> OJ L 63, 28.2.2004, p. 22.

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▼ **B**

If no, please specify the transport means or equipment that are eligible:

.....

- b) ☐ purchasing price for the take over of an establishment which has closed or which would have closed had it not been purchased  
c) ☐ intangible investment

The eligible costs of intangible investment shall be the costs of acquisition of the technology:

- ☐ patents' rights  
☐ operating or patented know-how licences  
☐ unpatented know-how (technical knowledge)

Please provide a short description <sup>(1)</sup> .....

- d) ☐ wage costs:

Is the amount of the aid expressed as a percentage of the wage costs over a period of two years relating to the employment created?

☐ yes ☐ no

2.4. Intensity of the aid

2.4.1 Investment projects situated outside of assisted regions under Article 87(3)(c) and under Article 87(3)(a) for:

small enterprises ☐ medium sized enterprises ☐

2.4.2 What are the intensities of the aid for investment projects expressed in gross terms?

Please specify: .....

Investment projects situated inside of assisted regions under Article 87(3)(c) and under Article 87(3)(a):

small enterprises ☐ medium sized enterprises ☐

What are the intensities of the aid for investment projects expressed in gross terms? Please specify:

.....

3. **Cumulation of the aid**

3.1. What is the maximum ceiling for cumulated aid?

Please specify: .....

.....

4. **Specific conditions for aid for job creation**

4.1. Does the aid provide for guarantees that the aid for job creation is linked to the carrying-out of an initial investment project in tangible or intangible assets?

☐ yes ☐ no

4.2. Does the aid provide for guarantees that the aid for job creation is created within three years of the investment's completion?

☐ yes ☐ no

<sup>(1)</sup> This description should reflect how the authorities intend to ensure consistency with point 4.6 of the Guidelines of National Regional Aid, OJ 74, 10.3.1998, p. 9, as amended by the community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty, OJ C 288, 9.10.1999, p. 2, and the subsequent Amendments to the Guidelines on National Regional Aid, OJ C 258, 9.9.2000, p. 5.

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▼ **B**

Should one of the two previous questions be answered in the negative, please explain how the authorities intend to comply with these requirements:  
.....

- 4.3. Does the employment created represent a net increase in the number of employees in the establishment concerned, compared with the average over the past 12 months?

☐ yes ☐ no

- 4.4. Does the aid provide for guarantees that the employment within the qualified region will be maintained for a minimum period of five years?

☐ yes ☐ no

If yes, what are the guarantees for that ? .....

- 4.5. Does the aid provide for guarantees that the jobs lost during the period of reference are being deducted from the apparent number of jobs created during the same period?

☐ yes ☐ no

5. **Specific Conditions for Investment Project in assisted areas with higher regional aid**

- 5.1. Does the aid include a clause stipulating that the recipient has made a minimum contribution of at least 25% of the total investment and that this contribution will be exempted of any aid?

☐ yes ☐ no

- 5.2. What are the guarantees that the aid for initial investment (both material and intangible investment) is made conditional on the maintenance of the investment for a minimum period of five years?  
.....  
.....

6. **Aid to consultancy and other service activities**

- 6.1. Are eligible costs limited to:

- ☐ costs for services provided by outside consultants and other services providers?

Please specify if such services are not a continuous or periodic activity nor relate to the enterprise's usual operating expenditure, such as routine tax consultancy services, regular legal service or advertising  
.....  
.....

- ☐ costs of firms participating in fairs and exhibitions? Please specify if the aid is related to the additional costs incurred for renting, setting up and running the stand:

Is the participation limited to the first participation in a fair or exhibition?

☐ yes ☐ no

- ☐ Other costs (in particular cases where aid is awarded directly to the service(s) provider or consultant(s) Please specify under which conditions: .....

- 6.2. Please indicate the maximum aid intensity expressed in gross terms:

If the aid intensity exceeds 50 % gross please indicate in detail why this aid intensity should be necessary:  
.....  
.....

- 6.3. Please indicate the maximum ceiling for cumulated aid:  
.....  
.....

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▼ **B**

7. **Necessity of the aid**

7.1. Does the aid foresee that any application for aid must be submitted before work on the project is started?

☐ yes ☐ no

7.2. If not has the Member State adopted legal provisions establishing a legal right to aid according to objective criteria and without further exercise of discretion by the Member States?

☐ yes ☐ no

8. **Other Information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the Regulation (EC) 70/2001.

▼ **M6**

*PART III.2*

**SUPPLEMENTARY INFORMATION SHEET ON STATE AID FOR TRAINING**

This supplementary information sheet must be used for the notification of individual aid pursuant to Article 6(1)(g) of Commission Regulation (EC) No 800/2008<sup>(1)</sup> and covered by the Criteria for the compatibility analysis of training State aid cases subject to individual notification (hereinafter 'Criteria for the compatibility analysis')<sup>(2)</sup>. It must also be used in the case of any individual aid or scheme, which is notified to the Commission for reasons of legal certainty.

If there are several beneficiaries participating in the notified project, please provide the information below for each of them.

**COMPATIBILITY OF AID UNDER ARTICLE 87(3)(c) OF THE EC TREATY — DETAILED ASSESSMENT**

Aid for training may be considered to be compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

The purpose of this detailed assessment is to ensure that high amounts of aid for training do not distort competition to an extent contrary to the common interest, but rather contribute to the common interest. This happens when the benefits of State aid in terms of positive knowledge spill-over outweigh the harm for competition and trade.

The provisions below provide guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty. Member States are invited to provide all the elements that they consider useful for the assessment of the case.

If there are several beneficiaries involved in the project notified as individual aid, please provide the information below for each of them.

**Characteristics of the notified measure**

1. Please provide a brief description of the measure specifying objective(s) of the measure, aid instrument, structure/organisation of the training, beneficiaries, budget, aid amount, payment schedule, aid intensity, and eligible costs.
2. Does the measure apply to the production and/or processing and/or marketing of the agricultural products listed in Annex I to the EC Treaty?

☐ yes ☐ no

3. Does the measure apply to the production, processing and/or marketing of the fisheries and/or aquaculture products listed in Annex I to the EC Treaty?

☐ yes ☐ no

<sup>(1)</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3).

<sup>(2)</sup> OJ C 188, 11.8.2009, p. 1.

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▼ **M6**

4. Is the aid foreseen for the maritime transport sector?

☐ yes ☐ no

If yes, please answer the following questions:

- (a) Is the trainee not an active member of the crew but a supernumerary on board?

☐ yes ☐ no

- (b) Shall the training be carried out on board of ships entered into Community registers?

☐ yes ☐ no

5. Does the notified measure relate to:

Specific training <sup>(1)</sup>:

☐ yes ☐ no

General training <sup>(2)</sup>:

☐ yes ☐ no

A combination of general and specific training:

☐ yes ☐ no

Training aid given to disabled or disadvantaged workers <sup>(3)</sup>:

☐ yes ☐ no

6. Please provide a detailed description of the training project including programme, skills to be acquired, timing, number of hours, participants, organisers, budget, etc.
7. Please provide details on the beneficiary including identity, group of which the beneficiary is a member, annual turnover, number of employees and business activities.
8. If applicable, please indicate the exchange rate which has been used for the purposes of the notification.
9. Please number all documents provided by the Member States as annexes to the notification form and indicate the document numbers in the relevant parts of this supplementary information sheet.

**Objective of the aid**

10. Please give a detailed description of the objectives of common interest pursued by the notified measure.

**Existence of positive externalities <sup>(4)</sup>**

11. Please demonstrate that the training will generate positive externalities and provide the supporting documents.

The following elements may be used for the purposes of demonstrating positive externalities. Please specify those relevant for the notified measure, and provide supporting documents:

☐ Nature of the training

<sup>(1)</sup> As defined in Article 38 of Regulation (EC) No 800/2008.

<sup>(2)</sup> As defined in Article 38 of Regulation (EC) No 800/2008.

<sup>(3)</sup> As defined in Article 2 of Regulation (EC) No 800/2008.

<sup>(4)</sup> Cf. Criteria for the compatibility analysis, Section 2.1.

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▼ **M6**

- ☐ Transferability of the skills acquired during the training
- ☐ Participants to the training

**Appropriate instrument <sup>(1)</sup>**

12. Please explain to what extent the notified measure represents an appropriate instrument to increase training activities and provide the supporting documents.

**Incentive effect and necessity of the aid <sup>(2)</sup>**

In order to demonstrate the incentive effect, the Commission requires an evaluation by the Member State in order to prove that without the aid, i.e. in the counterfactual situation, the quantity or quality of the training activities would be smaller.

13. Has/have the supported project(s) started prior to the submission of the application for the aid by the beneficiary/beneficiaries to the national authorities?

☐ yes ☐ no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary.

14. If no, specify the relevant dates:

The training project will start on:

The aid application by the beneficiary was submitted to the national authorities on:

Please provide the relevant supporting documents.

15. Please provide the beneficiary's internal documents on training costs, participants, content and scheduling for two scenarios: training project with aid and training project without aid. Please explain, on the basis of this information, how State aid increases the quantity and/or quality of the planned training activities.
16. Please confirm that there is no legal obligation for the employers to provide the training type covered by the notified measure.
17. Please provide with the beneficiary's training budgets for previous years.
18. Please explain the relationship between the training programme and business activities of the aid beneficiary.

**Proportionality of the aid <sup>(3)</sup>**

*Eligible costs*

Eligible costs must be calculated following Article 39 of Regulation (EC) No 800/2008 and limited to the extra costs necessary to achieve an increase of training activities.

19. Please specify the eligible costs foreseen for the measure

- ☐ trainers' personnel costs
- ☐ trainers' and trainees' travel expenses, including accommodation costs
- ☐ other current expenses such as materials and supplies directly related to the project
- ☐ depreciation of tools and equipment, to the extent that they are used exclusively for the training project
- ☐ cost of guidance and counselling services with regard to the training project

<sup>(1)</sup> Cf. Criteria for the compatibility analysis, Section 2.2.

<sup>(2)</sup> Cf. Criteria for the compatibility analysis, Section 2.3.

<sup>(3)</sup> Cf. Criteria for the compatibility analysis, Section 2.4.

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▼ **M6**

- ☐ indirect costs (administrative, rent, overheads), transport and tuition costs for participants) up to the amount of the total of the other eligible costs referred to above
- ☐ trainees' personnel costs <sup>(1)</sup>.

20. Please provide a detailed calculation of the eligible costs of the notified measure ensuring that the eligible costs are limited to the part of **extra costs** necessary to achieve an increase of quality or quantity of training activities.
21. Please provide evidence that the aid is limited to the minimum, i.e. to the part of the extra costs of the training that the company cannot recover by benefiting directly from the skills acquired by its employees during the training.

*Aid intensities for general training*

22. Please specify the aid intensity applicable to the notified measure.
23. Is the general training under the notified measure given to disabled or disadvantaged workers?
- ☐ yes ☐ no

24. Nature of the beneficiary:

- |                         |                          |     |                          |    |
|-------------------------|--------------------------|-----|--------------------------|----|
| Large enterprise        | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| Medium-sized enterprise | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| Small enterprise        | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |

*Aid intensities for specific training*

25. Please specify the aid intensity applicable to the notified measure.
26. Is the specific training under the notified measure given to disabled or disadvantaged workers?
- ☐ yes ☐ no

27. Nature of the beneficiary

- |                         |                          |     |                          |    |
|-------------------------|--------------------------|-----|--------------------------|----|
| Large enterprise        | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| Medium-sized enterprise | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| Small enterprise        | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |

**Analysis of the distortion of competition and trade <sup>(2)</sup>**

28. Please specify whether the beneficiary received training aid in the past and provide details on the previous aid (dates, amount of aid, and duration of training projects).
29. Please specify the annual training costs of the beneficiary (total training budget for the last three years, proportion of training costs in relation to total costs) and explain how the aid affects the beneficiary's costs (e.g. percentage of annual training costs and total costs covered by the aid, etc.).
30. Please specify the relevant product and geographic markets on which the beneficiary is active and on which the aid is likely to have an impact.
31. For each of these markets please provide:
- market concentration ratio,
  - market share of the beneficiary,
  - market shares of the other companies present in these markets.

<sup>(1)</sup> As regards the trainees' personnel costs, only the hours during which the trainees actually participate in the training, after deduction of any productive hours, may be taken into account.

<sup>(2)</sup> This section does not apply to measures of less than EUR 2 provided the question 10.3 in Part I of this Annex is duly completed.



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▼ **M6**

32. Please describe the structure and competitive situation on the relevant markets and provide supporting documents (e.g. barriers to entry and exit, product differentiation, character of the competition between market participants, etc.).
33. Please describe the features of the sector where the beneficiary is active (e.g. importance of the trained workforce for the business, existence of overcapacity, financing strategies of training for competitors, etc.).
34. If relevant, please provide information on the effects on trade (shift of trade flows).

**CUMULATION**

35. Is the aid granted under the notified measure combined with other aid?

☐ yes ☐ no

If yes, please describe the rules on cumulating aid applicable to the notified aid measure:

**OTHER INFORMATION**

36. Please indicate here any other information you consider relevant to the assessment of the measure(s) in concerned.

*PART III.3*

**SUPPLEMENTARY INFORMATION SHEET ON STATE AID TO DISADVANTAGED AND DISABLED WORKERS**

This supplementary information sheet must be used for the notification of individual aid pursuant to Article 6(1)(h) to (i) of Regulation (EC) No 800/2008 and covered by the Criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification (hereinafter 'Criteria for the compatibility analysis')<sup>(1)</sup>. It must also be used in the case of any individual aid or scheme, which is notified to the Commission for reasons of legal certainty.

If there are several beneficiaries participating in the notified project, please provide the information below for each of them.

**COMPATIBILITY OF AID UNDER ARTICLE 87(3)(c) OF THE EC TREATY — DETAILED ASSESSMENT**

Aid to disadvantaged and disabled workers may be considered to be compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

The purpose of this detailed assessment is to ensure that high amounts of aid to disadvantaged and disabled workers do not distort competition to an extent contrary to the common interest, but actually contribute to the common interest. This happens when the benefits of State aid in terms of the increased net employment of targeted disabled and disadvantaged workers outweigh the harm for competition and trade.

The provisions below provide guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty. Member States are invited to provide all the elements that they consider useful for the assessment of the case.

If there are several beneficiaries involved in the project notified as individual aid, please provide the information below for each of them.

**Characteristics of the notified measure**

1. Please provide a brief description of the notified measure specifying objective of the aid, aid instrument, beneficiaries, categories of workers concerned, aid amount, payment schedule, duration, aid intensity, and eligible costs.

<sup>(1)</sup> OJ C 188, 11.8.2009, p. 6.

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▼ **M6**

2. Does the measure apply to the production and/or processing and/or marketing of the agricultural products listed in Annex I to the EC Treaty?

☐ yes ☐ no

3. Does the measure apply to the production, processing and/or marketing of the fisheries and/or aquaculture products listed in Annex I to the EC Treaty?

☐ yes ☐ no

4. Please provide details on the beneficiary including identity, group of which the beneficiary is a member, turnover, number of employees and business activities.

5. Does the notified measure relate to:

Recruitment of disadvantaged workers <sup>(1)</sup>:

☐ yes ☐ no

Recruitment of severely disadvantaged workers <sup>(2)</sup>:

☐ yes ☐ no

Recruitment of disabled workers <sup>(3)</sup>:

☐ yes ☐ no

6. If applicable, please indicate the exchange rate which has been used for the purposes of the notification.
7. Please number all documents provided by the Member States as annexes to the notification form and indicate the document numbers in the relevant parts of this supplementary information sheet.

**Objective of the aid**

8. Please give a detailed description of the objectives of common interest pursued by the notified measure.

Equity objective of common interest <sup>(4)</sup>

9. Please demonstrate that the notified measure will lead to a net increase of employment of the targeted disabled and disadvantaged workers and quantify the increase.

10. The following elements may be used for the purposes to demonstrate that the notified measure contributes to an equity objective of common interest. Please specify those relevant for the notified measure, and provide supporting documents:

- ☐ Number and categories of workers concerned by the measure
- ☐ Employment rates of the categories of workers concerned by the measure on the national and/or regional level and in the undertaking(s) concerned
- ☐ Unemployment rates for the categories of workers concerned by the measure on the national and/or regional level.

**Appropriate instrument <sup>(5)</sup>**

11. Please explain to what extent the notified measure represents an appropriate instrument to increase the employment of disadvantaged and/or disabled workers and provide the supporting documents.

<sup>(1)</sup> As defined in Article 2(18) of Regulation (EC) No 800/2008.

<sup>(2)</sup> As defined in Article 2(19) of Regulation (EC) No 800/2008.

<sup>(3)</sup> As defined in Article 2(20) of Regulation (EC) No 800/2008.

<sup>(4)</sup> Cf. Criteria for the compatibility analysis, Section 2.1.

<sup>(5)</sup> Cf. Criteria for the compatibility analysis, Section 2.2.

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▼ **M6**

**Incentive effect and necessity of the aid <sup>(1)</sup>**

In order to demonstrate the incentive effect, the Commission requires an evaluation by the Member State proving that the wage subsidy is only paid for a disadvantaged or disabled worker in a firm, where the recruitment would have not occurred without the aid.

12. Has/have the supported project(s) started prior to the submission of the application for the aid by the beneficiary/beneficiaries to the national authorities?

☐ yes ☐ no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary to increase a net employment of disabled or disadvantaged workers.

13. If no, specify the relevant dates:

The employment commenced on:

The aid application by the beneficiary was submitted to the national authorities on:

Please provide the relevant supporting documents.

14. Does the recruitment lead to an increase, by comparison to a situation without aid, of number of disadvantaged or disabled workers in the undertaking(s) concerned?

☐ yes ☐ no

15. If not, have the post or posts fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy?

☐ yes ☐ no

16. Please describe any existing or past wage subsidies in the undertaking concerned: categories and number of workers subject to subsidies.

**Proportionality of the aid <sup>(2)</sup>**

*Eligible costs*

Eligible costs must be calculated following Articles 40 and 41 of Regulation (EC) No 800/2008 and limited to the extra costs necessary to achieve a net increase of disadvantaged or disabled workers employed.

17. Which are the eligible costs foreseen under the notified measure?

- ☐ gross wage, before tax  
☐ compulsory contributions, such as social security charges  
☐ child care and parent care costs.

18. Please provide a detailed calculation of the eligible costs and the period covered <sup>(3)</sup> by the notified measure ensuring that the eligible costs are limited to the costs necessary to achieve a net increase of employment of the targeted categories of disadvantaged or disabled workers.

19. Please provide evidence that the aid is limited to the minimum, i.e. the aid amount does not exceed the net additional costs of employing the targeted categories of disadvantaged or disabled workers compared to the costs of employing workers who are not disadvantaged/disabled.

<sup>(1)</sup> Cf. Criteria for the compatibility analysis, Section 2.3.

<sup>(2)</sup> Cf. Criteria for the compatibility analysis, Section 2.4.

<sup>(3)</sup> For employment of disadvantaged workers eligible costs shall be the wage costs over a maximum period of 12 months (or 24 months for severely disadvantaged worker) following recruitment. For employment of disabled workers eligible costs shall be the wage costs over any given duration during which the disabled worker is being employed.

▼ **M6**

*Aid intensities for disadvantaged workers*

20. Please specify the aid intensity applicable to the notified measure.

*Aid intensities for disabled workers*

21. Please specify the aid intensity applicable to the notified measure.

**Analysis of the distortion of competition and trade <sup>(1)</sup>**

22. Please provide information on the aid amount, payment schedule and aid instrument.

23. Please specify whether the beneficiary received aid for disadvantaged or disabled workers in the past and provide details on the previous aid measures (dates, amount of aid, categories and number of workers concerned, and duration of wage subsidies).

24. Please specify the employment costs of the beneficiary (total employment costs, employment costs of targeted disabled and disadvantaged workers, proportion of employment costs in relation to total costs) and explain how the aid affects the beneficiary's costs (e.g. percentage of employment costs and total costs covered by the aid).

25. Please specify the relevant product and geographic markets on which the beneficiary is active and the aid is likely to have an impact.

26. For each of these markets please provide:

- market concentration ratio,
- market share of the beneficiary,
- market shares of the other companies present in these markets.

27. Please describe the structure and competitive situation on the relevant markets and provide supporting documents (e.g. barriers to entry and exit, product differentiation, character of the competition between market participants, etc.).

28. Please describe the features of the sector where the beneficiary is present (e.g. importance of the labour costs for the sector, existence of overcapacity, etc.).

29. Please describe the situation on the national/regional labour market (e.g. unemployment and employment rates, wage levels, labour law, etc.).

30. If relevant, please provide information on the effects on trade (shift of trade flows).

**CUMULATION**

31. Is the aid granted under the notified measure combined with other aid?

☐ yes ☐ no

32. If yes, please describe the rules on cumulating aid applicable to the notified aid measure:

**OTHER INFORMATION**

33. Please indicate here any other information you consider relevant to the assessment of the measure(s) in concerned.

<sup>(1)</sup> This section does not apply to measures of less than EUR 5 million for the employment of disadvantaged workers and of less than EUR 10 million for the employment of disabled workers provided the question 10.3 in Part I of this Annex is duly completed.

▼ M1

PART III.4

**SUPPLEMENTARY INFORMATION SHEET ON REGIONAL AID**

*This supplementary information sheet must be used for the notification of any aid scheme or ad hoc aid covered by the guidelines on national regional aid for 2007-2013 (RAG) <sup>(1)</sup>. The present annex cannot be used for the particular purpose of notification of new regional aid maps for the period 2007-2013. Transparent investment aid schemes falling under the scope of the exemption regulation on regional investment aid are exempted from the notification obligation. Therefore, Member States are invited to clarify the scope of their notification; in the particular case that a scheme covers both transparent and non-transparent forms of investment aid, they are invited to limit the scope of the notification only to the second category.*

*In the case of ad hoc aid (i.e. aid granted outside existing aid schemes), Member States will have to demonstrate that the project contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition. Moreover, Member States will have to demonstrate that the aid will not be unduly concentrated on a particular sector of activity and that it creates no adverse sectoral effects.*

*Another supplementary information sheet (Part III.5) must be submitted in case of notification of regional investment aid to large investment projects in the accordance with section 4.3 of the RAG.*

**1. Scheme or ad hoc aid**

The scheme or the ad hoc aid relates to

1.1. ☐ initial investment

☐ The aid is calculated as a percentage of the investment's eligible material and immaterial costs

☐ The aid is calculated as a percentage of the expected wage costs of the persons to be hired

☐ operating aid

☐ aid for newly-created small enterprises

☐ combination of any above

1.2. The aid is granted:

☐ automatically, should the conditions of the scheme be fulfilled

☐ on a discretionary basis, following a decision of the authorities

Should the aid be granted on a discretionary basis, please provide a short description of the criteria followed and attach a copy of the administrative provisions applicable for the awarding of aid:

.....  
.....

1.3. Does the aid respect the regional aid ceilings determined in the regional aid map in force at the time of awarding the aid, including those resulting from the provisions applicable to aid for large investment projects (section 4.3 of RAG)?

☐ yes ☐ no

Does the scheme include a reference to the regional aid map in force?

☐ yes ☐ no

<sup>(1)</sup> Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

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▼ **M1**

2. **Initial investment aid**

2.1. Does the scheme cover investment in fixed capital or job creation linked to initial investment relating to:

- ☐ the setting-up of a new establishment?
- ☐ the extension of an existing establishment?
- ☐ diversification of the output of an establishment into new, additional products?
- ☐ a fundamental change in the overall production process of an existing establishment?
- ☐ the acquisition by an independent investor of capital assets directly linked to an establishment which has closed or which would have closed had it not been purchased?

2.2. Where the aid is calculated on the basis of material or immaterial investment costs, or of acquisition costs in the case of a takeover, does the aid include a clause stipulating that the beneficiary makes a financial contribution of at least 25 % of the total eligible costs and that this contribution will be free of any public support, including *de minimis* aid?

☐ yes ☐ no

2.3. Where the aid is granted automatically on the basis of objective criteria under a legal basis giving rights to the beneficiaries to receive the aid, does the scheme exclude the award of aid to projects which have started before the entry into force of the legal basis?

☐ yes ☐ no

Where the aid is not granted automatically, does the scheme provide that the application for aid must be submitted before work is started on the project and the competent authorities must have confirmed in writing that, subject to the final outcome of a detailed verification, the project meets the conditions of eligibility laid down by the scheme (see p. 38 of the RAG)?

☐ yes ☐ no

In the case of ad hoc aid, did the competent authority issue a letter of intent to award aid before work started on the project, which was conditional on the Commission approval of the measure?

☐ yes ☐ no

If any of the previous points mentioned above under 2.3 are not fulfilled, please explain why and how the authorities intend to comply with these necessary conditions:

.....

2.4. What are the aid intensities under the scheme or ad hoc aid expressed in gross terms?

.....

What are the parameters enabling the calculation of aid intensities?

.....

2.4.1. ☐ *Grants*

☐ in nominal amount

.....

☐ in present (discounted) value

.....

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▼ **M1**

2.4.2. ☐ *Tax measures*

How is the discounted value of the tax capped and to which aid intensity?

.....

2.4.3. ☐ *Public soft loans*

maximum period of the loan:

.....

maximum proportion (amount of the loan as a % of the eligible investment):

.....

maximum length of the grace period:

.....

minimum interest rate:

.....

— Is the loan covered by normal securities required by banks?

☐ yes ☐ no

If yes, to what extent?

.....

— What is the expected default rate, by categories of beneficiaries?

.....

— Is the interest rate increased in situations involving a particular risk?

☐ yes ☐ no

— Is the interest rate fixed, variable, dependent on profits, a combination of above?

.....

— Are the loans subordinated?

☐ yes ☐ no

2.4.4. ☐ *Interest rate subsidy:*

maximum amount of the rebate:

.....

maximum proportion (amount of the loan as a % or proportion of the eligible investment):

.....

maximum length of the grace period:

.....

duration of the loan:

.....

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▼ **M1**

2.4.5. ☐ *Guarantee schemes*

Please indicate the types of loans for which guarantees may be granted:

.....

Please indicate the method and the parameters used for the calculation of the grant equivalent of the guarantee, including duration, proportion and amount of the loan:

.....

Please specify the premiums paid by the State to the bank:

.....

What is the expected default rate, by categories of beneficiaries?

.....

What is the maximum coverage (percentage) of a loan by the guarantee?

.....

What are the conditions for the mobilisation of guarantees?

.....

2.4.6. ☐ *Public participations*

Please indicate if the scheme involves aid in form of public participations:

.....

To what extent does the public participation deviate from the Market Economy Investor principle?

.....

Please provide relevant information in order to calculate the aid element of the public participation:

.....

2.4.7. ☐ *Other:*

.....

2.5. Is replacement investment excluded from the scheme?

☐ yes ☐ no

If not, the authorities are requested to fill in section 3 of this form on operating aid.

2.6. Is assistance for firms in difficulty <sup>(1)</sup> and/or for the financial restructuring of firms in difficulty excluded from the scheme?

☐ yes ☐ no

<sup>(1)</sup> As defined in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).



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▼ **M1**

2.7. Investment aid calculated as a percentage of the investment's eligible material and immaterial costs

Does the eligible expenditure under the scheme relate to:

2.7.1. ☐ *Material assets:*

The value of the investment is established on the basis of <sup>(1)</sup>:

☐ land

☐ buildings

☐ plant/machinery (equipment)

☐ in case of a takeover, capital assets

Please provide a short description:

.....  
.....

Are the assets acquired new, except in the case of SMEs and takeovers?

☐ yes ☐ no

Please specify:

.....

Does the scheme ensure that any aid awarded in the past for the acquisition of assets in case of takeovers has been taken into account/deducted prior to the purchase (see p. 54 of the RAG)?

☐ yes ☐ no

Please specify:

.....

How is it ensured that the transactions in case of takeovers will take place under market conditions?

.....

Are costs related to the acquisition of assets — other than land and buildings — under financial lease included in the eligible expenditure?

☐ yes ☐ no

Does the lease contain an obligation to purchase the asset — other than land and buildings — at the expiry of the term of the lease?

☐ yes ☐ no

---

<sup>(1)</sup> In the transport sector, expenditure on the purchase of transport equipment (movable assets) is not eligible for investment aid.

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▼ **M1**

For the financial lease of land and buildings, does the lease continue for at least five years after the anticipated date of the completion of the investment project, for large companies, and three years for SMEs?

☐ yes ☐ no

Should one of the previous questions under 2.7 be answered in the negative, please explain how the authorities intend to comply with the necessary conditions:

.....  
.....

2.7.2. ☐ *Immaterial assets:*

The value of the investment is established on the basis of expenditure entailed by the transfer of technology through the acquisition of:

- ☐ patent rights
- ☐ licences
- ☐ know-how
- ☐ unpatented technical knowledge

Please provide a short description:

.....  
.....

Does the scheme include a clause stipulating that the expenditure on eligible intangible investment must not exceed 50 % of the total eligible investment expenditure for the project in the case of large firms?

☐ yes ☐ no

Does the measure ensure that eligible immaterial assets:

- ☐ are used exclusively in the establishment receiving the regional aid?
- ☐ are regarded as amortisable assets?
- ☐ are purchased from third parties under market conditions?
- ☐ are included in the capital assets of the firm and remain in the establishment receiving the regional aid for at least five years for large companies and three years for SMEs?

Should one of these conditions not be explicitly reflected in the scheme, explain why and how the authorities intend to respect these requirements:

.....  
.....

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▼ M1

Does the scheme include in the eligible expenditure for SMEs the costs of preparatory studies and consultancy costs linked to the investment?

☐ yes ☐ no

Does the scheme provide that consultancy costs for SMEs are limited to an aid intensity of up to 50 % of the actual costs incurred?

☐ yes ☐ no

2.7.3. How is it ensured that aid for initial investment (both material and immaterial assets) is made conditional on the maintenance of the investment for a minimum period of five years in case of large companies and three years in case of SMEs?

.....  
.....

2.8. Investment aid calculated on the basis of wage costs

2.8.1. Does the measure ensure that the aid calculated on the basis of wage costs is linked to an initial investment project?

☐ yes ☐ no

2.8.2. Does the measure ensure that job creation means a net increase in the number of employees (ALU) directly employed in a particular establishment compared with the average over the previous 12 months, after deducting any jobs lost during that 12 month period in the same establishment?

☐ yes ☐ no

2.8.3. How is it ensured that the eligible expenditure will not exceed the wage costs of a person hired, calculated over a period of two years?

.....

2.8.4. Does the measure ensure that the posts will be filled within three years of the completion of works?

☐ yes ☐ no

2.8.5. Does the measure ensure that the jobs created will be maintained within the region concerned for a minimum period of five years (or three years in the case of SMEs) from the date the post was first filled?

☐ yes ☐ no

Should one of the previous questions mentioned under 2.8 be answered in the negative, please explain how the authorities intend to comply with these necessary conditions:

.....  
.....

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3. **Operating aid**

- 3.1. What is the direct link between the awarding of operating aid and the contribution to regional development?  
.....  
.....
- 3.2. What are the structural handicaps that the operating aid is seeking to redress?  
.....  
.....
- 3.3. How is it ensured that the nature and the level of the operating aid are proportional to the handicaps it seeks to alleviate?  
.....  
.....
- 3.4. What arrangements have been made to ensure that the operating aid is progressively reduced and limited in time?  
.....  
.....
- 3.5. Is the operating aid scheme open to all sectors?  
☐ yes ☐ no
- 3.6. Is the scheme designed to offset additional transport or employment costs?  
☐ yes ☐ no
- 3.7. If one of the above questions (3.5—3.6) is answered negatively, how is it ensured that p. 78 of the RAG is respected?  
.....  
.....
- 3.8. Is operating aid intended to promote exports excluded?  
☐ yes ☐ no

**Specific questions relating to the outermost regions or to regions with low population density or regions with least population density**

- 3.9. Should operating aid not be progressively reduced and not be limited in time, please specify whether the following conditions are met:
- 3.9.1. Does the aid benefit an outermost region or a region with low population density or with least population density?  
☐ yes ☐ no
- 3.9.2. Is this aid intended to offset in part additional transport costs?  
☐ yes ☐ no

Please provide proof of the existence of these additional costs and the method of calculation used to determine their amount <sup>(1)</sup>. In particular, please provide proof that the conditions of point 81 of the RAG are respected:

.....  
.....

Indicate what will be the maximum amount of aid (on the basis of an aid-per-passenger/kilometre ratio or aid per tonne/kilometre) and the percentage of the additional costs covered by the aid:

.....  
.....

<sup>(1)</sup> The description should reflect how the authorities intend to ensure that the aid is given only in respect of the extra cost of transport of goods inside the national borders, it must not be allowed to become export aid, it is calculated on the basis of the most economical form of transport and the shortest route between the place of production or processing and commercial outlets, and cannot be given for the transport of the products of businesses without an alternative location.

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- 3.9.3. In the outermost regions, is the aid intended to offset the additional costs arising in the pursuit of economic activity from the factors identified in Article 299(2) of the EC Treaty?

☐ yes ☐ no

Please determine the amount of the additional cost and the method of calculation:

.....  
.....

How can the authorities establish the link between the additional costs and the factors identified in Article 299(2) of the EC Treaty?

.....  
.....

- 3.9.4. Is the aid intended to prevent or reduce the continuing depopulation of the least populated regions?

☐ yes ☐ no

How can the authorities demonstrate that the aid proposed is necessary and appropriate to prevent or reduce continuing depopulation and that it will not affect trading conditions to an extent contrary to the common interest?

.....  
.....

**4. Aid for newly-created small enterprises**

*Information on the beneficiaries*

- 4.1. Are the beneficiaries small enterprises on the date of granting the aid within the meaning of Article 2 of Annex I to Commission Recommendation 2003/361/EC <sup>(1)</sup>?

☐ yes ☐ no

- 4.2. Is the aid awarding authority required to verify that all the beneficiaries are autonomous in the meaning of Article 3 of Annex I to Recommendation 2003/361/EC?

☐ yes ☐ no

- 4.3. Does the scheme ensure that aid is only granted to small enterprises which have been created less than five years before the date of granting the aid?

☐ yes ☐ no

- 4.4. Please describe the mechanisms put in place in order to ensure that no misuse of the aid measure takes place in the form of existing enterprises being artificially closed down and re-started in order to receive this type of aid:

.....  
.....

*Geographical application of the scheme*

- 4.5. Is the aid scheme limited to assisted areas only?

☐ yes ☐ no

<sup>(1)</sup> OJ L 124, 20.5.2003, p. 36.

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- 4.6. The beneficiaries conduct their economic activity in the following regions (please specify in conformity with the denomination of the regions as defined in the regional aid map):

— All assisted areas in the Member State concerned  
☐ yes ☐ no

— Article 87(3)(a) region(s)  
☐ yes ☐ no

Please specify the region(s) (NUTS):  
.....

— Article 87(3)(c) region(s)  
☐ yes ☐ no

Please specify the region(s) (NUTS):  
.....

*Eligible expenditure*

- 4.7. Are legal, advisory, consultancy and administrative costs directly related to the creation of the enterprise included in the eligible expenditure?

☐ yes ☐ no

If yes, please specify: .....

- 4.8. Are the eligible costs strictly limited to those that are incurred within the first five years after the creation of the enterprise and, within those five years, to the time when the company qualifies as a small enterprise according to Article 2 and 3 of Annex 1 to Recommendation 2003/361/EC?

☐ yes ☐ no

- 4.9. Please indicate in the following list, which costs are included in the eligible expenditures:

— Interests on external finance  
☐

— Dividend on own capital employed, not exceeding the reference rate  
☐

— Fees for renting production facilities/equipment  
☐

— Energy, water, heating costs  
☐

— Taxes (other than VAT and corporate taxes on business income)  
☐

Please specify: .....

— Administrative charges  
☐

Please specify: .....

— Depreciation  
☐

— Fees for leasing production facilities/equipment  
☐

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— Wage costs

☐

Are compulsory social charges included in the wage costs?

☐ yes ☐ no

As regards depreciation, fees for leasing production facilities/equipment or wage costs, can you confirm that the underlying investments or job creation and recruitment measures have not benefited or will not benefit from other forms of aid?

☐ yes ☐ no

*Aid intensities*

4.10. What is the aid intensity foreseen by the measure for eligible expenses incurred within the first three years after the creation of the enterprises or for expenditures directly related to the creation of the enterprise?

... % for Article 87(3)(a) region(s)

... % for Article 87(3)(c) region(s)

4.11. What is the aid intensity foreseen by the measure for eligible expenses incurred in the fourth and fifth year after the creation of the enterprises?

... % for Article 87(3)(a) region(s)

... % for Article 87(3)(c) region(s)

4.12. Is the aid intensity increased by five percentage points as indicated under point 89 of the RAG?

☐ yes ☐ no

If yes, please specify:

— For Article 87(3)(a) regions with a GDP <sup>(1)</sup> of less than 60 % of Community average

☐ yes ☐ no

— For low population density regions with less than 12,5 inhabitants/km<sup>2</sup>

☐ yes ☐ no

— For small islands with a population of less than 5 000

☐ yes ☐ no

— For other communities with a population of less than 5,000 suffering from similar isolation like islands

☐ yes ☐ no

Please specify the region(s): .....

4.13. In case the beneficiaries have establishments located in more than one type of region (Article 87(3)(a) or (c), outside assisted areas or those indicated under 4.12.), please indicate how it will be ensured that intensities or a possible top-up are applied correctly:

.....  
.....

*Aid amount*

4.14. Is the maximum aid amount awarded to beneficiaries located in Article 87(3)(a) regions limited to EUR 2 million per enterprise and in Article 87(3)(c) regions to EUR1 million per enterprise?

☐ yes ☐ no

4.15. Are the annual aid amounts awarded limited to 33 % of the abovementioned maximum amounts?

☐ yes ☐ no

<sup>(1)</sup> GDP per capita in Purchasing Power Standard (PPS).

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- 4.16. Please provide a description on the mechanisms used or the form in which the aid is awarded to the beneficiary enterprises (e.g. grant, loan, etc.) and explain in detail how aid intensities and maximum aid amounts are calculated, in particular, for non transparent forms of aid:

.....  
.....

*Cumulation*

- 4.17. Can any other form of public support be granted on the basis of the same eligible costs as regards interest on external finance, dividend on own capital employed, fees for renting production facilities/equipment, energy, water, heating costs, or taxes (other than VAT and corporate taxes)?

☐ yes ☐ no

If yes, please describe the mechanism put in place in order to ensure that the upper limits for the aid amount per enterprise in total and per year as well as aid intensities are respected:

.....  
.....

**5. Scope of the scheme or ad hoc aid**

- 5.1. Does the aid scheme apply to all sectors?

☐ yes ☐ no

Is the aid scheme targeted at a particular sector of activity?

☐ yes ☐ no

If yes, please explain

.....

- 5.2. Does the scheme apply to the production of the agricultural products listed in Annex I to the Treaty?

☐ yes ☐ no

Does the scheme apply to the processing and marketing of agricultural products, but only to the extent laid down in the Community guidelines for State aid in the agriculture sector <sup>(1)</sup>, or any replacement Guidelines?

☐ yes ☐ no

- 5.3. Does the scheme apply to the transport sector?

☐ yes ☐ no

If yes,

— Transport Services

- ☐ Maritime Transport  
☐ Air Transport  
☐ Road Transport  
☐ Rail Transport  
☐ Urban Transport  
☐ Inland waterway Transport  
☐ Combined transport

<sup>(1)</sup> OJ C 28, 1.2.2000, p. 2. Corrected by OJ C 232, 12.8.2000, p. 17.



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Management of transport infrastructure

- ☐ Port infrastructure
- ☐ Airport infrastructure
- ☐ Road infrastructure
- ☐ Rail infrastructure
- ☐ Urban Transport infrastructure
- ☐ Inland waterway infrastructure

— Monitoring

Will the annual report trace any individual aid falling under the abovementioned categories with its amount and its beneficiary?

☐ yes ☐ no

5.4. Does the scheme apply to the shipbuilding sector?

☐ yes ☐ no

5.5. Does the scheme respect the specific provisions, such as the prohibition to grant aid to the steel sector <sup>(1)</sup> and/or synthetic fibres <sup>(2)</sup>?

☐ yes ☐ no

5.6. Does the scheme provide for respect of individual notification obligation foreseen in section 4.3. of the RAG – Aid for large investment projects <sup>(3)</sup>?

☐ yes ☐ no

6. **Cumulation**

6.1. Where regional aid under one scheme can be combined with aid under other scheme(s), please specify, in each scheme, the method by which compliance is ensured with the conditions on cumulation listed in section 4.4 of the RAG.

.....

6.2. Is it ensured that regional investment aid shall not be cumulated with *de minimis* support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in the approved regional aid map?

☐ yes ☐ no

6.3. Where aid calculated on the basis of (material or immaterial) investment costs is combined with aid calculated on the basis of wage costs, does the aid scheme respect the intensity ceiling laid down for the region concerned?

☐ yes ☐ no

7. **Transparency**

7.1. Does the scheme exclude projects for which eligible expenditure was incurred before the date of publication of the final scheme in the Internet (see p. 108 of the RAG)?

☐ yes ☐ no

8. **Other information**

Please indicate here any other information (e.g. environmental impacts or benefits) you consider relevant to the assessment of the measure(s) concerned under the guidelines on national regional aid.

.....

<sup>(1)</sup> In the sense of Annex I to the RAG.

<sup>(2)</sup> In the sense of Annex II to the RAG.

<sup>(3)</sup> Please note that you have to fill in a specific notification form (Part III.5) in case of aid to large investment projects.

▼ **M1**

PART III.5

**SUPPLEMENTARY INFORMATION SHEET ON REGIONAL AID FOR LARGE INVESTMENT PROJECTS**

*This supplementary information sheet must be used for the notification of any regional investment aid exceeding the threshold for individual notification defined in point 64 of the Guidelines for national regional aid for 2007-2013.*

*For ad hoc aid (aid granted outside existing schemes) the Member State must also provide the Supplementary Information Sheet on regional aid (Part III.4). In addition, Member States will have to demonstrate that the project contributes towards a coherent regional development strategy and that, having regard to the nature and size of the project, it will not result in unacceptable distortions of competition. Moreover, Member States will have to demonstrate that the aid will not be unduly concentrated on a particular sector of activity and that it creates no adverse sectoral effects.*

*The Commission reserves the right to ask for further information in order to carry out an in-depth assessment if the thresholds for such an assessment as defined in point 68 of the Regional Aid Guidelines are reached.*

*Additionally to this supplementary information sheet(s) the Member State must provide:*

— Part I. General Information,

— Part II. Summary Information for publication in the Official Journal of the European Union.

*The Member State must also provide the relevant investment agreement, the (draft) aid contract and any other relevant document (including, in the case of ad hoc aid, the letter of intent), in order to confirm that the granting of the aid is in conformity with the general rules under the Guidelines for national regional aid for 2007-2013 and with any underlying aid scheme.*

*If amounts are converted into the euro or other currencies, please provide the implicit exchange rate assumptions. Please always indicate if the amounts mentioned are in nominal amounts or discounted.*

**1. Additional information on beneficiaries**

**1.1. Structure of the company or companies investing in the project**

**1.1.1. Identity of aid recipient(s):**

.....

**1.1.2. If the legal identity of the aid recipient is different from the undertaking(s) that finance(s) the project or from the actual beneficiary(ies) of the aid, describe also these differences.**

.....

**1.1.3. Please give a clear description of the relation between the beneficiary, the group of enterprises it belongs to and other associated enterprises, including joint ventures.**

.....

**1.2. For the company or companies investing in the project, provide the following data for the last three financial years (at group level).**

**1.2.1. Worldwide turnover, EEA turnover, turnover in the Member State concerned:**

.....

**1.2.2. Net operating income, return on capital employed and free cash flow:**

.....

**1.2.3. Employment worldwide, at EEA level and in the Member State concerned:**

.....

**1.2.4. Audited financial statements and annual report(s) for the last three years:**

.....

**1.3. If the investment takes place in an existing establishment (plant), provide the following data for the last three financial years of that entity (data for the existing establishment/plant).**

**1.3.1. Worldwide turnover, EEA turnover, turnover in Member State concerned:**

.....

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- 1.3.2. Net operating income, return on capital employed and free cash flow:  
.....
- 1.3.3. Employment:  
.....
- 1.3.4. Aid history — Did the beneficiary receive aid for any other investment in the same establishment (plant) in the last three years?  
☐ yes ☐ no
- If yes, please give more details:  
.....
- 1.4. *Firms in difficulty*  
Does the aid benefit a firm in difficulty <sup>(1)</sup> or will it be used for the financial restructuring of a firm in difficulty?  
☐ yes ☐ no
- If yes, please note that the Community guidelines on State aid for rescuing and restructuring firms in difficulty are applicable.
2. **Aid**
- 2.1. *Form of aid*  
Please give a detailed description of each form of aid:  
.....
- 2.2. *Amount of aid*  
For each form of aid, provide the following information:
- 2.2.1. Amount of support, both in nominal and discounted terms:  
.....
- 2.2.2. A complete schedule of the payment of the proposed assistance:  
.....
- In case of aid awarded in the form of exemptions on future taxes, please indicate how the discounted aid amount will be capped:  
.....
- 2.2.3. The applicable existing aid scheme(s), including title, State aid number and reference to Commission approval, submission under interim procedure, or supplementary information sheet pursuant to an exemption regulation:  
.....
- 2.2.4. The application for aid was submitted before work was started on the project and the competent authorities have confirmed in writing that, subject to the final outcome of a detailed verification, the project meets the conditions of eligibility laid down by the scheme.  
☐ yes ☐ no
- If no, please explain.  
.....
- 2.3. *Characteristics*
- 2.3.1. Are any of the assistance measures of the overall package not yet defined?  
☐ yes ☐ no
- If yes, please specify, and explain how the total discounted aid amount will be capped:  
.....

<sup>(1)</sup> As defined in the Community guidelines on State aid for Rescuing and Restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

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- 2.3.2. Indicate which of the abovementioned measures does not constitute State aid and for what reason(s):  
.....
- 2.3.3. How is it ensured that the aid is made conditional on the maintenance of the investment or the jobs created for a minimum period of five years in case of large companies and three years in case of SMEs?  
.....
- 2.4. *Financing from Community and other sources*
- 2.4.1. Are some of the abovementioned measures to be co-financed by Community funds (European Investment Bank, European Social Fund, European Regional Development Fund, other)? Please explain.  
.....
- 2.4.2. Is some additional support for the same project to be requested from any other European or international financing institutions?  
☐ yes ☐ no
- If so, for what amounts?  
.....
- 2.5. *Reporting*
- Please confirm that the following documents will be provided to the Commission:
- ☐ within two months of granting the aid, a copy of the aid contract between the granting authority and the beneficiary;
- ☐ on a five-yearly basis, starting from the approval of the aid by the Commission, an intermediary report (including information on the aid amounts being paid, on the execution of the aid contract and on any other investment projects started at the same establishment/plant);
- ☐ within six months after payment of the last tranche of the aid, based on the notified payment schedule, a detailed final report.
3. **Assisted project**
- 3.1. *Timeline*
- Specify the planned start date of the investment, the planned date of completion of the investment and the planned year by which full production will be reached, if necessary for each product envisaged by the investment project.  
.....
- 3.2. *Description of the project*
- 3.2.1. Specify the type of the project and whether it is a new establishment; the extension of an existing establishment; diversification of the output of an establishment into new, additional products; a fundamental change in the overall production process of an existing establishment; or the acquisition of capital assets directly linked to an establishment by an independent investor which has closed or which would have closed had it not been purchased:  
.....
- 3.2.2. Provide a short description of the project:  
.....
- 3.3. *Breakdown of the project costs*
- 3.3.1. Specify the total cost of the investment over the lifetime of the project:  
.....
- 3.3.2. Provide a detailed breakdown per year and per category (land, buildings, plant/machinery, or other) of the eligible costs associated with the investment project, where relevant for each product envisaged by the investment project:  
.....

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▼ **M1**

3.4. *Financing of total project costs*

Please provide a complete description of the financing of the project and how it ensures that at least 25 % of the eligible costs are financed in a way which is free of public support, including *de minimis* aid.

4. **Product and market characteristics**

In this section, if applicable, please take account of any relevant marketing or similar arrangements with other companies for the calculation of the capacity and the market share (e.g. exclusive licenses for sales).

4.1. *Characterisation of product(s) envisaged by the project*

4.1.1. Specify all the product(s) that will be produced in the aided facility upon the completion of the investment and indicate, where appropriate, the Prodcom code or CPA nomenclature for projects in the service sectors.

4.1.2. Will the products envisaged by the project replace any other products produced by the beneficiary (at group level)? What product(s) will it replace? If these replaced products are not produced at the location of the project, indicate where they are currently produced. Please provide a description of the link between the replaced production and the current investment and give a time schedule for the replacement.

4.1.3. What other product(s) can be produced with the same new facilities (through flexibility of the production installations of the beneficiary) at little or no additional cost?

4.2. *Product concerned and relevant product market*

4.2.1. Explain if the project concerns an intermediate product and if a significant part of the output is not sold on the market (under market conditions). Based on the above explanation, for the purpose of calculating the market share and capacity increase in the remainder of this section. Please indicate if the product concerned is the product envisaged by the project or if it is the downstream product.

4.2.2. Please indicate the demand side substitutes and the supply side substitutes of the product concerned. The relevant product market includes the product concerned and its substitutes considered to be such either by the consumer (by reason of the product's characteristics, prices and intended use) or by the producer (through flexibility of the production installations of the beneficiary and its competitors).

4.3. *Market share data*

Please answer the following questions for all products concerned.

4.3.1. For the purpose of applying point 68(a) of the RAG, the Commission will normally assume that the relevant geographic market is the European Economic Area (EEA). Please provide arguments if another geographic market for the product(s) is considered relevant.

4.3.2. Please provide an estimate of all sales of the aid recipient on the relevant market (at group level, in value and volume terms), from the year preceding the start year of the investment to the year following full production of the product envisaged by the project. If applicable, provide a breakdown of these sales into product concerned and other categories of products sold by the aid beneficiary on the relevant market.

4.3.3. Please provide an estimate of the overall sales of all producers on the relevant market (in value and volume terms), from the year preceding the start year of the investment to the year following full production of the product envisaged by the project. If available, include statistics prepared by public and/or independent sources.

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▼ **M1**

4.3.4. Please explain the methodology underlying the estimates and the implicit price assumptions.

4.4. *Market evolution*

Please answer the following questions for all products concerned.

4.4.1. Provide for each of the last six years data on apparent consumption <sup>(1)</sup> (in value and volume terms) in the relevant product market in the EEA. Please also provide implicit price assumptions. If available, include statistics prepared by the public and/or independent sources.

4.4.2. Please calculate from the above figures the Compound Annual Growth Rate (CAGR) <sup>(2)</sup> of apparent consumption in the relevant product market in the EEA.

4.4.3. Please calculate the average annual growth rate of the EEA's GDP over the last five years as a Compound Annual Growth Rate (CAGR) using Eurostat figures <sup>(3)</sup> ([www.eu.int/comm/eurostat/](http://www.eu.int/comm/eurostat/) — currently the figures can be found under "Themes/Economy and finance/National accounts/Annual national accounts/GDP and main aggregates").

4.4.4. Is the average annual growth rate of the apparent consumption on the relevant product market in the EEA over the last five years below the average annual growth rate of the EEA GDP over the last five years?

☐ yes ☐ no

4.5. *Capacity considerations*

Please answer the following questions for all products concerned.

If from point 4.4 on market evolution follows that the average annual growth rate of the apparent consumption on the relevant market is below the average annual growth rate of the EEA GDP, provide the following information:

4.5.1. Provide an estimate of the production capacity created by the investment (in volume and value terms).

4.5.2. Provide an estimate of any changes in the total capacity of the beneficiary (at group level) in the EEA between the year preceding the start year of the project and the year following completion of the project (in volume and in value terms). Please also provide implicit price assumptions. If available, include statistics prepared by public and/or independent sources.

4.5.3. Provide an estimate of the total apparent consumption on the relevant product market(s) in the EEA for the year preceding the start year and for the year following the completion of the project (in volume and in value terms). Please also provide implicit price assumptions. If available, include statistics prepared by public and/or independent sources.

5. **Other information**

Please indicate here any other information (e.g. environmental impacts or benefits) you consider relevant to the assessment of the measure(s) concerned.

<sup>(1)</sup> Apparent consumption is production plus imports minus exports. If no apparent consumption data are readily available, other relevant data can be used.

<sup>(2)</sup> The CAGR is calculated as  $[y(t) / y(t - 5)]^{1/5} - 1$ .

<sup>(3)</sup> EU25 can be used as a proxy for the EEA in this context.

▼ **M3**

PART III.6.a

**SUPPLEMENTARY INFORMATION SHEET FOR RESEARCH AND DEVELOPMENT  
AND INNOVATION AID: AID SCHEMES**

*This supplementary information sheet must be used for the notification of any aid scheme <sup>(16)</sup> covered by the Community framework for State aid for research and development and innovation (hereinafter the R&D&I Framework) <sup>(17)</sup>. It must also be used for aid schemes for Research and Development to SMEs, which do not fall under a Block Exemption Regulation <sup>(18)</sup> as well as for aid intended for the production, processing and marketing of agricultural products.*

1. **Basic characteristics of the notified measure**

*Please fill in the relevant parts of the notification form corresponding to the character of the notified scheme. Please find below a basic guidance.*

(A) Please specify the type of aid and fill in the appropriate subsections of **Section 4** (Compatibility of aid under Article 87(3)(c) of the EC Treaty) of this supplementary information sheet:

- ☐ Aid for R&D projects, *fill in Section 4.1;*
- ☐ Aid for technical feasibility studies, *fill in Section 4.2;*
- ☐ Aid for industrial property right costs for SMEs, *fill in Section 4.3;*
- ☐ Aid for young innovative enterprises, *fill in Section 4.4;*
- ☐ Aid for process and organisational innovation in services, *fill in Section 4.5;*
- ☐ Aid for innovations advisory services and for innovation support services, *fill in Section 4.6;*
- ☐ Aid for the loan of highly qualified personnel, *fill in Section 4.7;*
- ☐ Aid for innovation clusters, *fill in Section 4.8.*

*Furthermore, please fill in also **Section 5** (Incentive effect and necessity of aid) and **Section 8** (Reporting and monitoring) in order to provide the requested confirmations.*

(B) Does the aid scheme involve research organisations <sup>(19)</sup>/innovation intermediaries?

- ☐ yes ☐ no

*If yes, please fill in **Section 2 and/or 3** (Research organisations and innovation intermediaries and Indirect State aid to undertakings through publicly funded research organisations) of this supplementary information sheet.*

(C) Can the aid be combined with other aid?

- ☐ yes ☐ no

*If yes, fill in **Section 6** (Cumulation) of this supplementary information sheet.*

(D) Does the R&D aid concern products listed in Annex I to the EC Treaty?

- ☐ yes ☐ no

*If yes, fill in **Section 7** (Specific questions related to agriculture and fisheries) of this supplementary information sheet.*

<sup>(16)</sup> As regards the aid for promotion of execution of important projects of common European interest, the Commission may also consider a group of projects as together constituting a project. For details see Section 4 of Supplementary Information Sheet for research and development and innovation aid: individual aid (part III.6.b of Annex I to Commission Regulation (EC) No 794/2004).

<sup>(17)</sup> Community framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

<sup>(18)</sup> Currently Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33) as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004, amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) or any subsequent regulation replacing it.

<sup>(19)</sup> For definition see Section 2.2(d) of the R&D&I Framework.

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▼ **M3**

- (E) Please confirm that if the SME specific aid <sup>(20)</sup>/bonus is granted, the beneficiaries comply with the SME definition as defined by the Community legislation <sup>(21)</sup>:

☐ yes

- (F) If the scheme involves commissioning/purchasing of R&D activities/results from undertakings by the public authorities, are the providers selected in an open tender procedure <sup>(22)</sup>?

☐ yes

☐ no

*If no, please note that such payments from the public authorities to undertakings would normally involve State aid.*

- (G) If applicable, please provide an exchange rate which has been used for the purposes of the notification: .....

- (H) Please confirm that any aid granted under the notified scheme will be notified individually to the Commission if it reaches the thresholds for a detailed assessment laid down in Section 7.1 of the R&D&I Framework.

☐ yes

- (I) All documents provided by the Member States as annexes to the notification form shall be numbered and document numbers shall be indicated in the relevant parts of this supplementary information sheet.

2. **Research organisations and innovation intermediaries as recipients of State aid <sup>(23)</sup>**

2.1. *Public funding of non-economic activities*

- (A) Do the research organisations or non-for-profit innovation intermediaries carry out an economic activity <sup>(24)</sup> (an activity consisting in offering goods and/or services on a given market)?

☐ yes

☐ no

If yes, please provide description of these activities:

- (B) If the same entity carries out activities of both economic and non-economic <sup>(25)</sup> nature, can the two kinds of activities and their costs and funding be clearly separated?

☐ yes

☐ no

If yes, provide details:

*If yes, please note that public funding of non-economic activities does not fall under Article 87(1) of the EC Treaty. If not, public funding of economic activities generally entails State aid.*

2.2. *Public funding of economic activities*

- (C) Can the Member State prove that:

— the totality of the State funding is passed on from the research organisations or not-for-profit innovation intermediaries (carrying out economic activities) to the final recipients;

AND

— there is no advantage granted to the intermediaries?

☐ yes

☐ no

Please provide details and evidence:

*If yes, please note that the intermediary organisations may not be recipient of State aid. As regards the aid to final recipients, normal State aid rules apply.*

<sup>(20)</sup> I.e. measures under Sections 4.3, 4.4, 4.6 and 4.7 of this supplementary information sheet. Please note that the measure under Section 4.4 is limited to small enterprises.

<sup>(21)</sup> See footnote 20.

<sup>(22)</sup> Cf. R&D&I Framework, Section 2.1.

<sup>(23)</sup> Cf. R&D&I Framework, Section 3.1.

<sup>(24)</sup> For details see Section 3.1.1 of R&D&I Framework (footnote 24).

<sup>(25)</sup> For details see Section 3.1.1 (second and third paragraphs) of R&D&I Framework.



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3. **Indirect State aid to undertakings through publicly funded research organisations <sup>(26)</sup>**

3.1. *Research on behalf of undertakings*

- (A) Are the projects supported under the notified scheme carried out by research organisations on behalf of undertakings?

☐ yes ☐ no

- (B) If yes, do the research organisations (acting as agent) render services to the undertakings (acting as principals) in situations, where:

— the agents receive payment of an adequate remuneration for their services,

☐ yes ☐ no

AND

— do the principals specify the terms and conditions of these services?

☐ yes ☐ no

Please provide details:

.....  
.....

- (C) Do the research organisations provide their services at market price?

☐ yes ☐ no

If there is no market price, do the research organisations provide their services at a price which reflects full costs plus a reasonable margin?

☐ yes ☐ no

Please provide details:

.....  
.....

*If a research organisation renders services and if the answer to one of the questions in Section C is yes, there will be normally no State aid passed to the undertakings through the research organisation.*

3.2. *Collaboration of undertakings and research organisations*

- (A) Is the collaboration project carried out jointly by undertakings and research organisations?

☐ yes ☐ no

If yes, provide details on the partnerships.

.....  
.....

- (B) If yes, do the participating undertakings bear the full cost of the projects supported under the notified scheme?

☐ yes ☐ no

Are the results which do not give rise to intellectual property rights widely disseminated AND are any intellectual property rights which result from the activity of the research organisations fully allocated <sup>(27)</sup> to the research organisations?

☐ yes ☐ no

Do the research organisations receive from the participating undertakings compensation equivalent to the market price for the intellectual property rights <sup>(28)</sup> which result from the activity of the research organisations carried out in the project and which are transferred to the participating undertakings?

☐ yes ☐ no

Please provide details (please note that any contribution of the participating undertakings to the costs of the research organisations shall be deducted from the compensation):

.....  
.....

<sup>(26)</sup> Cf. R&D&I Framework, Section 3.2.

<sup>(27)</sup> For details see Section 3.2.2 (footnote 28) of the R&D&I Framework.

<sup>(28)</sup> For details see Section 3.2.2 (footnote 29) of the R&D&I Framework.

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- (C) If none of the answers to questions of Section B is yes, the Member State may rely on individual assessment of the collaboration projects <sup>(29)</sup>.

Please provide an individual assessment of the collaboration projects, taking into account the above mentioned elements. Please attach also the contractual agreements to the notification.

*If none of the answers to questions of Section B is yes and if the individual assessment of the collaboration projects does not lead to the conclusion that there is no State aid, the Commission will consider the full value of the contribution of the research organisation to the project as aid to undertakings.*

4. **Compatibility of aid under Article 87(3)(c) of the EC Treaty**

4.1. *Aid for R&D projects* <sup>(30)</sup>

4.1.1. Research category <sup>(31)</sup>

- (A) Please indicate which R&D stages <sup>(32)</sup> are supported under the notified scheme:

- ☐ fundamental research  
☐ industrial research  
☐ experimental development

Give examples of major projects to be covered by the notified scheme:

.....  
.....

- (B) If individual R&D projects encompass different research categories, please explain how this will be taken into account in determining the maximum aid intensity of a given project (the maximum aid intensity applicable must reflect the stages of research involved).

.....  
.....

4.1.2. Eligible costs

*All eligible costs must be allocated to a specific category of R&D <sup>(33)</sup>. Please specify (or tick) below.*

	Fundamental research	Industrial research	Experimental development
Personnel costs			
Costs of instruments and equipment			
Costs for building and land			
Cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices			
Additional overheads incurred directly as a result of the research project			
Other operating expenses			

<sup>(29)</sup> There also may be no State aid where the assessment of the contractual agreement between the partners leads to the conclusion that any intellectual property rights to the R&D&I results as well as access rights to the results are allocated to the different partners of the collaboration and adequately reflect their respective interests, work packages, and financial and other contributions to the project.

<sup>(30)</sup> Cf. R&D&I Framework, Section 5.1.

<sup>(31)</sup> To classify the activities, you may refer to the Commission practice or the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and technological Activities, proposed Standard Practice for Surveys on Research and Experimental Development (Organisation for Economic Cooperation and Development, 2002).

<sup>(32)</sup> For definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

<sup>(33)</sup> Cf. Section 5.1.4 of the R&D&I Framework.

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4.1.3. Aid intensities and bonuses

*The aid intensity is calculated on the basis of the eligible costs of the project. It must be established for each beneficiary of aid, including in a collaboration project <sup>(34)</sup>.*

(A) Basic intensities (without bonuses) <sup>(35)</sup>:

	Fundamental research	Industrial research	Experimental development
Maximum aid intensity			

(B) Bonuses:

Do the supported projects benefit from a bonus?

☐ yes ☐ no

*If yes, please specify below.*

— Is an SME bonus applied under the notified scheme?

☐ yes ☐ no

Specify the level of bonus applicable <sup>(36)</sup>: .....

— Is a bonus for effective collaboration between undertakings (i) or collaboration of an undertaking with a research organisation (ii) or (only for projects of industrial research) dissemination of results (iii) applied under the notified scheme?

☐ yes ☐ no

(i) If a bonus for an effective collaboration between at least two undertakings, which are independent of each other, is applied, please confirm that the following conditions are fulfilled:

☐ no single undertaking bears more than 70 % of the eligible costs of the collaboration project;

AND

☐ the project involves collaboration with at least one SME or the collaboration has a cross-border character, i.e. research and development activities are carried out in at least two different Member States.

Specify the level of bonus applicable <sup>(37)</sup>: .....

(ii) If a bonus for an effective collaboration between an undertaking and a research organisation, particularly in the context of coordination of national R&D policies, is applied, please confirm that the following conditions are fulfilled:

☐ the research organisation bears at least 10 % of the eligible costs;

AND

☐ the research organisation has the right to publish the result of the research projects insofar as they stem from research implemented by that organisation.

Specify the level of bonus applicable <sup>(38)</sup>: .....

<sup>(34)</sup> In the case of State aid for an R&D project being carried out in collaboration between research organisations and undertakings, the combined aid deriving from direct government support for a specific research project and, where they constitute aid, contributions from research organisations to that project may not exceed the applicable aid intensities for each benefiting undertaking.

<sup>(35)</sup> The aid intensity may not exceed 100 % for fundamental research, 50 % for industrial research and 25 % for experimental development.

<sup>(36)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

<sup>(37)</sup> The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %.

<sup>(38)</sup> The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %. This bonus does not apply to the research organisation.

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- (iii) If in the case of industrial research a bonus for wide dissemination of the results of the project is applied, please specify at least one of the following methods of wide dissemination:

- ☐ technical and scientific conferences;
- ☐ publication in scientific or technical journals;
- ☐ availability in open access repositories (databases where raw research data can be accessed by anyone);
- ☐ availability through free or open source software.

Specify the level of bonus applicable <sup>(39)</sup>: .....

- (C) Specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%): .....

4.1.4. Special conditions for repayable advance <sup>(40)</sup>

- (A) Is the aid to the R&D projects granted in the form of a repayable advance?

- ☐ yes ☐ no

- (B) If yes, is the aid granted in the form of a repayable advance under the notified scheme expressed as gross grant equivalent <sup>(41)</sup>?

- ☐ yes ☐ no

If yes, what is the aid intensity of repayable advance expressed as gross grant equivalent <sup>(42)</sup> applicable under the notified scheme: .....

Furthermore, please provide the complete methodology applied AND the underlining verifiable data on which the above mentioned methodology has been based:

.....  
.....

- (C) If the aid cannot be expressed in gross grant equivalent, what is the level of the repayable advance expressed as a percentage of the eligible costs: .....

In case the rates of repayable advance granted to the R&D project are higher than the rates indicated in Sections 5.1.2 and 5.1.3 (up to the maximum rates indicated in Section 5.1.5 of the R&D&I Framework, please):

- notify to the Commission the detailed information on the repayment in the case of success and define clearly what will be considered as a successful outcome of the research activities,

AND

- confirm the following:

- ☐ the measure provides that in case of successful outcome the advance is repaid with an interest rate at least equal to the applicable rate resulting from the application of the Commission notice on the method of setting the reference and discount rates <sup>(43)</sup>;
- ☐ in case of a success exceeding the outcome defined as successful, the Member State is entitled to request payments beyond payments of the advance amount including interest according to the reference rate foreseen by the Commission;
- ☐ in case of partial success, the Member State requires that the repayment secured is in proportion to the degree of success achieved.

<sup>(39)</sup> The aid intensity may be increased by 15 percentages points, but up to a maximum of 80 %.

<sup>(40)</sup> Cf. R&D&I Framework, Section 5.1.5.

<sup>(41)</sup> Gross grant equivalent of a repayable advance reflects the probability that the advance will be repaid by the beneficiaries.

<sup>(42)</sup> The gross grant equivalent must fulfil the conditions on maximum aid intensities laid down in Sections 5.1.2 and 5.1.3 of the R&D&I Framework.

<sup>(43)</sup> OJ C 273, 9.9.1997, p. 3. Also published under: [http://ec.europa.eu/comm/competition/state\\_aid/legislation/reference.html](http://ec.europa.eu/comm/competition/state_aid/legislation/reference.html)

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4.1.5. Special conditions for fiscal measures <sup>(44)</sup>

- (A) Is the aid to the R&D projects supported under the notified scheme granted in the form of a fiscal measure?

☐ yes ☐ no

If the aid for the R&D project is granted in the form of a fiscal measure, please provide evaluation studies in order to enable the Commission to assess the incentive effect of the R&D fiscal aid.

- (B) If yes, please specify how the aid intensities are calculated:

- ☐ on the basis of individual R&D project;
- ☐ as the ratio between the overall tax relief and the sum of all eligible R&D costs incurred in a period not exceeding three consecutive fiscal years;
- ☐ other: .....

Please provide details on the calculation method applied:

.....  
.....

4.2. Aid for technical feasibility studies <sup>(45)</sup>

4.2.1. General conditions

The studies are preparatory to <sup>(46)</sup>:

- ☐ industrial research;
- ☐ experimental development.

4.2.2. Aid intensities

Specify the maximum aid intensity <sup>(47)</sup> (%) for SMEs: .....

Specify the maximum aid intensity <sup>(48)</sup> (%) for large companies: .....

*The aid intensity is calculated on the basis of cost of feasibility studies of the project.*

4.3. Aid for industrial property right costs for SMEs <sup>(49)</sup>

4.3.1. Conditions

Which stage of research <sup>(50)</sup> is concerned?

- ☐ fundamental research;
- ☐ industrial research;
- ☐ experimental development.

4.3.2. Eligible costs and aid intensities

- (A) Specify the eligible costs <sup>(51)</sup>:

- ☐ costs preceding the grant of the right in the first legal jurisdiction: .....
- ☐ translation and other costs incurred in order to obtain the granting or validation of the right in other legal jurisdiction: .....
- ☐ costs incurred in defending the validity of the right during the official prosecution of the application and possible opposition proceedings: .....

<sup>(44)</sup> Cf. R&D&I Framework, Section 5.1.6.

<sup>(45)</sup> Cf. R&D&I Framework, Section 5.2.

<sup>(46)</sup> To classify the activities, you may refer to the Commission practice or the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and technological Activities, proposed Standard Practice for Surveys on Research and Experimental Development (Organisation for Economic Cooperation and Development, 2002); for definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

<sup>(47)</sup> For SMEs, the aid intensity may not exceed 75 % for studies preparatory to industrial research activities and 50 % for studies preparatory to experimental development activities.

<sup>(48)</sup> For large companies, the aid intensity may not exceed 65 % for studies preparatory to industrial research activities and 40 % for studies preparatory to experimental development activities.

<sup>(49)</sup> Cf. R&D&I Framework, Section 5.3.

<sup>(50)</sup> For definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

<sup>(51)</sup> For details see Section 5.3 (second paragraph) of the R&D&I Framework.

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(B) Specify the maximum aid intensity (%) <sup>(52)</sup>: .....

4.4. *Aid for young innovative enterprises <sup>(53)</sup> (for small enterprises)*

Please confirm that:

(A) ☐ the beneficiaries are exclusively small enterprises as defined by Community legislation <sup>(54)</sup>, in existence for less than six years at the time when the aid is granted;

(B) ☐ the beneficiaries are innovative enterprises.

Please confirm that the compliance with this condition is ensured through:

☐ an evaluation carried out by an external expert demonstrating that the beneficiary will in the foreseeable future develop products, services or processes which are technologically new or substantially improved compared to the state of the art in its industry in the Community, and which carry a risk of technological or industrial failure;

OR

☐ the evidence that the R&D expenses of the beneficiary represent at least 15 % of its total operating expenses in at least one of the three years preceding the granting of the aid or in the case of a start-up enterprise without any financial history, in the audit of its current fiscal period, as certified by an external auditor.

Please provide details on how this is implemented:

.....  
.....

(C) Specify the maximum aid amount applicable under the notified scheme: .....

Please confirm that the aid for young innovative enterprises will not exceed:

☐ EUR 1 million in non-assisted areas;

☐ EUR 1,5 million in regions eligible for the derogation in Article 87(3)(a) of the EC Treaty;

☐ EUR 1,25 million in regions eligible for the derogation in Article 87(3)(c) of the EC Treaty.

(D) Please confirm that:

☐ the beneficiaries didn't receive aid for young innovative enterprises before and will receive this type of aid only once during the period in which they qualify as a young innovative enterprise.

(E) Do the enterprises benefit from a cumulation of aid?

☐ yes

☐ no

If yes, please indicate how the specific cumulation rules for young innovative enterprise aid (Section 5.4 of the R&D&I Framework) will be complied with.

.....  
.....

4.5. *Aid for process and organisational innovation in services <sup>(55)</sup>*

4.5.1. *General conditions*

(A) To which type of innovation in service activities <sup>(56)</sup> does the notified scheme refer to?

☐ process innovation in service activities;

☐ organisational innovation in service activities.

<sup>(52)</sup> Maximum aid levels correspond to the same levels of aid as would have qualified as R&D aid in respect of the research activities which first led to the industrial property rights concerned.

<sup>(53)</sup> Cf. R&D&I Framework, Section 5.4.

<sup>(54)</sup> See footnote 20.

<sup>(55)</sup> Cf. R&D&I Framework, Section 5.5.

<sup>(56)</sup> For definitions see Section 2.2(i), (j) of the R&D&I Framework.

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Please provide a detailed description of the innovation in service activities <sup>(57)</sup> (process and/or organisational):

.....

.....

.....

.....

(B) Please confirm that:

- ☐ the organisational innovation is related to the use and exploitation of Information and Communication Technologies (ICT) to change the organisation;
- ☐ the innovation is formulated as a project with an identified and qualified project manager, as well as identified project costs;
- ☐ the result of the aided project is the development of a standard, of a business model, methodology of concept, which can be systematically reproduced, possibly certified, and possibly patented;
- ☐ the process or organisational innovation is new or substantially improved compared to the state of the art in its industry in the Community;
- ☐ the process or organisational innovation projects entail a clear degree of risk;
- ☐ the aid is granted to large enterprises only if they collaborate with SMEs in the aided activity and that the collaborating SMEs incur at least 30 % of the total eligible costs.

Please provide details/evidence concerning all these elements:

.....

.....

4.5.2. Eligible costs and aid intensities

(A) Please specify the eligible costs <sup>(58)</sup>:

	Eligible costs
Personnel costs	
Costs of instruments and equipment	
Costs for building and land	
Cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices	
Additional overheads incurred directly as a result of the research project	
Other operating expenses	

(B) Specify the maximum aid intensity <sup>(59)</sup> for large enterprises (%): .....

Specify the maximum aid intensity <sup>(60)</sup> for medium enterprises <sup>(61)</sup> (%): .....

Specify the maximum aid intensity <sup>(62)</sup> for small enterprises <sup>(63)</sup> (%): .....

*The aid intensity is calculated on the basis of the eligible costs of the projects.*

<sup>(57)</sup> In order to classify the activities, you may refer to the Commission practice or the specific definitions provided in the OSLO Manual, Guidelines for Collecting and Interpreting Innovation Data, 3rd Edition (Organisation For Economic Cooperation and Development, 2005).

<sup>(58)</sup> For details see Section 5.1.4. Please note that in the case of organisational innovation, the costs of instruments and equipment cover costs of ICT instruments and equipment only.

<sup>(59)</sup> The maximum aid intensity is 15 % of the eligible costs.

<sup>(60)</sup> The maximum aid intensity is 25 % of the eligible costs.

<sup>(61)</sup> See footnote No 20.

<sup>(62)</sup> The maximum aid intensity is 35 % of the eligible costs.

<sup>(63)</sup> Idem footnote No 46.

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4.6. *Aid for innovation advisory services and for innovation support services* <sup>(64)</sup> (for SMEs)

4.6.1. General conditions

(A) Specify the maximum aid amount (not exceeding EUR 200 000 per beneficiary within any three year period):

(B) Please confirm that:

- ☐ if the service provider does not benefit from a national or European certification the aid will not cover more than 75 % of the eligible costs;
- ☐ the beneficiaries use the State aid to buy the services at market price (or if the service provider is a non-for-profit entity, at a price which reflects its full costs plus a reasonable margin).

Please provide details on how this will be ensured.

.....

.....

4.6.2. Eligible costs

(A) What type of aid is granted?

- ☐ aid for innovation advisory services;
- ☐ aid for innovation support services.

(B) If it is an aid for innovation advisory services, specify the eligible costs:

- ☐ management consulting: .....
- ☐ technological assistance: .....
- ☐ technology transfer services: .....
- ☐ training: .....
- ☐ consultancy for acquisition, protection and trade in Intellectual Property Rights and for licensing agreements: .....
- ☐ consultancy on the use of standards: .....

(C) If it is an aid for innovation support services, specify the eligible costs:

- ☐ office space: .....
- ☐ data banks: .....
- ☐ technical libraries services: .....
- ☐ market research: .....
- ☐ use of laboratory: .....
- ☐ quality labelling: .....
- ☐ testing and certification: .....

4.6.3. Special conditions for a non-for-profit entity

*If the service providers are non-for-profit entities, the aid may be given in the form of a reduced price, as the difference between the price paid and the market price (or a price which reflects full costs plus a reasonable margin).*

(A) Is the aid given in the form of a reduced price?

- ☐ yes ☐ no

<sup>(64)</sup> Cf. R&D&I Framework, Section 5.6.



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If yes, provide evidence of the existence of a system ensuring transparency about the full costs of the innovation advisory and innovation support services provided, as well as about the price paid by the beneficiaries, so that the aid received can be measured and monitored.

.....

.....

4.7. *Aid for the loan of highly qualified personnel* <sup>(65)</sup> (for SMEs)

4.7.1. General conditions

(A) Where do the highly qualified personnel <sup>(66)</sup> come from?

- ☐ research organisations;
- ☐ large enterprises.

Provide details (if possible) on research organisations and on large enterprises.

.....

.....

(B) Please confirm that:

- ☐ the seconded personnel are not replacing other personnel;
- ☐ the seconded personnel are employed in a newly created function within the beneficiary undertaking.

Specify please this newly created function:

.....

.....

- ☐ the seconded personnel have been employed for at least two years in the research organisations or the large enterprises which are sending the personnel on secondment;
- ☐ the seconded personnel work on R&D&I activities within the SME receiving aid.

4.7.2. Eligible costs and aid intensities

(A) Specify the eligible costs:

- ☐ costs for borrowing and employing highly qualified personnel: .....
- ☐ mobility allowance for the seconded personnel: .....

(B) ☐ Please confirm that consultancy costs (payment of the service rendered by the expert without employing the expert in the undertaking) are excluded from eligible costs of the aid for the loan of highly qualified personnel.

(C) Specify the maximum aid intensity <sup>(67)</sup> (%): .....

4.8. *Aid for innovation clusters* <sup>(68)</sup>

4.8.1. General conditions

(A) What type of aid is granted to the beneficiaries?

- ☐ investment aid;
- ☐ operating aid for cluster animation.

<sup>(65)</sup> Cf. R&D&I Framework, Section 5.7.

<sup>(66)</sup> For definition see Section 2.2. (k) of the R&D&I Framework.

<sup>(67)</sup> The maximum aid intensity is 50 % of the eligible costs, for a maximum of three years per undertaking and per person borrowed.

<sup>(68)</sup> Cf. R&D&I Framework, Section 5.8.

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- (B) Please confirm that:
- ☐ the aid is exclusively granted to the legal entities operating the innovation clusters;
- ☐ the beneficiaries are in charge of managing the participation and access to the clusters' premises, facilities and activities.
- Please provide details:
- .....
- .....
- ☐ access to the clusters' premises, facilities and activities is not restricted.
- (C) Do the fees charged for using the cluster's facilities and for participating in the cluster's activities reflect their costs?
- ☐ yes ☐ no
- If yes, please demonstrate how this is ensured:
- .....
- .....
- If not, please provide details (especially with respect to the existence of aid within the meaning of Article 87(1) of the EC Treaty, see Section 3.1 of the R&D&I Framework):
- .....
- .....
- (D) Please attach an analysis of the technological specialisation of the innovation cluster, existing regional potential, existing research capacity, presence of clusters in the Community with similar purposes and potential market volumes of the activities in the cluster:
- .....
- .....

4.8.2. Specific conditions concerning investment aid for cluster animation

- (A) What type of investment is carried out?
- ☐ setting up of innovation clusters;
- ☐ expansion of innovation clusters;
- ☐ animation of innovation clusters.
- (B) For which facilities is the aid granted?
- ☐ facilities for training and research centre;
- ☐ open-access research infrastructures, laboratory, testing facility;
- ☐ broadband network infrastructures.
- (C) Specify the eligible costs:
- ☐ costs relating to investment in land: .....
- ☐ buildings: .....
- ☐ machinery: .....
- ☐ equipment: .....
- (D) What is the basic aid intensity (%) <sup>(69)</sup>: .....
- If applicable, what is the basic aid intensity for regions falling under Article 87(3)(a) of the EC Treaty:
- with less than 75 % of average EU-25 GDP per capita, outermost regions with higher GDP per capita and statistical effect regions (until 1 January 2011)(%) <sup>(70)</sup>: .....

<sup>(69)</sup> The maximum aid intensity is 15 % of the eligible costs.  
<sup>(70)</sup> The maximum aid intensity is 30 % of the eligible costs.

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- with less than 60 % of average EU-25 GDP per capita (%) <sup>(71)</sup>: .....
- with less than 45 % of average EU-25 GDP per capita (%) <sup>(72)</sup>: .....

If applicable, what is the basic aid intensity for statistical effect regions falling under Article 87(3)(c) of the EC Treaty from 1 January 2011 (%) <sup>(73)</sup>: .....

(E) Is any bonus granted to beneficiaries?

- ☐ yes ☐ no

If yes, specify below:

— Do you apply an SME bonus?

- ☐ yes ☐ no

Specify the level of bonus applicable to small enterprises <sup>(74)</sup>: .....

Specify the level of bonus applicable to medium-sized enterprises <sup>(75)</sup>: .....

— Do you apply a bonus for undertakings located in outermost regions?

- ☐ yes ☐ no

If yes, specify the level of bonus applicable to undertakings located in outermost regions:

- where their GDP per capita falls below 75 % of EU-25 GDP average (%) <sup>(76)</sup>: .....
- other outermost regions (%) <sup>(77)</sup>: .....

4.8.3. Specific conditions concerning operating aid for cluster animation

(A) For how long is such aid granted: ..... years

If the aid is granted for a longer period than five years, please provide convincing evidence in order to justify such longer period <sup>(78)</sup>.  
.....  
.....

(B) Is the aid degressive?

- ☐ yes ☐ no

(C) Specify the eligible costs:

- ☐ marketing of the cluster to recruit new companies to take part in the cluster: .....
- ☐ management of the cluster's open-access facilities: .....
- ☐ organisation of training programmes, workshops and conferences to support knowledge sharing and networking between the members of the cluster: .....

(D) Aid intensity:

- degressive aid (please specify degressive rates for each year) <sup>(79)</sup>: .....
- non-degressive aid (%) <sup>(80)</sup>: .....

<sup>(71)</sup> The maximum aid intensity is 40 % of the eligible costs.

<sup>(72)</sup> The maximum aid intensity is 50 % of the eligible costs.

<sup>(73)</sup> The maximum aid intensity is 20 % of the eligible costs.

<sup>(74)</sup> The aid intensity may be increased by maximum 20 percentage points for small enterprises.

<sup>(75)</sup> The aid intensity may be increased by maximum 10 percentage points for medium-sized enterprises.

<sup>(76)</sup> The aid intensity may be increased by maximum 20 percentage points.

<sup>(77)</sup> The aid intensity may be increased by maximum 10 percentage points.

<sup>(78)</sup> In any case, the period may never exceed 10 years.

<sup>(79)</sup> The intensity may amount 100 % for the eligible costs the first year but must have fallen in a linear fashion to zero by the end of the fifth year.

<sup>(80)</sup> The maximum aid intensity is 50 % of the eligible costs.

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5. **Incentive effect and necessity of aid** <sup>(81)</sup>

5.1. *General conditions*

Please confirm that when granting the aid under the notified measure, it will be ensured that the R&D&I activities of individual beneficiaries will not commence prior to their aid application or granting decision in case of fiscal aid.

☐ yes

Please provide details on how the compliance with this condition will be ensured:

.....  
.....

In case the aid is granted for projects of large enterprises, to SMEs if it exceeds EUR 7,5 million, for process and organisational innovation in services and for innovation clusters, please confirm that the incentive effect will be evaluated on the basis of at least one of the following indicators:

☐ increase in project size;

☐ increase in scope;

☐ increase in speed;

☐ increase in total amount spent on R&D&I;

☐ other: .....

Please provide details on how this evaluation will be carried out:

.....  
.....

6. **Cumulation** <sup>(82)</sup>

(A) Is the aid granted under the notified scheme combined with other aid <sup>(83)</sup>?

☐ yes

☐ no

(B) If yes, please describe the cumulation rules applicable to the notified aid scheme:

.....  
.....  
.....

(C) Please specify how the respect of cumulation rules will be verified in the notified aid scheme:

.....  
.....  
.....

7. **Specific questions relating to agriculture and fisheries** <sup>(84)</sup>

(A) Does the R&D aid concern products listed in Annex I to the EC Treaty?

☐ yes

☐ no

If yes, specify the type of products:

.....  
.....

<sup>(81)</sup> Cf. R&D&I Framework, Chapter 6.

<sup>(82)</sup> Cf. R&D&I Framework, Chapter 8.

<sup>(83)</sup> Please note that the aid for R&D&I shall not be cumulated with de minimis support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in the R&D&I Framework.

<sup>(84)</sup> Cf. R&D&I Framework, Chapter 9.

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(B) If yes, please provide the answers to the following questions:

— is the aid of general interest to the particular sector or sub-sector concerned?

☐ yes ☐ no

If yes, provide evidence:

.....  
.....

— is the information that research will be carried out, and with which goal published on Internet prior to the commencement of the research AND does the information published include an approximate date of the expected results and their place of publication on the Internet, as well as a mention that the result will be available at no cost?

☐ yes ☐ no

If yes, provide evidence and specify the Internet address:

.....  
.....

— are the results of the research made available on Internet, for a period of at least five years AND can it be confirmed that the information on the Internet will be published no later than any which may be given to members of any particular organisation?

☐ yes ☐ no

If yes, provide evidence:

.....  
.....

— is the aid granted directly to the researching institution or body AND does it exclude the direct granting of non-research related aid to a company producing, processing or marketing agricultural products, as well as the provision of price support to producers of such products?

☐ yes ☐ no

If yes, provide evidence:

.....  
.....

*If the answers to all four conditions of Section B above are yes, the aid intensity up to 100 % can be allowed. If not, cases of R&D aid for products listed in Annex I to the EC Treaty are to be examined under the normal rules of the R&D&I Framework.*

(C) Specify the total aid intensity (%): .....

(D) Cooperation pursuant to Council Regulation (EC) No 1698/2005 on support for rural development by the EAFRD <sup>(85)</sup>

Has the cooperation been approved for Community co-financing under Article 29 of Regulation (EC) No 1698/2005 AND/OR is the State aid granted as additional financing pursuant to Article 89 of this Regulation under the same conditions and at the same intensity as the co-financing <sup>(86)</sup>?

☐ yes ☐ no

*If not, cases of R&D aid for products listed in Annex I to the EC Treaty are to be examined under the normal rules of the R&D&I Framework.*

<sup>(85)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1), as amended by Regulation (EC) No 1463/2006 (OJ L 277, 9.10.2006, p. 1).

<sup>(86)</sup> Commission will allow State aid for cooperation pursuant to Article 29 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) if such cooperation has been approved for Community co-financing under that Article and/or the State aid is granted as additional financing pursuant to Article 89 of Regulation (EC) No 1698/2005 under the same conditions and at the same intensity as the co-financing.

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8. **Reporting and monitoring** <sup>(87)</sup>

8.1. *Annual reports*

*Please note that this reporting obligation is without prejudice to the reporting obligation pursuant to Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999* <sup>(88)</sup>.

(A) Please undertake to submit annual reports on the implementation of the notified scheme to the Commission, containing all the elements listed below <sup>(89)</sup>:

- name of the beneficiary;
- aid amount per beneficiary;
- aid intensity;
- sectors of activity where the aided projects are undertaken.

☐ yes

(B) Please undertake to explain in the annual report for all aid granted under an approved scheme to large undertakings how the incentive effect has been respected for aid given to such undertakings <sup>(90)</sup>.

☐ yes

8.2. *Access to full text of schemes*

(A) Please undertake to publish the full text of the final aid schemes as approved by the Commission on the Internet.

☐ yes

Please provide the Internet address: .....

(B) Please confirm that the scheme as approved by the Commission will not be applied before the information is published on the Internet (as required under Section A above).

☐ yes

8.3. *Information sheets, monitoring*

(A) Please undertake, whenever aid for R&D&I is granted on the basis of aid schemes without falling under the duty for individual notification, and exceeds EUR 3 million <sup>(91)</sup>, to provide the Commission within 20 working days starting from the granting of the aid by the competent authority with the information requested in the standard form laid down in the Annex to the R&D&I Framework.

☐ yes

(B) Please undertake to maintain detailed records regarding the granting of aid, with all information necessary to establish that the eligible costs and maximum allowable aid intensity have been observed.

☐ yes

(C) Please undertake to ensure that detailed records referred to in Section B above are maintained for 10 years from the date on which the aid was granted.

☐ yes

(D) Please undertake to submit the records referred to in Section B above on request of the Commission.

☐ yes

9. **Other information**

Please give any other information you consider necessary to assess the measure(s) in question under the Community Framework for State aid for research, development and innovation.

<sup>(87)</sup> Cf. R&D&I Framework, Section 10.1.

<sup>(88)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

<sup>(89)</sup> As regards the specific reporting requirements for fiscal aid and clusters, please see Section 10.1.1 (third and fourth paragraphs) of the R&D&I Framework.

<sup>(90)</sup> Notably using the criteria specified in section 6 of the R&D&I Framework.

<sup>(91)</sup> If applicable, please provide an exchange rate used when answering this question.

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PART III.6.b

**SUPPLEMENTARY INFORMATION SHEET FOR RESEARCH AND DEVELOPMENT  
AND INNOVATION AID: INDIVIDUAL AID**

*This supplementary information sheet must be used for the notification of any individual aid covered by the Community framework for State aid for research and development and innovation (hereinafter the R&D&I Framework) <sup>(92)</sup>. It must also be used for individual aid for Research and Development to SMEs, which does not fall under a Block Exemption Regulation <sup>(93)</sup> or is subject to individual notification obligation as it exceeds the individual notification thresholds laid down in the block exemption. This notification sheet also covers the individual aid intended for the production, processing and marketing of agricultural products.*

1. **Basic characteristics of the notified measure**

*Please fill in the relevant parts of the notification form corresponding to the character of the notified measure. In particular, please note that **Section 8** is to be completed only if the notified measure is subject to a detailed assessment, i.e. only if condition(s) of **Section 7** are met. Please find below a basic guidance.*

- (A) Is the aid granted in order to promote the execution of an important project of common European interest?

☐ yes ☐ no

*If yes, please fill in **Section 4** (Compatibility of aid under Article 87(3)(b) of the EC Treaty) of this supplementary information sheet. Furthermore please fill in **Section 11** (Reporting and monitoring).*

- (B) If no, please specify the type of aid and fill in the appropriate subsections of **Section 5** (Compatibility of aid under Article 87(3)(c) of the EC Treaty) of this supplementary information sheet:

- ☐ Aid for R&D projects, fill in *Section 5.1*;  
☐ Aid for technical feasibility studies, fill in *Section 5.2*;  
☐ Aid for industrial property right costs for SMEs, fill in *Section 5.3*;  
☐ Aid for young innovative enterprises, fill in *Section 5.4*;  
☐ Aid for process and organisational innovation in services, fill in *Section 5.5*;  
☐ Aid for innovations advisory services and for innovation support services, fill in *Section 5.6*;  
☐ Aid for the loan of highly qualified personnel, fill in *Section 5.7*;  
☐ Aid for innovation clusters, fill in *Section 5.8*.

*Furthermore, please fill in: **Section 6** (Incentive effect and necessity of aid) in order to verify the incentive effect, **Section 7** (Criteria triggering a detailed assessment) in order to verify if the notified aid is subject to the detailed assessment of **Section 8** (Additional information for detailed assessment) and **Section 11** (Reporting and monitoring).*

- (C) Does the aid involve research organisations <sup>(94)</sup>/innovation intermediaries?

☐ yes ☐ no

*If yes, fill in **Section 2 and/or 3** (Research organisations and innovation intermediaries and Indirect State aid to undertakings through publicly funded research organisations) of this supplementary information sheet.*

- (D) Can the aid be combined with other aid?

☐ yes ☐ no

*If yes, fill in **Section 9** (Cumulation) of this supplementary information sheet.*

<sup>(92)</sup> Community framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).  
<sup>(93)</sup> Currently Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33) as amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22) or any subsequent regulation replacing it.  
<sup>(94)</sup> For definition see Section 2.2 (d) of the R&D&I Framework.

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- (E) Does the R&D aid concern products listed in Annex I to the EC Treaty?

☐ yes ☐ no

*If yes, fill in **Section 10** (Specific questions related to agriculture and fisheries) of this supplementary information sheet.*

- (F) In case the notified individual aid is based on an approved scheme, please provide details concerning that scheme, including its publication reference (Internet address) and State aid registration number:

.....  
.....

- (G) Please confirm that if the SME specific aid <sup>(96)</sup>/bonus is granted, the beneficiary complies with the SME definition as defined by the Community legislation <sup>(96)</sup>:

☐ yes

Please provide relevant information and evidence:

.....  
.....

- (H) If the aid involves commissioning/purchasing of R&D activities/results from undertakings by the public authorities, are the providers selected in an open tender procedure <sup>(97)</sup>?

☐ yes ☐ no

*If no, please note that such payments from the public authorities to undertakings would normally involve State aid.*

- (I) If applicable, please provide an exchange rate which has been used for the purposes of the notification: .....

- (J) All documents provided by the Member States as annexes to the notification form shall be numbered and document numbers shall be indicated in the relevant parts of this supplementary information sheet.

2. **Research organisations and innovation intermediaries as recipients of state aid <sup>(98)</sup>**

*If there are several research organisations or innovation intermediaries involved in the notified project, please provide the information below for each of them.*

2.1. **Public funding of non-economic activities**

- (A) Does the research organisation or non-for-profit innovation intermediary carry out an economic activity <sup>(99)</sup> (an activity consisting in offering goods and/or services on a given market)?

☐ yes ☐ no

If yes, please provide description of these activities: .....

.....  
.....

- (B) If the same entity carries out activities of both economic and non-economic <sup>(100)</sup> nature, can the two kinds of activities and their costs and funding be clearly separated?

☐ yes ☐ no

If yes, provide details:

.....  
.....

*If yes, please note that public funding of non-economic activities does not fall under Article 87(1) of the EC Treaty. If not, public funding of economic activities generally entails State aid.*

<sup>(96)</sup> I.e. measures under Sections 5.3, 5.4, 5.6 and 5.7 of this supplementary information sheet. Please note that the measure under Section 5.4 is limited to small enterprises.

<sup>(96)</sup> See footnote 20.

<sup>(97)</sup> Cf. R&D&I Framework, Section 2.1.

<sup>(98)</sup> Cf. R&D&I Framework, Section 3.1.

<sup>(99)</sup> For details see Section 3.1.1 of R&D&I Framework (footnote 24).

<sup>(100)</sup> For details see Section 3.1.1 (2nd and 3rd paragraph) of R&D&I Framework.



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2.2. *Public funding of economic activities*

Can the Member State prove that:

- the totality of the State funding has been passed on from the research organisation or not-for-profit innovation intermediary (carrying out economic activities) to the final recipients;

AND

- there is no advantage granted to the intermediary?

☐ yes

☐ no

Please provide details and evidence:

.....  
.....

*If yes, please note that the intermediary organisations may not be recipient of State aid. As regards the aid to final recipients, normal State aid rules apply.*

3. **Indirect State aid to undertakings through publicly funded research organisations** <sup>(101)</sup>

*If there are more research organisations or innovation intermediaries involved in the notified project, please provide the information below for each of them.*

3.1. *Research on behalf of undertakings*

- (A) Is the supported project carried out by research organisations on behalf of undertakings?

☐ yes

☐ no

- (B) If yes, do the research organisations (acting as agent) render services to the undertakings (acting as principals) in situations, where:

- the agents receive payment of an adequate remuneration for their services,

☐ yes

☐ no

AND

- do the principals specify the terms and conditions of these services?

☐ yes

☐ no

Please provide details:

.....  
.....

- (C) Do the research organisations provide their services at market price?

☐ yes

☐ no

*If there is no market price, do the research organisations provide their services at a price which reflects full costs plus a reasonable margin?*

☐ yes

☐ no

Please provide details:

.....  
.....

*If a research organisation renders services and if the answer to one of the questions in Section C is yes, there will be normally no State aid passed to the undertakings through the research organisation.*

3.2. *Collaboration of undertakings and research organisations*

- (A) Is the collaboration project carried out jointly by undertakings and research organisations?

☐ yes

☐ no

If yes, provide details on the partnerships:

.....  
.....

<sup>(101)</sup> Cf. R&D&I Framework, Section 3.2.

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- (B) If yes, do the participating undertakings bear the full cost of the projects supported under the notified scheme?

☐ yes ☐ no

Are the results which do not give rise to intellectual property rights widely disseminated AND are any intellectual property rights which result from the activity of the research organisations fully allocated <sup>(102)</sup> to the research organisations?

☐ yes ☐ no

Do the research organisations receive from the participating undertakings compensation equivalent to the market price for the intellectual property rights <sup>(103)</sup> which result from the activity of the research organisations carried out in the project and which are transferred to the participating undertakings?

☐ yes ☐ no

Please provide details (please note that any contribution of the participating undertakings to the costs of the research organisations shall be deducted from the compensation):

.....  
.....

- (C) If none of the answers to questions of Section B is yes, the Member State may rely on individual assessment of the collaboration projects <sup>(104)</sup>.

Please provide an individual assessment of the collaboration projects, taking into account the above mentioned elements. Please attach also the contractual agreements to the notification.

*If none of the answers to questions of Section B is yes and if the individual assessment of the collaboration projects does not lead to the conclusion that there is no State aid, the Commission will consider the full value of the contribution of the research organisation to the project as aid to undertakings.*

4. **Compatibility of aid under article 87(3)(b) of the EC treaty**

*Aid for R&D&I to promote the execution of an important project <sup>(105)</sup> of common European interest may be considered to be compatible with the common market pursuant to Article 87(3)(b) of the EC Treaty.*

4.1. *General conditions (cumulative)*

- (A) Please confirm that:

☐ the project contributes in a concrete, clear and identifiable manner to the Community interest <sup>(106)</sup>;

AND

☐ the advantage achieved by the objective of the project is not limited to one Member State or to the Member States implementing it, but extends to the Community as a whole <sup>(107)</sup>;

AND

☐ the project presents a substantive leap forward for the Community objectives.

Please provide details and evidence:

.....  
.....

<sup>(102)</sup> For details see Section 3.2.2 (footnote 28) of the R&D&I Framework.

<sup>(103)</sup> For details see Section 3.2.2 (footnote 29) of the R&D&I Framework.

<sup>(104)</sup> There also may be no State aid where the assessment of the contractual agreement between the partners leads to the conclusion that any intellectual property rights to the R&D&I results as well as access rights to the results are allocated to the different partners of the collaboration and adequately reflect their respective interests, work packages, and financial and other contributions to the project.

<sup>(105)</sup> The Commission may also consider a group of projects as together constituting a project.

<sup>(106)</sup> Please note that the common European interest must be demonstrated in practical terms, e.g. it must be demonstrated that the project enables significant progress to be made towards achieving specific Community objectives.

<sup>(107)</sup> The fact that the project is carried out by undertakings in different countries is not sufficient.

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(B) Specify the positive effects of the aid:

- ☐ important spill-overs for society;
- ☐ contribution of the measure to the improvement of the Community situation regarding R&D&I in the international context;
- ☐ creation of new markets;
- ☐ development of new technologies;
- ☐ other positive effects.

.....  
.....

(C) Please provide the terms of implementation of the project (including participants, objectives) <sup>(108)</sup>:

.....  
.....

(D) Please provide details and evidence illustrating that the aid is necessary to achieve the defined objective of common interest AND presents an incentive for the execution of the project <sup>(109)</sup>:

.....  
.....

(E) Please provide details and evidence demonstrating that the project involves a high level of risk:

.....  
.....

(F) Please provide details and evidence illustrating that the project is of great importance with respect to its character and its volume <sup>(110)</sup>:

.....  
.....

4.2. Description of the project

Please provide a detailed description of the project. For orientation please see Section 5.1 of this supplementary information sheet.

.....  
.....

5. **Compatibility of aid under article 87(3)(c) of the EC treaty**

*If there are several beneficiaries involved in the notified project, please provide the information below for each of them.*

5.1. *Aid for R&D projects* <sup>(111)</sup>

5.1.1. Research category <sup>(112)</sup>

(A) Please indicate which R&D stages <sup>(113)</sup> are supported under the notified aid measure:

- ☐ fundamental research;
- ☐ industrial research;
- ☐ experimental development.

<sup>(108)</sup> Please note that the projects must be clearly defined as regards these aspects.

<sup>(109)</sup> For orientation please see the criteria included in Section 6 of this supplementary information sheet.

<sup>(110)</sup> I.e. is meaningful with respect to its objective and is of substantial size.

<sup>(111)</sup> Cf. R&D&I Framework, Section 5.1.

<sup>(112)</sup> To classify the activities, you may refer to the Commission practice or the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and technological Activities, proposed Standard Practice for Surveys on Research and Experimental Development (Organisation for Economic Cooperation and Development, 2002).

<sup>(113)</sup> For definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

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- (B) If the R&D projects encompass different research categories, please list and qualify the different tasks as falling under the categories of fundamental research, industrial research or experimental development or as not falling under any of those categories at all.

.....  
.....

5.1.2. Eligible costs

*All eligible costs must be allocated to a specific category of R&D <sup>(114)</sup>. Please specify the eligible costs and indicate their amount.*

	Fundamental research	Industrial research	Experimental development
Personnel costs			
Costs of instruments and equipment			
Costs for building and land			
Cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices			
Additional overheads incurred directly as a result of the research project			
Other operating expenses			

5.1.3. Aid intensities and bonuses

*The aid intensity is calculated on the basis of the eligible costs of the project. It must be established for each beneficiary of the aid, including in a collaboration project <sup>(115)</sup>.*

- (A) Basic intensities (without bonuses) <sup>(116)</sup>:

	Fundamental research	Industrial research	Experimental development
Maximum aid intensity			

<sup>(114)</sup> Cf. Section 5.1.4 of the R&D&I Framework. These eligible costs apply to aid for R&D projects (Section 5.1) research projects and to process and organisational innovation in services (Section 5.5).

<sup>(115)</sup> In the case of State aid for an R&D project being carried out in collaboration between research organisations and undertakings, the combined aid deriving from direct government support for a specific research project and, where they constitute aid, contributions from research organisations to that project may not exceed the applicable aid intensities for each benefiting undertaking.

<sup>(116)</sup> The aid intensity may not exceed 100% for fundamental research, 50% for industrial research and 25% for experimental development.

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(B) Bonuses:

Are bonuses applied under the notified measure?

☐ yes ☐ no

*If yes, please specify below:*

— Is an SME bonus applied?

☐ yes ☐ no

Specify the level of bonus applicable <sup>(117)</sup>: .....

— Is a bonus for effective collaboration between undertakings (i) or collaboration of an undertaking with a research organisation (ii) or (only for projects of industrial research) dissemination of results (iii) applied under the notified aid measure?

☐ yes ☐ no

(i) If a bonus for an effective collaboration between at least two undertakings, which are independent of each other, is applied, please confirm that the following conditions are fulfilled:

☐ no single undertaking bears more than 70 % of the eligible costs of the collaboration project;

AND

☐ the project involves collaboration with at least one SME or the collaboration has a cross-border character, i.e. research and development activities are carried out in at least two different Member States.

Specify the level of bonus applicable <sup>(118)</sup>: .....

(ii) If a bonus for an effective collaboration between an undertaking and a research organisation, particularly in the context of coordination of national R&D policies, is applied, please confirm that the following conditions are fulfilled:

☐ the research organisation bears at least 10 % of the eligible costs;

AND

☐ the research organisation has the right to publish the result of the research projects in so far as they stem from research implemented by that organisation.

Specify the level of bonus applicable <sup>(119)</sup>: .....

(iii) If in the case of industrial research a bonus for wide dissemination of the results of the project is applied, please specify at least one of the following methods of wide dissemination:

☐ technical and scientific conferences;

☐ publication in scientific or technical journals;

☐ availability in open access repositories (databases where raw research data can be accessed by anyone);

☐ availability through free or open source software.

Specify the level of bonus applicable <sup>(120)</sup>: .....

(C) Specify the total aid intensity of the projects supported under the notified aid measure (taking into account the bonuses) (%): .....

<sup>(117)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

<sup>(118)</sup> The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %.

<sup>(119)</sup> The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %. This bonus does not apply to the research organisation.

<sup>(120)</sup> The aid intensity may be increased by 15 percentage points, but up to a maximum of 80 %.

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5.1.4. Special conditions for repayable advance <sup>(121)</sup>

(A) Is the aid to the R&D projects granted in the form of a repayable advance?

☐ yes ☐ no

(B) Is the aid granted in the form of a repayable advance under the notified measure expressed as gross grant equivalent <sup>(122)</sup>?

☐ yes ☐ no

If yes, what is the aid intensity of repayable advance expressed as gross grant equivalent <sup>(123)</sup>:

Furthermore, please specify on the basis of which approved aid scheme <sup>(124)</sup> is the aid granted and provide details on the complete methodology applied in order to determine the gross grant equivalent, underlying verifiable data.

(C) If the aid cannot be expressed in gross grant equivalent, what is the level of the repayable advance expressed as a percentage of the eligible costs:

In case the rates of repayable advance granted to the R&D project are higher than the rates indicated in Sections 5.1.2 and 5.1.3 (up to the maximum rates indicated in Section 5.1.5) of the R&D&I Framework, please:

— notify to the Commission the detailed information on the repayment in the case of success and define clearly what will be considered as a successful outcome of the research activities;

AND

— confirm the following:

☐ the measure provides that in case of successful outcome the advance is repaid with an interest rate at least equal to the applicable rate resulting from the application of the Commission notice on the method of setting the reference and discount rates <sup>(125)</sup>;

☐ in case of a success exceeding the outcome defined as successful, the Member State is entitled to request payments beyond payments of the advance amount including interest according to the reference rate foreseen by the Commission;

☐ in case of partial success, the Member State requires that the repayment secured is in proportion to the degree of success achieved.

5.1.5. Matching clause <sup>(126)</sup>

Is the matching clause used in this notified measure?

☐ yes ☐ no

If yes, higher intensities than generally permissible may be authorised.

If yes, provide details and evidence that competitors located outside the Community have received in the last three years or are going to receive, aid of an equivalent intensity for similar projects, programmes, research, development or technology:

<sup>(121)</sup> Cf. R&D&I Framework, Section 5.1.5.

<sup>(122)</sup> Gross grant equivalent of a repayable advance reflects the probability that the advance will be repaid by the beneficiaries.

<sup>(123)</sup> The gross grant equivalent must fulfil the conditions on maximum aid intensities laid down in Sections 5.1.2 and 5.1.3 of the R&D&I Framework.

<sup>(124)</sup> For details see Section 5.1.5 of the R&D&I Framework (2nd paragraph).

<sup>(125)</sup> OJ C 273, 9.9.1997, p. 3. Also published under: [http://ec.europa.eu/comm/competition/state\\_aid/legislation/reference.html](http://ec.europa.eu/comm/competition/state_aid/legislation/reference.html).

<sup>(126)</sup> Cf. R&D&I Framework, Section 5.1.7.

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Do actual or potential direct or indirect distortions of international trade exist?

☐ yes ☐ no

If yes, provide evidence:

.....  
.....

Provide also sufficient information to enable the Commission to assess the situation, in particular regarding the need to take account of the competitive advantage enjoyed by a third-country competitor:

.....  
.....

5.2. *Aid for technical feasibility studies* <sup>(127)</sup>

5.2.1. General conditions

The studies are preparatory to <sup>(128)</sup>:

- ☐ industrial research;  
☐ experimental development.

5.2.2. Aid intensities

Specify the maximum aid intensity <sup>(129)</sup> (%): .....

*The aid intensity is calculated on the basis of cost of feasibility studies of the project.*

5.3. *Aid for industrial property right costs for SMEs* <sup>(130)</sup>

5.3.1. Conditions

Which stage of research <sup>(131)</sup> is concerned?

- ☐ fundamental research;  
☐ industrial research;  
☐ experimental development.

5.3.2. Eligible costs and aid intensities

(A) Specify the eligible costs <sup>(132)</sup> and indicate their amount:

- ☐ costs preceding the grant of the right in the first legal jurisdiction: .....  
.....  
☐ translation and other costs incurred in order to obtain the granting or validation of the right in other legal jurisdiction: .....  
.....  
☐ costs incurred in defending the validity of the right during the official prosecution of the application and possible opposition proceedings: .....  
.....

(B) Specify the maximum aid intensity (%) <sup>(133)</sup>: .....

<sup>(127)</sup> Cf. R&D&I Framework, Section 5.2.

<sup>(128)</sup> To classify the activities, you may refer to the Commission practice or the specific examples and explanations provided in the Frascati Manual on the Measurement of Scientific and technological Activities, proposed Standard Practice for Surveys on Research and Experimental Development (Organisation for Economic Cooperation and Development, 2002); for definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

<sup>(129)</sup> For SMEs, the aid intensity may not exceed 75 % for studies preparatory to industrial research activities and 50 % for studies preparatory to experimental development activities; for large companies, the aid intensity may not exceed 65 % for studies preparatory to industrial research activities and 40 % for studies preparatory to experimental development activities.

<sup>(130)</sup> Cf. R&D&I Framework, Section 5.3.

<sup>(131)</sup> For definitions see Section 2.2(e), (f), (g) of the R&D&I Framework.

<sup>(132)</sup> For details see Section 5.3 (second paragraph) of the R&D&I Framework.

<sup>(133)</sup> Maximum aid levels correspond to the same levels of aid as would have qualified as R&D aid in respect of the research activities which first led to the industrial property rights concerned.

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5.4. *Aid for young innovative enterprises* <sup>(134)</sup> (for small enterprises)

Please confirm that:

- (A) ☐ the beneficiary is a small enterprise as defined by Community legislation <sup>(135)</sup>, in existence for less than six years at the time when the aid is granted;

Please provide details and evidence:

.....  
.....

- (B) ☐ the beneficiary is an innovative enterprise.

Please confirm that the compliance with this condition is ensured through:

- ☐ an evaluation carried out by an external expert demonstrating that the beneficiary will in the foreseeable future develop products, services or processes which are technologically new or substantially improved compared to the state of the art in its industry in the Community, and which carry a risk of technological or industrial failure;

OR

- ☐ the evidence that the R&D expenses of the beneficiary represent at least 15 % of its total operating expenses in at least one of the three years preceding the granting of the aid or in the case of a start-up enterprise without any financial history, in the audit of its current fiscal period, as certified by an external auditor.

Please provide details on how this is implemented:

.....  
.....

- (C) Specify the maximum aid amount applicable under the notified measure <sup>(136)</sup>: .....

- (D) Please confirm that:

- ☐ the beneficiary did not receive aid for young innovative enterprises before and will receive this type of aid only once during the period in which it qualifies as a young innovative enterprise.

- (E) Does the enterprise benefit from a cumulation of aid?

☐ yes ☐ no

If yes, please indicate how the specific cumulation rules for young innovative enterprise aid (Section 5.4 of the R&D&I Framework) will be complied with:

.....  
.....

5.5. *Aid for process and organisational innovation in services* <sup>(137)</sup>

5.5.1. General conditions

- (A) To which type of innovation in service activities <sup>(138)</sup> does the notified measure refer?

- ☐ process innovation in service activities;  
☐ organisational innovation in service activities.

Please provide a detailed description of the innovation in service activities <sup>(139)</sup> (process and/or organisational):

.....  
.....

<sup>(134)</sup> Cf. R&D&I Framework, Section 5.4.

<sup>(135)</sup> See footnote 20.

<sup>(136)</sup> The aid may not exceed EUR 1 million in non-assisted areas; EUR 1,5 million in regions eligible for the derogation in Article 87(3)(a) of the EC Treaty; EUR 1,25 million in regions eligible for the derogation in Article 87(3)(c) of the EC Treaty.

<sup>(137)</sup> Cf. R&D&I Framework, Section 5.5.

<sup>(138)</sup> For definitions see Section 2.2(i), (j) of the R&D&I Framework.

<sup>(139)</sup> In order to classify the activities, you may refer to the Commission practice or the specific definitions provided in the OSLO Manual, Guidelines for Collecting and Interpreting Innovation Data, 3<sup>rd</sup> Edition (Organisation For Economic Cooperation and Development, 2005).



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(B) Please confirm that:

- ☐ the organisational innovation is related to the use and exploitation of Information and Communication Technologies (ICT) to change the organisation;
- ☐ the innovation is formulated as a project with an identified and qualified project manager, as well as identified project costs;
- ☐ the result of the aided project is the development of a standard, of a business model, methodology of concept, which can be systematically reproduced, possibly certified, and possibly patented;
- ☐ the process or organisational innovation is new or substantially improved compared to the state of the art in its industry in the Community;
- ☐ the process or organisational innovation project entails a clear degree of risk;
- ☐ the aid is granted to large enterprise only if collaborates with SMEs in the aided activity and that the collaborating SMEs incur at least 30 % of the total eligible costs.

Please provide details/evidence for all these elements:

.....

.....

5.5.2. Eligible costs and aid intensities

(A) Please specify the eligible costs <sup>(140)</sup> and indicate their amount:

	Eligible costs
personnel costs	
costs of instruments and equipment	
costs for building and land	
cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices	
additional overheads incurred directly as a result of the research project	
other operating expenses	

(B) Specify the maximum aid intensity <sup>(141)</sup> (%): .....

*The aid intensity is calculated on the basis of the eligible costs of the projects.*

5.6. Aid for innovation advisory services and for innovation support services <sup>(142)</sup> (for SMEs)

5.6.1. General conditions

(A) Specify the maximum aid amount (not exceeding EUR 200 000 per beneficiary within any three year period): .....

(B) Please confirm that:

- ☐ if the service provider does not benefit from a national or European certification, the aid will not cover more than 75 % of the eligible costs;
- ☐ the beneficiaries use the State aid to buy the services at market price (or if the service provider is a non-for-profit entity, at a price which reflects its full costs plus a reasonable margin).

Please provide details on how this will be ensured:

.....

.....

<sup>(140)</sup> For details see Section 5.1.4 R&D&I Framework. Please note that in the case of organisational innovation, the costs of instruments and equipment cover costs of ICT instruments and equipment only.

<sup>(141)</sup> The maximum aid intensity is 15 % of the eligible costs for a large enterprise; 25 % of the eligible costs for a medium enterprise; 35 % of the eligible costs for a small enterprise.

<sup>(142)</sup> Cf. R&D&I Framework, Section 5.6.

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5.6.2. Eligible costs

- (A) What type of aid is granted?
- ☐ aid for innovation advisory services;
- ☐ aid for innovation support services.
- (B) If it is an aid for innovation advisory services, specify the eligible costs and indicate their amount:
- ☐ management consulting: .....
- ☐ technological assistance: .....
- ☐ technology transfer services: .....
- ☐ training: .....
- ☐ consultancy for acquisition, protection and trade in Intellectual Property Rights and for licensing agreements: .....
- ☐ consultancy on the use of standards: .....
- (C) If it is an aid for innovation support services, specify the eligible costs and indicate their amount:
- ☐ office space: .....
- ☐ data banks: .....
- ☐ technical libraries services: .....
- ☐ market research: .....
- ☐ use of laboratory: .....
- ☐ quality labelling: .....
- ☐ testing and certification: .....

5.6.3. Special conditions for a non-for-profit entity

*If the service provider is a non-for-profit entity, the aid may be given in the form of a reduced price, as the difference between the price paid and the market price (or a price which reflects full costs plus a reasonable margin).*

Is the aid given in the form of a reduced price?

- ☐ yes ☐ no

If yes, provide evidence of the existence of a system ensuring transparency about the full costs of the innovation advisory and innovation support services provided, as well as about the price paid by the beneficiaries, so that the aid received can be measured and monitored.

.....

.....

5.7. Aid for the loan of highly qualified personnel <sup>(143)</sup> (for SMEs)

5.7.1. General conditions

- (A) Where do the highly qualified personnel <sup>(144)</sup> come from?

- ☐ research organisations;
- ☐ large enterprises.

Provide details (if possible) on research organisations and on large enterprises.

.....

.....

<sup>(143)</sup> Cf. R&D&I Framework, Section 5.7.

<sup>(144)</sup> For definition see Section 2.2(k) of the R&D&I Framework.

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- (B) Please confirm that:
- ☐ the seconded personnel are not replacing other personnel;
  - ☐ the seconded personnel are employed in a newly created function within the beneficiary undertaking.  
Specify please this newly created function:  
.....
  - ☐ the seconded personnel have been employed for at least two years in the research organisations or the large enterprises which are sending the personnel on secondment;
  - ☐ that the seconded personnel work on R&D&I activities within the SME receiving aid.

5.7.2. Eligible costs and aid intensities

- (A) Specify the eligible costs and indicate their levels:
- ☐ costs for borrowing and employing highly qualified personnel: .....
  - ☐ mobility allowance for the seconded personnel: .....
- (B) ☐ please confirm that consultancy costs (payment of the service rendered by the expert without employing the expert in the undertaking) are excluded from eligible costs of the aid for the loan of highly qualified personnel.
- C) Specify the maximum aid intensity <sup>(145)</sup> (%): .....

5.8. Aid for innovation clusters <sup>(146)</sup>

5.8.1. General conditions

- (A) What type of aid is granted to the beneficiary?
- ☐ investment aid;
  - ☐ operating aid for cluster animation.
- (B) Please confirm that:
- ☐ the aid is exclusively granted to the legal entity operating the innovation cluster;
  - ☐ the beneficiary is in charge of managing the participation and access to the cluster's premises, facilities and activities;  
Please provide details:  
.....
  - ☐ access to the clusters' premises, facilities and activities is not restricted.
- (C) Do the fees charged for using the cluster's facilities and for participating in the cluster's activities reflect their costs?
- ☐ yes ☐ no
- If yes, please demonstrate how this is ensured:  
.....
- If not, please provide details (especially with respect to the existence of aid within the meaning of Article 87(1) of the EC Treaty, see Section 3.1 of the R&D&I Framework):  
.....
- (D) Please attach an analysis of the technological specialisation of the innovation cluster, existing regional potential, existing research capacity, presence of clusters in the Community with similar purposes and potential market volumes of the activities in the cluster:  
.....

<sup>(145)</sup> The maximum aid intensity is 50 % of the eligible costs, for a maximum of three years per undertaking and per person borrowed.

<sup>(146)</sup> Cf. R&D&I Framework, Section 5.8.

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5.8.2. Specific conditions concerning investment aid for cluster animation

- (A) What type of investment is carried out?
- ☐ setting up of innovation clusters;
- ☐ expansion of innovation clusters;
- ☐ animation of innovation clusters.
- (B) For which facilities is the aid granted?
- ☐ facilities for training and research centre;
- ☐ open-access research infrastructures, laboratory, testing facility;
- ☐ broadband network infrastructures.
- (C) Specify the eligible costs and indicate their amount:
- ☐ costs relating to investment in land: .....
- ☐ buildings: .....
- ☐ machinery: .....
- ☐ equipment: .....
- (D) What is the basic aid intensity (%) <sup>(147)</sup>: .....
- (E) Is any bonus granted to the beneficiary?
- ☐ yes ☐ no
- If yes, specify below:*
- Do you apply an SME bonus?
- ☐ yes ☐ no
- Specify the level of the bonus <sup>(148)</sup>: .....
- Do you apply a bonus for undertakings located in outermost regions?
- ☐ yes ☐ no
- If yes, specify the level of bonus applicable to an undertaking located in outermost regions <sup>(149)</sup>: .....*

5.8.3. Specific conditions concerning operating aid for cluster animation

- (A) For how long is such aid granted: ..... years
- If the aid is granted for a longer period than 5 years, please provide convincing evidence in order to justify such longer period <sup>(150)</sup>.*
- .....
- (B) Is the aid degressive?
- ☐ yes ☐ no
- (C) Specify the eligible costs and indicate their amount:
- ☐ marketing of the cluster to recruit new companies to take part in the cluster: .....
- ☐ management of the cluster's open-access facilities: .....
- ☐ organisation of training programmes, workshops and conferences to support knowledge sharing and networking between the members of the cluster: .....

<sup>(147)</sup> The maximum aid intensity is 15% of the eligible costs; for regions falling under Article 87(3)(a) of the EC Treaty the maximum aid intensity is the following: 30% of the eligible costs for regions with less than 75% of average EU-25 GDP per capita, outermost regions with higher GDP per capita and statistical effect regions (until 1 January 2011); 40% for regions with less than 60% of average EU-25 GDP per capita (%); 50% for regions with less than 45% of average EU-25 per capita. For statistical effect regions falling under Article 87(3)(c) of the EC Treaty from 1 January 2011 the maximum aid intensity is 20% of the eligible costs.

<sup>(148)</sup> The aid intensity may be increased by maximum 20 percentage points for small enterprises and by maximum 10 percentage points for medium-sized enterprises.

<sup>(149)</sup> The aid intensity may be increased by maximum 20 percentage points for outermost regions where GDP per capita falls below 75% of EU-25 average and by maximum 10 percentage points for other outermost regions.

<sup>(150)</sup> In any case, the period may never exceed 10 years.

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- (D) Aid intensity:
- degressive aid (please specify degressive rates for each year) <sup>(151)</sup>: .....
  - non-degressive aid (%) <sup>(152)</sup>: .....

6. **Incentive effect and necessity of aid** <sup>(153)</sup>

6.1. *General conditions*

- (A) Has the R&D&I activity already commenced prior to the aid application by the beneficiary to the national authorities <sup>(154)</sup>?

☐ yes ☐ no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary.

- (B) If no, specify the relevant dates:

— the R&D&I activity commenced on: .....,

— the aid application by the beneficiary was submitted to the national authorities on: .....

Please provide the relevant supporting documents.

6.2. *Evaluation of the incentive effect*

If the aid is granted for:

- process and organisational innovation in services,
- innovation clusters,
- R&D project for large undertakings,
- feasibility studies for large undertakings,
- R&D project for SMEs for aid exceeding EUR 7,5 million,
- feasibility studies for SMEs for aid exceeding EUR 7,5 million,

the Commission will require that the incentive effect is demonstrated by means of an evaluation. Go to the next questions.

Otherwise, the Commission considers that the incentive effect is automatically met for the measure at hand.

6.2.1. *General conditions*

*If it is necessary to demonstrate an incentive effect for several beneficiaries participating in the notified project, please provide the information below for each of them.*

*In order to verify that the planned aid will induce the aid recipient to change its behaviour so that it increases its level of R&D&I, the Commission requires an evaluation for the research categories in which it considers that the incentive effect is not automatically met (listed in Section 4.2 of this notification form).*

Please fill in the evaluation of the increased R&D&I activity (below), on the basis of an analysis comparing a situation without aid and a situation with aid being granted.

6.2.2. *Criteria*

- (A) Will the project size be increased?

☐ yes ☐ no

If yes, specify the type of increase:

- ☐ increase in the total project costs (without decreased spending by the beneficiary by a comparison with a situation without aid);
- ☐ increase in the number of people assigned to R&D&I activities;
- ☐ other type of increase: .....

Provide evidence of the relevant increases:

.....

.....

<sup>(151)</sup> The intensity may amount 100 % for the eligible costs the first year but must have fallen in a linear fashion to zero by the end of the fifth year.

<sup>(152)</sup> The maximum aid intensity is 50 % of the eligible costs.

<sup>(153)</sup> Cf. R&D&I Framework, Chapter 6.

<sup>(154)</sup> If the aid proposal is to grant aid for an R&D&I-project, this does not exclude that the potential beneficiary has already carried out feasibility studies which are not covered by the request for State aid.

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(B) Will the scope be increased?

☐ yes ☐ no

If yes, specify the type of increase:

- ☐ increase in the number of the expected deliverables from the project;
- ☐ more ambitious project illustrated by a higher possibility of a scientific or technological breakthrough or a higher risk of failure;
- ☐ other kind of increase: .....

Provide evidence of the relevant increases:

.....

.....

(C) Will the project speed be increased?

☐ yes ☐ no

If yes, provide evidence that the project will be completed in a shorter time with the aid than without the aid:

.....

.....

(D) Will the total amount spent on R&D&I be increased?

☐ yes ☐ no

If yes, specify the type of increase:

- ☐ increase in total R&D&I spending by the aid beneficiary;
- ☐ changes in the committed budget for the project (without corresponding decrease in the budget of other projects);
- ☐ increase in R&D&I spending by the aid beneficiary as a proportion of total turnover;
- ☐ other type of increase:

.....

.....

Provide evidence for the relevant increases:

.....

.....

(E) The Member State can also demonstrate the presence of incentive effect through other relevant quantitative and/or qualitative criteria. Please provide details and evidence:

.....

.....

.....

7. **Criteria triggering a detailed assessment** <sup>(155)</sup>

*If the aid concerns an R&D&I project or a feasibility study, please fill in Section 7.1 below. If the aid is granted for process or organisational innovation in service activities or for innovation clusters, please go to Section 7.2 of this supplementary information sheet. Otherwise, no detailed assessment is required.*

7.1. *Projects and feasibility studies*

(A) Eligible costs corresponding to fundamental research represent ... % of the total eligible costs (**ratio I**).

If **ratio I** is superior to 50 %, does one undertaking receive an aid amount exceeding EUR 20 million <sup>(156)</sup> per project/feasibility study?

☐ yes ☐ no

<sup>(155)</sup> Cf. R&D&I Framework, Section 7.1.

<sup>(156)</sup> If applicable, please provide an exchange rate used when answering this question.

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- (B) Eligible costs corresponding to industrial research and feasibility studies preparatory to industrial research represent ... % of the total eligible costs (**ratio II**).

If **ratio I + II** is superior to 50 %, does one undertaking receive an aid amount exceeding EUR 10 million per project/feasibility study?

☐ yes ☐ no

- (C) If **ratio I + II** is inferior to 50 %, does one undertaking receive an aid amount exceeding EUR 7,5 million per project/feasibility study?

☐ yes ☐ no

If the answer to one of these three questions is yes, then the notified aid is subject to a detailed assessment and additional information should be provided in order to enable the Commission to carry out a detailed assessment (Section 8 of this supplementary information sheet).

7.2. *Process or organisational innovation in service activities and innovation clusters*

If the aid is granted for process or organisational innovation in service activities, does one undertaking receive an aid amount exceeding EUR 5 million per project?

☐ yes ☐ no

If the aid is granted for innovation clusters, does the cluster (legal entity operating the innovation cluster) receive an aid amount exceeding EUR 5 million?

☐ yes ☐ no

If yes, then the notified aid is subject to a detailed assessment and additional information should be provided in order to enable the Commission to carry out a detailed assessment (Section 8 of this supplementary information sheet).

*Please note that the Commission will carry out a detailed assessment also in all cases notified to the Commission following an obligation to notify individually as prescribed in the block exemption regulation.*

8. **Additional information for detailed assessment** <sup>(157)</sup>

*If there are several beneficiaries participating in the notified project subject to a detailed assessment, please provide the information below for each of them. This is without prejudice to the full description of the notified project, including all participants, in the previous sections of this supplementary information sheet.*

8.1. *General observations*

*The purpose of this detailed assessment is to ensure that high amounts of aid for R&D&I do not distort competition to an extent contrary to the common interest, but actually contribute to the common interest. This happens when the benefits of State aid in terms of additional R&D&I outweigh the harm for competition and trade.*

*Provisions below represent a guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty.*

- (A) The Member States are in particular invited to rely on the information sources listed below. Please indicate if these supporting documents are attached to the notification:

- ☐ evaluations of past State aid schemes or measures;
- ☐ impact assessments made by the granting authority;
- ☐ risk assessments;
- ☐ financial reports;
- ☐ internal business plans;
- ☐ expert opinions;
- ☐ other studies related to R&D&I.

<sup>(157)</sup> Cf. R&D&I Framework, Chapter 7.

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(B) Similarly, please indicate the relevant positive effects of the notified measure and provide the supporting documents:

- ☐ net increase of R&D&I conducted by the undertaking;
- ☐ contribution of the measure to the global improvement of the sector concerned as regards the level of R&D&I;
- ☐ contribution of the measure to the improvement of the Community situation regarding R&D&I in the international context;
- ☐ other: .....

*For each of the sections below please provide the documents which are relevant for the notified measure. Member States are invited to provide any other elements that they consider useful for the assessment of the notified measure.*

8.2. *Existence of a market failure* <sup>(159)</sup>

(A) Please identify the market failure(s) hampering R&D&I in the present case and justifying the need for State aid and provide the supporting documents:

- ☐ knowledge spillovers (positive externalities/public goods);
- ☐ imperfect and asymmetric information;
- ☐ coordination failures.

(B) If State aid targets R&D&I projects or activities located in assisted areas, please provide information on:

- ☐ disadvantages caused by the peripherality and other regional specificities;
- ☐ specific local economic data, social and/or historic reasons for a low level of R&D&I activity in comparison with the relevant average data and/or situation at national and/or Community level as appropriate;;
- ☐ other relevant indicator showing an increased degree of market failure.

8.3. *Appropriate instrument* <sup>(159)</sup>

Please indicate on what basis the Member State decided to use a selective instrument such as State aid in order to increase R&D&I activities and provide supporting documents:

- ☐ impact assessment of the proposed measure;
- ☐ comparison with other policy options considered by the Member State;
- ☐ other: .....

8.4. *Incentive effect and analysis of the aid* <sup>(160)</sup>

(A) Please specify the intended change in the behaviour of the beneficiary induced by the aid (e.g. new project triggered, size, scope or speed of a project enhanced) and provide supporting documents:

- .....
- .....
- furthermore, please provide a description by means of counterfactual analysis of the behaviour of the beneficiary with respect to the project if it had not received the aid:  
.....  
.....
- please describe why the aid is necessary in order to make the project under scrutiny more attractive than the project described by means of counterfactual analysis, i.e. the project to be carried out without the aid:  
.....  
.....

<sup>(158)</sup> Cf. R&D&I Framework, Section 7.3.1.

<sup>(159)</sup> Cf. R&D&I Framework, Section 7.3.2.

<sup>(160)</sup> Cf. R&D&I Framework, Section 7.3.3.



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- (B) The following elements may be used for the purposes of demonstration of an incentive effect. Please specify those relevant for the notified measure and provide supporting documents:
- ☐ level of profitability;
  - ☐ amount of investment and the time path of cash flows;
  - ☐ level of risk involved in the research project <sup>(181)</sup>;
  - ☐ continuous evaluation.
- 8.5. *Proportionality of the aid* <sup>(182)</sup>
- (A) If there were multiple (potential) candidates for undertaking the R&D&I project in the Member State, was the beneficiary selected in an open selection process?
- ☐ yes ☐ no
- Please provide details and supporting documents:
- .....
- .....
- (B) Please explain how it is ensured that the aid is limited to the minimum necessary and provide supporting documents:
- .....
- .....
- 8.6. *Analysis of the distortion of competition and trade* <sup>(183)</sup>
- 8.6.1. *Relevant markets and effects on trade*
- (A) When relevant, please describe the likely impact of the aid on competition in the innovation process <sup>(184)</sup>:
- .....
- .....
- (B) Please indicate whether the aid is likely to have impact on any product market.
- ☐ yes ☐ no
- Please specify the product markets on which the aid is likely to have impact:
- .....
- .....
- .....
- .....
- (C) For each of these markets please provide some indicative market share of the beneficiary:
- .....
- .....
- For each of these markets please provide some indicative market shares of the other companies present in the market. If possible, please provide the associated Herfindahl-Hirschman Index (HHI):
- .....
- .....
- (D) Please describe the structure and dynamics of the relevant markets and provide supporting documents:
- .....
- .....

<sup>(181)</sup> Please note in this context that for State aid targeting R&D&I projects or activities located in assisted areas, the Commission will take into account disadvantages caused by the peripherality and other regional specificities, which negatively impact on the level of risk in the research project.

<sup>(182)</sup> Cf. R&D&I Framework, Section 7.3.4.

<sup>(183)</sup> Cf. R&D&I Framework, Section 7.4.

<sup>(184)</sup> The impact on competition in the in the innovation process will be relevant insofar as it has a foreseeable impact on the outcome of future product market competition. For details see Section 7.4 (third paragraph) of the R&D&I Framework.

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- (E) If relevant, please provide information on the effects on trade (shift of trade flows and location of economic activity):

.....  
.....

**8.6.2. Distorting dynamics incentives**

The following elements will be considered by the Commission in its analysis of effects of the aid on competitors' dynamic incentives to invest. Please, indicate those in relation to which supporting documents are provided:

- ☐ aid amount;  
☐ closeness to the market/category of aid;  
☐ open selection process;  
☐ exit barriers;  
☐ incentives to compete for a future market;  
☐ product differentiation and intensity of competition.

**8.6.3. Creating market power**

The following elements will be considered by the Commission in its analysis of effects of the aid on beneficiary's market power. Please, indicate those in relation to which details and supporting documents are provided:

- ☐ market power of aid beneficiary and market structure;  
☐ level of entry barriers;  
☐ buyer power;  
☐ selection process.

**8.6.4. Maintaining inefficient market structures**

Please specify if the aid is granted:

- ☐ in markets featuring overcapacity;  
☐ in declining industries;  
☐ in sensitive sectors.

Please provide details and supporting documents:

.....  
.....

**9. Cumulation <sup>(165)</sup>**

- (A) Is the aid granted under the notified measure combined with other aid <sup>(166)</sup>?

☐ yes ☐ no

- (B) If yes, please describe the cumulation rules applicable to the notified aid measure:

.....  
.....  
.....

- (C) Please specify how the respect of cumulation rules will be verified under the notified aid measure:

.....  
.....  
.....

<sup>(165)</sup> Cf. R&D&I Framework, Chapter 8.

<sup>(166)</sup> Please note that the aid for R&D&I shall not be cumulated with *de minimis* support in respect of the same eligible expenses in order to circumvent the maximum aid intensities laid down in the R&D&I Framework.

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▼ **M3**

10. **Specific questions relating to agriculture and fisheries** <sup>(187)</sup>

(A) Does the R&D aid concern products listed in Annex I to the EC Treaty?

☐ yes ☐ no

If yes, specify the type of products:

.....  
.....

(B) If yes, please provide the answers to the following questions:

— is the aid of general interest to the particular sector or sub-sector concerned?

☐ yes ☐ no

If yes, provide evidence:

.....  
.....

— is the information that research will be carried out, and with which goal published on Internet prior to the commencement of the research AND does the information published include an approximate date of the expected results and their place of publication on the Internet, as well as a mention that the result will be available at no cost?

☐ yes ☐ no

If yes, provide evidence and specify the Internet address:

.....  
.....

— are the results of the research made available on Internet, for a period of at least five years AND can it be confirmed that the information on the Internet will be published no later than any which may be given to members of any particular organisation?

☐ yes ☐ no

If yes, provide evidence:

.....  
.....

— is the aid granted directly to the researching institution or body AND does it exclude the direct granting of non-research related aid to a company producing, processing or marketing agricultural products, as well as the provision of price support to producers of such products?

☐ yes ☐ no

If yes, provide evidence:

.....  
.....

*If the answers to all four conditions of Section B above are yes, the aid intensity up to 100 % can be allowed. If not, cases of R&D aid for products listed in Annex I to the EC Treaty are to be examined under the normal rules of the R&D&I Framework.*

(C) Specify the total aid intensity (%): .....

<sup>(187)</sup> Cf. R&D&I Framework, Chapter 9.

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- (D) Cooperation pursuant to Regulation (EC) No 1698/2005 on support for rural development by the EAFRD <sup>(168)</sup>

Has the cooperation been approved for Community co-financing under Article 29 of Regulation (EC) No 1698/2005 AND/OR is the State aid granted as additional financing pursuant to Article 89 of this Regulation under the same conditions and at the same intensity as the co-financing <sup>(169)</sup>?

☐ yes ☐ no

*If not, cases of R&D aid for products listed in Annex I to the EC Treaty are to be examined under the normal rules of the R&D&I Framework.*

11. **Reporting and monitoring** <sup>(170)</sup>

11.1. *Annual reports*

*Please note that this reporting obligation is without prejudice to the reporting obligation pursuant to Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 <sup>(171)</sup>.*

Please undertake to submit annual reports on the implementation of the notified aid measure to the Commission, containing all the elements listed below <sup>(172)</sup>.

- name of the beneficiary;
- aid amount per beneficiary;
- aid intensity;
- sectors of activity where the aided project is undertaken.

☐ yes

11.2. *Information sheets, monitoring*

- (A) Please undertake to maintain detailed records regarding the granting of aid, with all information necessary to establish that the eligible costs and maximum allowable aid intensity have been observed.

☐ yes

- (B) Please undertake to ensure that detailed records referred to in Section A above are maintained for 10 years from the date on which the aid was granted.

☐ yes

- (C) Please undertake to submit the records referred to in Section A above on request of the Commission.

☐ yes

12. **Other information**

Please give any other information you consider necessary to assess the measure(s) in question under the Community Framework for State aid for research, development and innovation.

<sup>(168)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1) as amended by Regulation (EC) No 1463/2006 (OJ L 277, 9.10.2006, p. 1).

<sup>(169)</sup> Commission will allow State aid for cooperation pursuant to Article 29 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) if such cooperation has been approved for Community co-financing under that Article and/or the State aid is granted as additional financing pursuant to Article 89 of Regulation (EC) No 1698/2005 under the same conditions and at the same intensity as the co-financing.

<sup>(170)</sup> Cf. R&D&I Framework, Section 10.1.

<sup>(171)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

<sup>(172)</sup> As regards the specific reporting requirements for clusters, please see Section 10.1.1 (fourth paragraph) of the R&D&I Framework.

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▼ **B**

PART III.7.A

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR RESCUING FIRMS IN DIFFICULTY:  
AID SCHEMES**

*This supplementary information sheet must be used for the notification of rescue aid schemes covered by the Community guidelines on State aid for rescuing and restructuring firms in difficulty<sup>(1)</sup>.*

**1. Eligibility**

1.1. Is the scheme limited to firms that fulfil at least one of the eligibility criteria below:

1.1.1. Is the scheme limited to firms, where more than half their registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?

☐ yes ☐ no

1.1.2. Are the firms unlimited companies, where more than half of their capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?

☐ yes ☐ no

1.1.3. Do the firms fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?

☐ yes ☐ no

1.2. Is the scheme limited to rescuing small or medium-sized enterprises in difficulty which correspond to the Community definition of SMEs?

☐ yes ☐ no

**2. Form of aid**

2.1. Is the aid granted under the scheme in the form of a loan guarantee or loans?

☐ yes ☐ no

2.2. If yes, will the loan be granted at an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rate adopted by the Commission?

☐ yes ☐ no

Please provide detailed information.

►<sup>(1)</sup> 2.3. Will the aid under the scheme be linked to loans that are to be reimbursed within six months after disbursement of the first instalment to the firm?◄

☐ yes ☐ no

**3. Other elements**

3.1. Will aid under the scheme be warranted on the grounds of serious social difficulties? Please justify.

3.2. Will aid under the scheme have no unduly adverse spillover effects on other Member States? Please justify.

3.3. Please explain why you think that the aid scheme is limited to the minimum necessary (i.e. is restricted to the amount needed to keep the firm in business for the period during which the aid is authorised. This should not go beyond a period of 6 months).

3.4. Do you undertake, within six months after granting the aid, to either approve a restructuring plan or a liquidation plan, or demand reimbursement of the loan and the aid corresponding to the risk premium from the beneficiary?

☐ yes ☐ no

Please specify the maximum amount of the aid that can be awarded to any one firm as part of the rescue operation:

3.5. Provide all relevant information on aid of any kind which may be granted to the firms eligible for receiving rescue aid during the same period of time.

**4. Annual report**

4.1. Do you undertake to provide reports, at least on an annual basis, on the scheme's operation, containing the information specified in the Commission's instructions on standardised reports?

☐ yes ☐ no

<sup>(1)</sup> Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

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▼ **B**

- 4.2. Do you undertake in such a report to include a list of beneficiary firms with at least the following information:
- (a) the company name;
  - (b) its sectoral code, using the NACE <sup>(1)</sup> two-digit sectoral classification codes;
  - (c) the number of employees;
  - (d) annual turnover and balance sheet value;
  - (e) the amount of aid granted;
  - (f) where appropriate, any restructuring aid, or other support treated as such, which it has received in the past;
  - (g) whether or not the beneficiary company has been wound up or subject to collective insolvency proceedings before the end of the restructuring period.
- ☐ yes                      ☐ no
5. **Other Information**
- Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the guidelines on aid for rescuing and restructuring firms in difficulty.

PART III.7.B

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR RESCUING FIRMS IN DIFFICULTY:  
INDIVIDUAL AID**

*This supplementary information sheet must be used for the notification of individual rescue aid covered by the Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(2)</sup>.*

1. **Eligibility**
- 1.1. Is the firm a limited company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?
- ☐ yes                      ☐ no
- 1.2. Is the firm an unlimited company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding months?
- ☐ yes                      ☐ no
- 1.3. Does the firm fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?
- ☐ yes                      ☐ no
- If you have answered yes to any of the above questions, please attach the relevant documents (latest profit and loss account with balance sheet, or court decision opening an investigation into the company under national company law)
- If you have answered no to all of the above questions, please submit evidence supporting that the firm is in difficulties, for it to be eligible for rescue aid.
- 1.4. When has the firm been created? .....
- 1.5. Since when is the firm operating? .....

<sup>(1)</sup> Statistical classification of economic activities in the European Community, published by the Statistical Office of the European Communities.

<sup>(2)</sup> Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

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▼ **B**

1.6. Does the company belong to a larger business group?

☐ yes ☐ no

If you have answered yes, please submit full details about the group (organisation chart, showing the links between the group's members with details on capital and voting rights) and attach proof that the company's difficulties are its own and are not the result of an arbitrary allocation of costs within the group and that the difficulties are too serious to be dealt with by the group itself.

1.7. Has the firm (or the group to which it belongs) in the past received any rescue aid?

☐ yes ☐ no

If yes, please provide full details (date, amount, reference to previous Commission decision if applicable, etc.)

**2. Form of aid**

2.1. Is the aid in the form of a loan guarantee or loans? Copies of the relevant documents should be provided.

☐ yes ☐ no

2.2. If yes, is the loan granted at an interest rate at least comparable to those observed for loans to healthy firms, and in particular the reference rate adopted by the Commission?

☐ yes ☐ no

Please provide detailed information.

► <sup>(1)</sup> 2.3. Is the aid linked to loans that are to be reimbursed within six months after disbursement of the first instalment to the firm? ◀

☐ yes ☐ no

**3. Other elements**

3.1. Is the aid warranted on the grounds of serious social difficulties? Please justify.

3.2. Does the aid have no unduly adverse spillover effects on other Member States? Please justify.

3.3. Please explain why you think that the aid is limited to the minimum necessary (i.e. is restricted to the amount needed to keep the firm in business for the period during which the aid is authorised). This should be done on the basis of a liquidity plan for the 6 months ahead and on the basis of a comparison with operating costs and financial charges over the previous 12 months.

3.4. Do you undertake, not later than six months after the rescue aid measure has been authorised, to communicate to the Commission a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated?

☐ yes ☐ no

**4. Other Information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the guidelines on aid for rescuing and restructuring firms in difficulty.

► <sup>(1)</sup> **M6**

▼ **B**

PART III.8.A

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR RESTRUCTURING FIRMS IN DIFFICULTY:  
AID SCHEMES**

*This supplementary information sheet must be used for the notification of restructuring aid schemes covered by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(1)</sup>.*

**1. Eligibility**

1.1. Is the scheme limited to firms that fulfil at least one of the eligibility criteria below:

1.1.1. Is the scheme limited to firms, where more than half their registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?

☐ yes ☐ no

1.1.2. Are the firms unlimited companies, where more than half of their capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding months?

☐ yes ☐ no

1.1.3. Do the firms fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?

☐ yes ☐ no

1.2. Is the scheme limited to restructuring small or medium-sized enterprises in difficulty which correspond to the Community definition of SMEs?

☐ yes ☐ no

**2. Return to viability**

A restructuring plan must be implemented which must assure restoration of viability. At least the following information should be included:

2.1. Presentation of the different market assumptions arising from the market survey.

2.2. Analysis of the reason(s) why the firm has run into difficulty.

2.3. Presentation of the proposed future strategy for the firm and how this will lead to viability.

2.4. Complete description and overview of the different restructuring measures planned and their cost.

2.5. Timetable for implementing the different measures and the final deadline for implementing the restructuring plan in its entirety.

2.6. Information on the production capacity of the company, and in particular on utilisation of this capacity, capacity reductions.

2.7. Full description of the financial arrangements for the restructuring, including:

- Use of capital still available;
- Sale of assets or subsidiaries to help finance the restructuring;
- Financial commitment by the different shareholders and third parties (like creditors, banks);
- Amount of public assistance and demonstration of the need for that amount;

<sup>(1)</sup> Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.



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▼ **B**

2.8. Projected profit and loss accounts for the next five years with estimated return on capital and sensitivity study based on several scenarios;

2.9. Name(s) of the author(s) of the restructuring plan and date on which it was drawn up.

3. **Avoidance of undue distortion of competition**

Does the scheme provide that recipient firms must not increase their capacity during the restructuring plan?

☐ yes ☐ no

4. **Aid limited to the minimum necessary**

Describe how it will be assured that the aid granted under the scheme is limited to the minimum necessary.

5. **One time, Last time**

Is it excluded that recipient firms receive restructuring aid more than once over a period of ten years?

☐ yes ☐ no

All cases where this principle is not respected must be notified individually

6. **Amount of aid**

6.1. Please specify the maximum amount of the aid that can be awarded to any one firm as part of the restructuring operation: .....

6.2. Provide all relevant information on aid of any kind which may be granted to the firms eligible for receiving restructuring aid.

7. **Annual report**

7.1. Do you undertake to provide reports, at least on an annual basis, on the scheme's operation, containing the information specified in the Commission's instructions on standardised reports?

☐ yes ☐ no

7.2. Do you undertake in such report to include a list of beneficiary firms with at least the following information:

- (a) the company name;
- (b) its sectoral code, using the NACE <sup>(1)</sup> two-digit sectoral classification codes;
- (c) the number of employees;
- (d) annual turnover and balance sheet value;
- (e) the amount of aid granted;
- (f) where appropriate, any restructuring aid, or other support treated as such, which it has received in the past;
- (g) whether or not the beneficiary company has been wound up or subject to collective insolvency proceedings before the end of the restructuring period.

☐ yes ☐ no

<sup>(1)</sup> Statistical classification of economic activities in the European Community, published by the Statistical Office of the European Communities.

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▼ **B**

8. **Other Information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the guidelines on aid for rescuing and restructuring firms in difficulty.

PART III.8.B

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR RESTRUCTURING FIRMS IN DIFFICULTY:  
INDIVIDUAL AID**

*This supplementary information sheet must be used for the notification of individual restructuring aid covered by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(1)</sup>.*

1. **Eligibility**

- 1.1. Is the firm a limited company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?

☐ yes ☐ no

- 1.2. Is the firm an unlimited company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?

☐ yes ☐ no

- 1.3. Does the firm fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?

☐ yes ☐ no

If you have answered yes on any of the above questions, please attach the relevant documents (latest profit and loss account with balance sheet, or court decision opening an investigation into the company under national company law)

If you have answered no to all of the above questions, please submit evidence supporting that the firm is in difficulties, for it to be eligible for restructuring aid.

- 1.4. When has the firm been created? .....

- 1.5. Since when is the firm operating? .....

- 1.6. Does the company belong to a larger business group?

☐ yes ☐ no

If you have answered yes, please submit full details about the group (organisation chart, showing the links between the group's members with details on capital and voting rights) and attach proof that the company's difficulties are its own and are not the result of an arbitrary allocation of costs within the group and that the difficulties are too serious to be dealt with by the group itself.

- 1.7. Has the firm (or the group to which it belongs) in the past received any restructuring aid?

☐ yes ☐ no

If yes, please provide full details (date, amount, reference to previous Commission decision if applicable, etc.)

<sup>(1)</sup> Community Guidelines on State aid for rescuing and restructuring firms in difficulty, JO C 288, 9.10.1999, p. 2. Please note that a specific form shall be used in case of aid for restructuring firms in the aviation sector (Part III.13.a) as well as in the agricultural sector (Part III. 12.p).

▼ **B**

2. **Restructuring plan**

2.1. Please supply a copy of the survey of the market(s) served by the firm in difficulty, with the name of the organisation which carried it out. The market survey must give in particular:

2.1.1. A precise definition of the product and geographical market(s).

2.1.2. The names of the company's main competitors with their shares of the world, Community or domestic market, as appropriate.

2.1.3. The evolution of the company's market share in recent years.

2.1.4. An assessment of total production capacity and demand at Community level, concluding whether or not there is excess capacity on the market.

2.1.5. Community-wide forecasts for trends in demand, aggregate capacity and prices on the market over the five years ahead.

2.2. Please attach the restructuring plan. At least the following information should be included:

2.2.1. Presentation of the different market assumptions arising from the market survey.

2.2.2. Analysis of the reason(s) why the firm has run into difficulty.

2.2.3. Presentation of the proposed future strategy for the firm and how this will lead to viability.

2.2.4. Complete description and overview of the different restructuring measures planned and their cost.

2.2.5. Timetable for implementing the different measures and the final deadline for implementing the restructuring plan in its entirety.

2.2.6. Information on the production capacity of the company, and in particular on utilisation of this capacity, capacity reductions.

2.2.7. Full description of the financial arrangements for the restructuring, including:

— Use of capital still available;

— Sale of assets or subsidiaries to help finance the restructuring;

— Financial commitment by the different shareholders and third parties (like creditors, banks);

— Amount of public assistance and demonstration of the need for that amount;

2.2.8. Projected profit and loss accounts for the next five years with estimated return on capital and sensitivity study based on several scenarios;

2.2.9. Name(s) of the author(s) of the restructuring plan and date on which it was drawn up.

2.3. Describe the compensatory measures proposed with a view to mitigating the distortive effects on competition at Community level.

2.4. Provide all relevant information on aid of any kind granted to the firm receiving restructuring aid, whether under a scheme or not, until the restructuring period comes to an end.

3. **Other Information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the guidelines on aid for rescuing and restructuring firms in difficulty.

▼ B

PART III.9

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR AUDIOVISUAL PRODUCTION**

*This supplementary information sheet must be used for notifications of aid covered by the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works <sup>(1)</sup>.*

1. **The aid scheme**
  - 1.1. Please describe as accurately as possible the purpose of the aid and its scope, where appropriate, for each measure.
  - 1.2. Does the aid directly benefit the creation of a cultural work (for cinema or television)?
  - 1.3. Please indicate what provisions exist to guarantee the cultural objective of the aid:  
.....  
.....
  - 1.4. Does the aid have the effect of supporting industrial investment?
2. **Conditions for eligibility**

Please indicate the conditions for eligibility for the planned aid:  
.....  
.....

  - 2.2. Beneficiaries:
    - 2.2.1. Does the scheme distinguish between specific categories of beneficiary (e.g. natural/legal person, dependent/independent producer/broadcaster, etc.)? .....
    - 2.2.2. Does the scheme differentiate on grounds of nationality or place of residence?  
.....  
.....
    - 2.2.3. In the case of establishment in the territory of a Member State, are beneficiaries obliged to fulfil any conditions other than that of being represented by a permanent agency? Note that the conditions of establishment must be defined with respect to the territory of the Member State and not to a subdivision of that State.
    - 2.2.4. If the aid has a tax component, must the beneficiary fulfil any obligations or conditions other than that of having taxable revenue in the territory of the Member State?
3. **Territorial coverage**
  - 3.1. Please indicate if there is provision for any form of obligation to spend in the territory of the Member State or in one of its subdivisions.
  - 3.2. Is it necessary to comply with a minimum degree of territorial coverage in order to be eligible for the aid?
  - 3.3. Is the required territorial coverage calculated with regard to the overall budget of the film or to the amount of aid?
  - 3.4. Does the condition of territorial coverage apply to certain specific items of the production budget?
  - 3.5. Is the absolute amount of aid adjustable in proportion to the expenditure carried out in the territory of the Member State?
  - 3.6. Is the aid intensity directly proportional to the effective degree of territorial coverage?
  - 3.7. Is the aid adjustable in proportion to the degree of territorial coverage required?

<sup>(1)</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, OJ C 43, 16.2.2002, p. 6.

▼ **B**

4. **Eligible costs**

- 4.1. Please specify the costs which may be taken into account to determine the amount of aid.
- 4.2. Do the eligible costs all relate directly to the creation of a cinematographic or audiovisual work?

5. **Aid intensity**

- 5.1. Please indicate whether the scheme provides for use of the concept of difficult, low-budget film in order to obtain an aid intensity of over 50% of the production budget.
- 5.2. If so, please indicate the categories of film covered by this concept.
- 5.3. Please indicate whether the aid can be combined with other aid schemes ('cumulation of aid') or other provisions for aid and, if so, what arrangements are made to limit such cumulation or to ensure that, in the case of cumulation, the maximum aid intensity for the work is not exceeded.

6. **Compatibility**

- 6.1. Please provide a reasoned justification in support of compatibility of the aid in the light of the principles set out in the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works.

7. **Other Information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the Communication on certain legal aspects relating to cinematographic and other audiovisual works.

▼ **M4**

PART III.10

**SUPPLEMENTARY INFORMATION SHEET ON STATE AID FOR ENVIRONMENTAL PROTECTION**

*This supplementary information sheet must be used for the notification of any aid covered by the Community Guidelines on State aid for environmental protection (hereinafter the Environmental aid guidelines) <sup>(1)</sup>. It must also be used for individual aid for environmental protection which does not fall under any block exemption or is subject to individual notification obligation as it exceeds the individual notification thresholds laid down in the block exemption.*

1. **Basic characteristics of the notified measure**

*Please fill in the relevant parts of the notification form corresponding to the character of the notified measure. Please find below a basic guidance.*

(A) Please specify the type of aid and fill in the appropriate subsections of **Section 3** (Compatibility of aid under Article 87(3)(c) of the EC Treaty) of this supplementary information sheet:

- ☐ Aid for undertakings which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards, fill in Section 3.1
- ☐ Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards, fill in Section 3.1
- ☐ Aid for SMEs for early adaptation to future Community standards, fill in Section 3.2
- ☐ Aid for environmental studies, fill in Section 3.3
- ☐ Aid for energy saving, fill in Section 3.4
- ☐ Aid for renewable energy sources, fill in Section 3.5
- ☐ Aid for the cogeneration, fill in Section 3.6
- ☐ Aid for energy-efficient district heating, fill in Section 3.7
- ☐ Aid for waste management, fill in Section 3.8
- ☐ Aid for the remediation of contaminated sites, fill in Section 3.9
- ☐ Aid for the relocation of undertakings, fill in Section 3.10
- ☐ Aid involved in tradable permit schemes, fill in Section 3.11
- ☐ Aid in the form of reductions of or exemptions from environmental taxes, fill in Section 6.

Furthermore, please fill in: **Section 4** (Incentive effect and necessity of aid), **Section 7** (Criteria triggering a detailed assessment), **Section 8** (Additional information for detailed assessment) <sup>(2)</sup>, and **Section 10** (Reporting and monitoring).

(B) Please explain the main characteristics (objective, likely effects of the aid, aid instrument, aid intensity, beneficiaries, budget etc.) of the notified measure.

<sup>(1)</sup> OJ C 82, 1.4.2008, p. 1. For details concerning the use of this supplementary notification sheet in agriculture and fisheries sectors see Section 2.1 (points 59 and 61) of the Environmental aid guidelines.

<sup>(2)</sup> Please note that Sections 4, 7 and 8 do not have to be filled in, in the case of tax exemptions and reductions from environmental taxes falling under Chapter 4 of the Environmental aid guidelines.

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- (C) Can the aid be combined with other aid?
- ☐ yes ☐ no
- If yes, fill in **Section 9** (Cumulation) of this supplementary information sheet.
- (D) Is the aid granted in order to promote the execution of an important project of common European interest?
- ☐ yes ☐ no
- If yes, please fill in **Section 5** (Compatibility of aid under Article 87(3)(b) of the EC Treaty) of this supplementary information sheet.
- (E) In case the notified individual aid is based on an approved scheme, please provide details concerning that scheme (case number, title of the scheme, date of Commission approval):
- .....
- .....
- (F) Please confirm that if the aid/bonus for small enterprises is granted, the beneficiaries comply with the definition for small enterprises as defined by the Community legislation:
- ☐ yes
- (G) Please confirm that if the aid/bonus for medium enterprises is granted, the beneficiaries comply with the definition for medium enterprises as defined by the Community legislation:
- ☐ yes
- (H) If applicable, please indicate the exchange rate which has been used for the purposes of the notification:
- .....
- .....
- (I) Please number all documents provided by the Member States as annexes to the notification form and indicate the document numbers in the relevant parts of this supplementary information sheet.

2. **Objective of the aid**

- (A) In the light of the objectives of common interest addressed by the Environmental aid guidelines (Section 1.2) please indicate the environmental objectives pursued by the notified measure. Please give a detailed description of each distinct type of aid to be granted under the notified measure:
- .....
- .....
- (B) If the notified measure has already been applied in the past please indicate its results in terms of environmental protection (please indicate the relevant case number and date of Commission approval and, if possible, attach national evaluation reports on the measure):
- .....
- .....
- (C) If the measure is new, please indicate the expected results and the period over which they will be achieved:
- .....
- .....

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3. **Compatibility of aid under Article 87(3)(c) of the EC Treaty**

*If there are several beneficiaries involved in the project notified as individual aid, please provide the information below for each of them.*

3.1. *Aid for undertakings which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards <sup>(1)</sup>*

3.1.1. **Nature of the supported investments, applicable standards**

(A) Please specify if the aid is granted for:

☐ investments enabling the beneficiary to increase the level of environmental protection resulting from its activities by improving on the applicable Community standards <sup>(2)</sup>, irrespective of the presence of mandatory national standards that are more stringent than the Community standard;

or

☐ investments enabling the beneficiary to increase the level of environmental protection resulting from its activities in the absence of Community standards.

(B) Please provide details, including, where applicable, information on the relevant Community standards:

.....  
.....

(C) If the aid is granted for reaching the national standard exceeding the Community standards, please indicate the applicable national standards and attach a copy:

.....  
.....

3.1.2. **Aid intensities and bonuses**

*In the case of aid schemes, the aid intensity must be calculated for each beneficiary of aid.*

(A) What is the maximum aid intensity applicable to the notified measure <sup>(3)</sup>? .....

(B) Is the aid granted in a genuinely competitive bidding process <sup>(4)</sup>?

☐ yes ☐ no

If yes, please provide details of the competitive process and attach a copy of the tender notice or its draft:

.....  
.....

(C) **Bonuses:**

Do the supported projects benefit from a bonus?

☐ yes ☐ no

If yes, please specify below.

— Is an SME bonus applied under the notified measure?

☐ yes ☐ no

<sup>(1)</sup> Cf. Environmental aid guidelines, Section 3.1.1.

<sup>(2)</sup> Please note that aid may not be granted where improvements bring companies into line with Community standards already adopted and not yet in force.

<sup>(3)</sup> The maximum aid intensity is 50 % of the eligible investment cost.

<sup>(4)</sup> For details of the genuinely competitive bidding process required, see point 77 of the Environmental aid guidelines.



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If yes, please specify the level of bonus applicable <sup>(1)</sup>: ... ..

— Is the bonus for eco-innovation <sup>(2)</sup> applied under the notified measure?

☐ yes ☐ no

If yes, please describe how the following conditions are fulfilled:

☐ the eco-innovation asset or project is new or substantially improved compared to the state of the art in its industry in the Community;

☐ the expected environmental benefit is significantly higher than the improvement resulting from the general evolution of the state of the art in comparable activities;

☐ the innovative character of these assets or projects involves a clear degree of risk, in technological, market or financial terms, which is higher than the risk generally associated with comparable non-innovative assets or projects.

Please provide details demonstrating the compliance with the abovementioned conditions:

.....  
.....

Specify the level of bonus applicable <sup>(3)</sup>: ... ..

(D) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%): .....

3.1.3. Eligible costs <sup>(4)</sup>

(A) Please confirm that the eligible costs are limited to the extra investment costs necessary to achieve a higher level of environmental protection than required by the Community standards:

☐ yes

(B) Please further confirm that:

☐ the precise environmental protection related cost constitutes the eligible costs, if the cost of investing in environmental protection can be easily identified;

or

☐ the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment <sup>(5)</sup>;

and

☐ the eligible costs are calculated net of any operating benefits and operating costs related to the extra investment for environmental protection and arising during the first five years of the life of the investment concerned.

(C) What form do the eligible costs take?

☐ investments in tangible assets;

☐ investments in intangible assets.

<sup>(1)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

<sup>(2)</sup> Cf. for details see point 78 of the Environmental aid guidelines.

<sup>(3)</sup> The aid intensity may be increased by 10 percentage points.

<sup>(4)</sup> For details see points 80 to 84 of the Environmental aid guidelines.

<sup>(5)</sup> The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection (corresponding to mandatory Community standards, if they exist) and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

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- (D) In case of investments in tangible assets please indicate the form (s) of investments concerned:
- ☐ investments in land which are strictly necessary in order to meet environmental objectives;
  - ☐ investments in buildings intended to reduce or eliminate pollution and nuisances;
  - ☐ investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
  - ☐ investments to adapt production methods with a view to protecting the environment.
- (E) In case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:
- ☐ it is regarded as a depreciable asset;
  - ☐ it is purchased on market terms, from an undertaking from which the acquirer has no power of direct or indirect control,
  - ☐ it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years <sup>(1)</sup>.
- Furthermore, please confirm that if the intangible asset is sold during those five years:
- ☐ the yield from the sale will be deducted from the eligible costs;
- and
- ☐ all or part of the amount of aid will, where appropriate, be reimbursed.
- (F) In case of investments aiming at obtaining a level of environmental protection higher than Community standards, please confirm the relevant statements:
- ☐ if the undertaking is adapting to national standards adopted in the absence of Community standards, the eligible costs consist of the additional investment costs necessary to achieve the level of environmental protection required by the national standards;
  - ☐ if the undertaking is adapting to or goes beyond national standards which are more stringent than the relevant Community standards or goes beyond Community standards, the eligible costs consist of the additional investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards <sup>(2)</sup>;
  - ☐ if no standards exist, the eligible costs consist of the investment costs necessary to achieve a higher level of environmental protection than that which the undertaking or undertakings in question would achieve in the absence of any environmental aid;
- (G) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:
- .....
- .....
- .....

<sup>(1)</sup> Please note that this condition does not apply if the intangible asset is technically out of date.

<sup>(2)</sup> Please note that the cost of investments needed to reach the level of protection required by the Community standards is not eligible.

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For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

.....  
.....  
.....  
.....  
.....

3.1.4. Specific rules on aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards <sup>(1)</sup>

*In the case of aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards, in addition to sections 3.1.-3.1.3:*

- (A) Please confirm that new transport vehicles for road, railway, inland waterway and maritime transport complying with adopted Community standards have been acquired before their entry into force and that the Community standards, once mandatory, do not apply retroactively to already purchased vehicles.

☐ yes

Please provide details:

.....  
.....

- (B) For retrofitting operations with an environmental protection objective in the transport sector, please confirm that:

☐ the existing means of transport are upgraded to environmental standards that were not yet in force at the date of the entry into operation of those means of transport;

or

☐ the means of transport are not subject to any environmental standards.

3.2. Aid for early adaptation to future Community standards <sup>(2)</sup>

3.2.1. Basic conditions

- (A) Please confirm that the investment is implemented and finalised at least one year before the entry into force of the standard.

☐ yes ☐ no

If yes, in the case of aid schemes, please provide details on how compliance with this condition is ensured:

.....  
.....

If yes, in the case of individual aid please provide details and relevant evidence:

.....  
.....

<sup>(1)</sup> Cf. Environmental aid guidelines, Section 3.1.2.

<sup>(2)</sup> Cf. Environmental aid guidelines, Section 3.1.3.

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- (B) Please provide details of the relevant Community standards, including the dates relevant for ensuring compliance with condition (A):

.....  
.....

3.2.2. Aid intensities

What is the basic aid intensity applicable to the notified measure?

- for small enterprises <sup>(1)</sup>: ..... ;  
— for medium-sized enterprises <sup>(2)</sup>: .....  
— for large enterprises <sup>(3)</sup>: ... ..

3.2.3. Eligible costs

- (A) Please confirm that the eligible costs are limited to the extra investment costs necessary to achieve the level of environmental protection required by the Community standard compared to the existing level of environmental protection required prior to the entry into force of this standard:

☐ yes

- (B) Please further confirm that:

☐ the precise environmental protection related cost constitutes the eligible costs, if the cost of investing in environmental protection can be easily identified;

or

☐ the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment <sup>(4)</sup>;

and

☐ eligible costs are calculated net of any operating benefits and operating costs related to the extra investment for environmental protection and arising during the first five years of the life of the investment concerned.

- (C) What form do the eligible costs take?

☐ investments in tangible assets

☐ investments in intangible assets

- (D) In case of investments in tangible assets please indicate the form (s) of investments concerned:

☐ investments in land which are strictly necessary in order to meet environmental objectives;

☐ investments in buildings intended to reduce or eliminate pollution and nuisances;

☐ investments in plant and equipment intended to reduce or eliminate pollution and nuisances;

☐ investments to adapt production methods with a view to protecting the environment.

<sup>(1)</sup> The maximum aid intensity is 25 % if the implementation and finalisation take place more than three years before the mandatory date of transposition or date of entry into force and 20 % if the implementation and the finalisation take place between one and three years before the mandatory date of transposition or date of entry into force.

<sup>(2)</sup> The maximum aid intensity is 20 % if the implementation and finalisation take place more than three years before the mandatory date of transposition or date of entry into force and 15 % if the implementation and the finalisation take place between one and three years before the mandatory date of transposition or date of entry into force.

<sup>(3)</sup> The maximum aid intensity is 15 % if the implementation and finalisation take place more than three years before the mandatory date of transposition or date of entry into force and 10 % if the implementation and the finalisation take place between one and three years before the mandatory date of transposition or date of entry into force.

<sup>(4)</sup> The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

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- (E) In case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:

- ☐ it is regarded as a depreciable asset;
- ☐ it is purchased on market terms, from an undertaking from which the acquirer has no power of direct or indirect control,
- ☐ it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years <sup>(1)</sup>.

Furthermore, please confirm that if the intangible asset is sold during those five years:

- ☐ the yield from the sale will be deducted from the eligible costs;
- and
- ☐ all or part of the amount of aid will, where appropriate, be reimbursed.

- (F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....

.....

.....

.....

.....

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

.....

.....

.....

.....

.....

3.3. *Aid for environmental studies* <sup>(2)</sup>

3.3.1. Studies directly linked to investments aiming at achieving standards which go beyond Community standards, or increase the level of environmental protection in the absence of Community standards

- (A) Please confirm if the aid is granted for studies directly linked to investments for the purposes of achieving standards which go beyond Community standards, or increase the level of environmental protection in the absence of Community standards.

☐ yes ☐ no

If yes, please specify which of the following purposes the investment serves:

- ☐ it enables the beneficiary to increase the level of environmental protection resulting from its activities by improving on the applicable Community standards, irrespective of the presence of mandatory national standards that are more stringent than the Community standard;

<sup>(1)</sup> Please note that this condition does not apply if the intangible asset is technically out of date.

<sup>(2)</sup> Cf. Environmental aid guidelines, Section 3.1.4.

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or

- ☐ it enables the beneficiary to increase the level of environmental protection resulting from its activities in the absence of Community standards.

(B) Please provide details, including, where applicable, the information on the relevant Community standards:

.....

(C) If the aid is granted for studies directly linked to investments aiming at reaching national standards which go beyond Community standards, please indicate the applicable national standards and attach a copy:

.....

(D) Please describe the types of studies that will be supported:

.....

.....

.....

3.3.2. Studies directly linked to investments for the purposes of achieving energy saving

Please confirm that the aid is granted for studies directly linked to investments for the purposes of achieving energy saving.

☐ yes ☐ no

If yes, please provide evidence on how the purpose of the relevant investment complies with the definition of energy savings as laid down in point 70(2) of the Environmental aid guidelines:

.....

3.3.3. Studies directly linked to investments of producing renewable energy

(A) Please confirm if the aid is granted for studies directly linked to investments for the purposes of producing renewable energy.

☐ yes ☐ no

If yes, please provide evidence on how the purpose of the relevant investment complies with the definition of production from renewable energy sources, as laid down in point 70(5) and (9) of the Environmental aid guidelines:

.....

(B) Please specify the type(s) of renewable energy sources which are intended to be supported under the investment linked to the environmental study and provide details:

.....

3.3.4. Aid intensities and bonuses

(A) What is the maximum aid intensity applicable to the notified measure <sup>(1)</sup>?

.....

(1) The maximum aid intensity is 50 % of the costs of the study.

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- (B) Is an SME bonus applied under the notified measure?

☐ yes ☐ no

If yes please specify the level of bonus applicable <sup>(1)</sup>: ... ..

3.4. *Aid for energy saving* <sup>(2)</sup>

3.4.1. **Basic conditions**

- (A) Please confirm that the notified measure complies with the definition of energy savings in point 70(2) of the Environmental aid guidelines.

☐ yes

- (B) Please specify the type(s) of the supported measures leading to energy saving, as well as the level of energy saving to be attained, and provide details:

.....  
.....

3.4.2. **Investment aid**

3.4.2.1. **Aid intensities and bonuses**

- (A) What is the basic aid intensity applicable to the notified measure <sup>(3)</sup>: .....

- (B) Bonuses:

— Is an SME bonus applied under the notified measure?

☐ yes ☐ no

If yes, please specify the level of bonus applicable <sup>(4)</sup>: ... ..

- (C) Is the aid granted in a genuinely competitive bidding process <sup>(5)</sup>?

☐ yes ☐ no

If yes, please provide details regarding the competitive process and attach a copy of the tender notice or its draft:

.....

- (D) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....

.....

3.4.2.2. *Eligible costs* <sup>(6)</sup>

- (A) As regards the calculation of the eligible costs, please confirm that the eligible costs are limited to the extra investment costs necessary to achieve energy savings beyond the level required by the Community standards:

☐ yes

- (B) Please further clarify whether:

☐ the precise energy saving related cost constitutes the eligible costs, in case the costs of investing in energy saving can be easily identified;

or

<sup>(1)</sup> When the aid is undertaken on behalf of an SME, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

<sup>(2)</sup> Cf. Environmental aid guidelines, Section 3.1.5.

<sup>(3)</sup> The maximum aid intensity is 60 % of the eligible investment costs.

<sup>(4)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

<sup>(5)</sup> For details of the genuinely competitive bidding process required, see point 97 of the Environmental aid guidelines.

<sup>(6)</sup> For details see point 98 of the Environmental aid guidelines.

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- ☐ the part of the investment directly related to energy saving is established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment <sup>(1)</sup>;
- and
- ☐ eligible costs are calculated net of any operating benefits and operating costs related to the extra investment for energy saving and arising during the first three years of the life of this investment in the case of SMEs, the first four years in the case of large undertakings that are not part of the EU CO<sub>2</sub> Emission Trading System and the first five years in the case of large undertakings that are part of the EU CO<sub>2</sub> Emission Trading System <sup>(2)</sup>.
- (C) In the case of investment aid for achieving a level of energy saving higher than Community standards, please confirm which one of the following statements is applicable:
- ☐ if the undertaking is adapting to national standards adopted in the absence of Community standards, the eligible costs consist of the additional investment costs necessary to achieve the level of environmental protection required by the national standards;
- ☐ if the undertaking is adapting to or goes beyond national standards which are more stringent than the relevant Community standards or goes beyond Community standards, the eligible costs consist of the additional investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards <sup>(3)</sup>;
- ☐ if no standards exist, the eligible costs consist of the investment costs necessary to achieve a higher level of environmental protection than that which the undertaking or undertakings in question would achieve in the absence of any environmental aid;
- (D) What form do the eligible costs take?
- ☐ investments in tangible assets;
- ☐ investments in intangible assets.
- (E) In the case of investments in tangible assets please indicate the form(s) of investments concerned:
- ☐ investments in land which are strictly necessary in order to meet environmental objectives;
- ☐ investments in buildings intended to reduce or eliminate pollution and nuisances;
- ☐ investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- ☐ investments to adapt production methods with a view to protecting the environment.
- (F) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:
- ☐ it is regarded as a depreciable asset;

<sup>(1)</sup> The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

<sup>(2)</sup> Please note that for large undertakings, this period can be reduced to the first three years of the life of the investment, where the depreciation time of the investment can be demonstrated not to exceed three years.

<sup>(3)</sup> Please note that the cost of investments needed to reach the level of protection required by the Community standards is not eligible.



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- ☐ it is purchased on market terms, from an undertaking from which the acquirer has no power of direct or indirect control,
- ☐ it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years <sup>(1)</sup>.

Furthermore, please confirm that if the intangible asset is sold during those five years:

- ☐ the yield from the sale will be deducted from the eligible costs;
- and
- ☐ all or part of the aid amount will be, where appropriate, reimbursed.

- (G) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation <sup>(2)</sup>, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....

.....

.....

.....

.....

If the notification concerns an individual aid measure, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

.....

.....

.....

.....

.....

3.4.3. Operating aid

- (A) Please provide information/calculations demonstrating that the aid is limited to compensating for net extra production costs resulting from the investment taking account of benefits resulting from energy saving <sup>(3)</sup>:

.....

.....

- (B) What is the duration of the operating aid measure <sup>(4)</sup>? .....

- (C) Is the aid degressive?

☐ yes ☐ no

What is the aid intensity of the:

— degressive aid (please indicate the degressive rates for each year) <sup>(5)</sup>: ..... ;

— non-degressive aid <sup>(6)</sup>: ... ..

<sup>(1)</sup> Please note that this condition does not apply if the intangible asset is technically out of date.

<sup>(2)</sup> See point 81(b) of the Environmental aid guidelines.

<sup>(3)</sup> Please note that any investment aid granted to the undertaking in respect of the new plant must be deducted from production costs.

<sup>(4)</sup> Please note that the duration must be limited to maximum five years.

<sup>(5)</sup> The aid intensity must not exceed 100 % of the extra costs in the first year, but must have fallen in a linear fashion to zero by the end of the fifth year.

<sup>(6)</sup> The maximum aid intensity is 50 % of the extra costs.

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3.5. *Aid for renewable energy sources* <sup>(1)</sup>

3.5.1. **Basic conditions**

- (A) Please confirm that the aid is granted exclusively for the promotion of renewable energy sources as defined by the Environmental aid guidelines <sup>(2)</sup>.

☐ yes ☐ no

- (B) In the case of biofuel promotion, please confirm that the aid is granted exclusively for the promotion of sustainable biofuels within the meaning of those guidelines.

☐ yes ☐ no

- (C) Please specify the type(s) of renewable energy sources <sup>(3)</sup> supported under the notified measure and provide details:

.....  
.....

3.5.2. **Investment aid**

3.5.2.1. **Aid intensities and bonuses**

- (A) What is the basic aid intensity applicable to each renewable energy source supported by the notified measure <sup>(4)</sup>: .....

- (B) Is an SME bonus applied under the notified measure?

☐ yes ☐ no

If yes, please specify the level of bonus applicable <sup>(5)</sup>: .....

- (C) Is the aid granted in a genuinely competitive bidding process <sup>(6)</sup>?

☐ yes ☐ no

If yes, please provide details of the competitive process and attach a copy of the tender notice or its draft:

.....

- (D) In the case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....  
.....

3.5.2.2. **Eligible costs** <sup>(7)</sup>

- (A) Please confirm that the eligible costs are limited to the extra investment costs borne by the beneficiary compared with a conventional power plant or with a conventional heating system with the same capacity in terms of the effective production of energy;

☐ yes

- (B) Please further confirm that:

☐ the precise renewable energy related cost constitutes the eligible costs, in case the cost of investing renewable energy can be easily identified;

or

<sup>(1)</sup> Cf. Environmental aid guidelines, Section 3.1.6.

<sup>(2)</sup> See point 70(5) to (9) of the Environmental aid guidelines.

<sup>(3)</sup> Please note that aid for investment and/or operating aid for the production of biofuels shall be allowed only with regard to sustainable biofuels.

<sup>(4)</sup> The maximum aid intensity is 60 % of the eligible investment costs.

<sup>(5)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

<sup>(6)</sup> For details of the genuinely competitive bidding process required, see point 104 of the Environmental aid guidelines.

<sup>(7)</sup> For details see points 105 and 106 of the Environmental aid guidelines.

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- ☐ the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment <sup>(1)</sup>;
- and
- ☐ eligible costs are calculated net of any operating benefits and costs related to the extra investment for renewable sources of energy and arising during the first five years of the life of the investment concerned.
- (C) What form do the eligible costs take?
- ☐ investments in tangible assets;
- ☐ investments in intangible assets.
- (D) In the case of investments in tangible assets, please indicate the form(s) of investments concerned:
- ☐ investments in land which are strictly necessary in order to meet environmental objectives;
- ☐ investments in buildings intended to reduce or eliminate pollution and nuisances;
- ☐ investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- ☐ investments to adapt production methods with a view to protecting the environment.
- (E) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:
- ☐ it is regarded as a depreciable asset;
- ☐ it is purchased on market terms, from an undertaking from which the acquirer has not power of direct or indirect control;
- ☐ it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years <sup>(2)</sup>.
- Furthermore, please confirm that if the intangible asset is sold during those five years:
- ☐ the yield from the sale will be deducted from the eligible costs;
- and
- ☐ all or part of the aid amount will be, where appropriate, reimbursed.
- (F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:
- .....
- .....
- .....
- .....
- .....
- For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by

<sup>(1)</sup> The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

<sup>(2)</sup> Please note that this condition does not apply if the intangible asset is technically out of date.

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reference to the counterfactual situation, and provide relevant evidence:

.....

.....

.....

.....

3.5.3. Operating aid

Following the choice of the operating aid assessment option <sup>(1)</sup>, please fill in the relevant part of the section below.

3.5.3.1. Option 1

(A) Please provide for the duration of the notified measure the following information demonstrating that the operating aid is granted in order to cover the difference between the cost of producing energy from renewable sources and the market price of the form of energy concerned:

— detailed analysis of the cost of producing energy from each of the relevant renewable sources <sup>(2)</sup>:

.....

.....

— detailed analysis of the market price of the form of energy concerned:

.....

.....

(B) Please demonstrate that the aid will be granted only until the plant has been fully depreciated according to normal accounting rules <sup>(3)</sup> and provide a detailed analysis of the depreciation of each type <sup>(4)</sup> of the investments for environmental protection:

.....

.....

For aid schemes, please specify how the compliance with this condition will be ensured:

.....

.....

For individual aid, please provide a detailed analysis demonstrating that this condition is fulfilled:

.....

.....

(C) When determining the amount of operating aid, please demonstrate how any investment aid granted to the undertaking in question in respect of a new plant is deducted from production costs:

.....

.....

<sup>(1)</sup> For details on Option 1 see point 109 of the Environmental aid guidelines, for Option 2 see point 110 of the Environmental aid guidelines and for Option 3 see point 111 of the Environmental aid guidelines.

<sup>(2)</sup> For aid schemes the information can be provided in the form of a (theoretical) calculation example (preferably with the amounts in net present values). The production costs should at least be specified separately for each type of renewable energy source. Specific information may also be useful for different plant capacities and for different types of production installation where the cost structure varies significantly (for example for land-based and/or off-shore wind power).

<sup>(3)</sup> Please note that any further energy produced by the plant will not qualify for any assistance. However, the aid may also cover a normal return on capital.

<sup>(4)</sup> The depreciation should at least be specified separately for each type of renewable energy source (preferably with the amounts in net present values). Specific information may also be useful for different plant capacities and land-based and/or off-shore windpower.

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(D) Does the aid also cover a normal return on capital?

☐ yes ☐ no

If yes, please provide details and the information/calculations showing the rate of the normal return and give reasons why the chosen rate is appropriate:

.....  
.....

(E) For aid for the production of renewable energy from biomass, where the operating aid would exceed the amount of investment, please provide data/evidence (based on calculation examples for aid schemes or detailed calculation for individual aid) demonstrating that the aggregate costs borne by the undertakings after plant depreciation are still higher than the market prices of the energy:

.....  
.....

(F) Please specify the precise support mechanisms (taking into account the requirements described above) and, in particular, the methods of calculating the amount of aid:

— for aid schemes based on a (theoretical) example of an eligible project:

.....  
.....

Furthermore, please confirm that the calculation methodology described above will be applied to all individual aid grants based on the notified aid scheme:

☐ yes

— for individual aid please provide a detailed calculation of the aid amount (taking into account the requirements described above):

.....  
.....

(G) What is the duration of the notified measure?

.....  
.....

It is the practice of the Commission to limit its authorisation to 10 years. If yes, could you please undertake to re-notify the measure within a period of 10 years?

☐ yes ☐ no

3.5.3.2. Option 2

(A) Please provide a detailed description of the green certificate or tender system (including, *inter alia*, the information on the level of discretionary powers, the role of the administrator, the price determination mechanism, the financing mechanism, the penalty mechanism and re-distribution mechanism):

.....  
.....

(B) What is the duration of the notified measure <sup>(1)</sup>?

.....  
.....

<sup>(1)</sup> Please note that the Commission can authorise such notified measure for a period of 10 years.

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- (C) Please provide data/calculations showing that the aid is essential to ensure the viability of the renewable energy sources:

.....  
.....

- (D) Please provide data/calculations showing that the aid does not in the aggregate result in overcompensation for renewable energy:

.....  
.....

- (E) Please provide information/calculations showing that the aid does not dissuade renewable energy producers from becoming more competitive:

.....  
.....

3.5.3.3. Option 3 <sup>(1)</sup>

- (A) What is the duration of the operating aid measure <sup>(2)</sup>? .....

- (B) Please provide for the duration of the notified measure the following information demonstrating that the operating aid is granted to compensate for the difference between the cost of producing energy from renewable sources and the market price of the form of energy concerned:

— detailed analysis of the cost of producing energy from each of the relevant renewable sources <sup>(3)</sup>:

.....  
.....

— detailed analysis of the market price of the form of energy concerned:

.....  
.....

- (C) Is the aid degressive?

☐ yes ☐ no

What is the aid intensity of the:

— degressive aid (please indicate the degressive rates for each year) <sup>(4)</sup>:

..... ;

— non-degressive aid <sup>(5)</sup>: ... ..

3.6. *Aid for cogeneration* <sup>(6)</sup>

3.6.1. **Basic conditions**

Please confirm that the aid for cogeneration is granted exclusively to cogeneration units satisfying the definition of high efficiency cogeneration as set out in point 70(11) of the Environmental aid guidelines:

☐ yes ☐ no

<sup>(1)</sup> Member States may grant operating aid in accordance with the provisions set out in point 100 of the Environmental aid guidelines.

<sup>(2)</sup> Please note that the duration must be limited to maximum five years.

<sup>(3)</sup> For aid schemes the information can be provided in the form of a (theoretical) calculation example (preferably with the amounts in net present values). The production costs should at least be specified separately for each type of renewable energy source. Specific information may also be useful for different plant capacities and land-based and/or off-shore wind power.

<sup>(4)</sup> The aid intensity must not exceed 100 % of the extra costs in the first year, but must have fallen in a linear fashion to zero by the end of the fifth year.

<sup>(5)</sup> The maximum aid intensity is 50 % of the extra costs.

<sup>(6)</sup> Cf. Environmental aid guidelines, Section 3.1.7.

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3.6.2. Investment aid

Please confirm that:

- ☐ the new cogeneration unit will overall make primary energy savings compared to separate production as defined by Directive 2004/8/EC and Commission Decision 2007/74/EC.
- ☐ the improvement of an existing cogeneration unit or conversion of an existing power generation unit into a cogeneration unit will result in primary energy savings compared to the original situation.

Please provide details and evidence demonstrating the compliance with the above mentioned conditions:

.....  
.....

3.6.2.1. Aid intensities and bonuses

(A) What is the basic aid intensity applicable to the notified measure <sup>(1)</sup>? .....

(B) Bonuses:

— Is an SME bonus applied under the notified measure?

☐ yes ☐ no

If yes, please specify the level of bonus applicable <sup>(2)</sup>: .....

(C) Is the aid granted in a genuinely competitive bidding process <sup>(3)</sup>?

☐ yes ☐ no

If yes, please provide details of the competitive process and attach a copy of the tender notice or its draft:

.....

(D) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....

.....

3.6.2.2. Eligible costs <sup>(4)</sup>

(A) Please confirm that the eligible costs are limited to the extra investment costs necessary to realise a high efficiency cogeneration plant:

☐ yes

(B) Please further confirm that:

☐ the precise cogeneration related cost constitutes the eligible costs, if the cost of investing in cogeneration can be easily defined;

or

☐ the extra investment costs directly related to cogeneration are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment <sup>(5)</sup>;

and

<sup>(1)</sup> The maximum aid intensity is 60 % of the eligible investment costs.

<sup>(2)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

<sup>(3)</sup> For details of the genuinely competitive bidding process required, see point 116 of the Environmental aid guidelines.

<sup>(4)</sup> For details see points 117 and 118 of the Environmental aid guidelines.

<sup>(5)</sup> The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

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- ☐ eligible costs are calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of the investment concerned.
- (C) What form do the eligible costs take?
- ☐ investments in tangible assets;
- ☐ investments in intangible assets.
- (D) In the case of investments in tangible assets, please indicate the form(s) of investments concerned:
- ☐ investments in land which are strictly necessary in order to meet environmental objectives;
- ☐ investments in buildings intended to reduce or eliminate pollution and nuisances;
- ☐ investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- ☐ investments to adapt production methods with a view to protecting the environment.
- (E) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how) please confirm that any such intangible asset satisfies the following conditions:
- ☐ it is regarded as a depreciable asset;
- ☐ it is purchased on market terms, from an undertaking from which the acquirer has not power of direct or indirect control,
- ☐ it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years <sup>(1)</sup>.
- Furthermore, please confirm that if the intangible asset is sold during those five years:
- ☐ the yield from the sale will be deducted from the eligible costs;
- and
- ☐ all or part of the aid amount will be, where appropriate, reimbursed.
- (F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:
- .....
- .....
- .....
- .....
- .....
- For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:
- .....
- .....
- .....
- .....
- .....

<sup>(1)</sup> Please note that this condition does not apply if the intangible asset is technically out of date.



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3.6.3. Operating aid

- (A) Please confirm that the existing cogeneration unit satisfies both the definition of high-efficiency cogeneration set out in point 70 (11) of the Environmental aid guidelines and the requirement that there are overall primary savings compared to separate production as defined by Directive 2004/8/EC and Decision 2007/74/EC:

☐ yes

- (B) Please confirm further that the operating aid for high efficiency cogeneration is granted exclusively to:

☐ undertakings distributing electric power and heat to the public, where the costs of producing such electric power or heat exceed its market price <sup>(1)</sup>;

☐ for the industrial use of the combined production of electric power and heat where it can be shown that the production cost of one unit of energy using that technique exceeds the market price of one unit of conventional energy <sup>(2)</sup>.

Please provide details and evidence that the relevant condition(s) is/are complied with:

.....  
.....

3.6.3.1. Option 1

- (A) Please provide the following information demonstrating that the operating aid is granted in order to cover the difference between the cost of producing energy in cogeneration units and the market price of the form of energy concerned:

— detailed analysis of the cost of producing energy in cogeneration units <sup>(3)</sup>:

.....  
.....

— detailed analysis of the market price of the form of energy concerned:

.....  
.....

- (B) Please demonstrate that the aid will be granted only until the plant has been fully depreciated according to normal accounting rules <sup>(4)</sup> and provide a detailed analysis of the depreciation of each type of the investments for environmental protection:

.....  
.....

For aid schemes, please specify how the compliance with this condition will be ensured:

.....  
.....

For individual aid, please provide a detailed analysis demonstrating that this condition is fulfilled:

.....  
.....

<sup>(1)</sup> The decision as to whether the aid is necessary will take account of the costs and revenue resulting from the production and sale of the electric power or heat.

<sup>(2)</sup> The production cost may include the plant's normal return on capital, but any gains by the undertaking in terms of heat production must be deducted from production costs.

<sup>(3)</sup> For aid schemes the information can be provided in the form of an (theoretical) calculation example.

<sup>(4)</sup> Please note that any further energy produced by the plant will not qualify for any assistance. However, the aid may also cover a normal return on capital.

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- (C) When determining the amount of operating aid, please demonstrate how any investment aid granted to the undertaking in question in respect of a new plant is deducted from production costs:

.....  
.....

- (D) Does the aid also cover a normal return on capital?

☐ yes ☐ no

If yes, please provide details and information/calculations showing the rate of normal return and give reasons why the chosen rate is appropriate:

.....  
.....

- (E) For aid supporting biomass-based CHP units, if the operating aid would exceed the amount of investment, please provide data/evidence (based on calculation examples for aid schemes or detailed calculation for individual aid) demonstrating that the aggregate costs borne by the undertakings after plant depreciation are still higher than the market prices of the energy:

.....  
.....

- (F) Please specify the precise support mechanisms (taking into account the requirements described above) and in particular the methods of calculating the amount of aid:

— for aid schemes based on a (theoretical) example of an eligible project:

.....  
.....

Furthermore, please confirm that the calculation methodology describe above will be applied to all individual aid grants based on the notified aid scheme:

☐ yes

— for individual aid please provide a detailed calculation of the amount of aid (taking into account the requirements described above):

.....  
.....

- (G) What is the duration of the notified measure?

.....  
.....

It is the Commission practice to limit its decisions to 10 years. If yes, could you please undertake to re-notify the measure within a period of 10 years?

☐ yes ☐ no

3.6.3.2. Option 2

- (A) Please provide a detailed description of the certificate or tender system (including , *inter alia*, the information on the level of discretionary powers, the role of the administrator, the price determination mechanism):

.....  
.....

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- (B) What is the duration of the notified measure <sup>(1)</sup>?  
.....  
.....
- (C) Please provide data/calculations showing that the aid is essential to ensure the viability of the production of energy in cogeneration plants:  
.....  
.....
- (D) Please provide data/calculations showing that the aid does not in the aggregate result in overcompensation for energy produced in cogeneration plants:  
.....  
.....
- (E) Please provide information/calculations showing that the aid does not dissuade producers of energy in cogeneration from becoming more competitive:  
.....  
.....

3.6.3.3. Option 3

- (A) What is the duration of the operating aid measure <sup>(2)</sup>? .....  
.....
- (B) Please provide for the duration of the notified measure the following information demonstrating that the operating aid is granted in order to compensate for the difference between the cost of producing energy in cogeneration plants and the market price of the form of energy concerned:  
— detailed analysis of the cost of producing energy in cogeneration plants:  
.....  
.....  
— detailed analysis of the market price of the form of energy concerned:  
.....  
.....
- (C) Is the aid degressive?  
☐ yes ☐ no  
What is the aid intensity of the:  
— degressive aid (please indicate the degressive rates for each year) <sup>(3)</sup>:  
..... ;  
— non-degressive aid <sup>(4)</sup>: .....  
.....

3.7. *Aid for energy efficient district heating* <sup>(5)</sup>

3.7.1. Basic conditions

Please confirm that:

- ☐ the environmental investment aid in energy-efficient district heating installations leads to primary energy savings

<sup>(1)</sup> Please note that the Commission can authorise such notified measure for a period of 10 years.  
<sup>(2)</sup> Please note that the duration must be limited to maximum five years.  
<sup>(3)</sup> The aid intensity must not exceed 100 % of the extra costs in the first year, but must have fallen in a linear fashion to zero by the end of the fifth year.  
<sup>(4)</sup> The maximum aid intensity is 50 % of the extra costs.  
<sup>(5)</sup> Cf. Environmental aid guidelines, Section 3.1.8.

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and

- ☐ the beneficiary district heating installation satisfies the definition of energy efficient district heating set out in point 70(13) of the Environmental aid guidelines

and

- ☐ the combined operation of the generation of heat (as well as electricity in the case of cogeneration) and the distribution of heat will result in primary energy savings

or

- ☐ the investment is meant for the use and distribution of waste heat for district heating purposes.

In the case of aid schemes, please provide details on how compliance with this condition is ensured:

.....  
.....

In the case of individual aid, please provide details and relevant evidence:

.....  
.....

3.7.2. Aid intensities and bonuses

- (A) What is the basic aid intensity applicable to the notified measure <sup>(1)</sup>? .....

- (B) Is an SME bonus applied under the notified measure?

☐ yes ☐ no

If yes, please specify the level of bonus applicable <sup>(2)</sup>: ... ..

- (C) Is the aid granted in a genuinely competitive bidding process <sup>(3)</sup>?

☐ yes ☐ no

If yes, please provide details of the competitive process and attach a copy of the tender notice or its draft:

.....

- (D) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....

3.7.3. Eligible costs <sup>(4)</sup>

- (A) Please confirm that the eligible costs are limited to the extra investment costs necessary to realise an investment leading to energy-efficient district heating as compared to the reference investment:

☐ yes

- (B) Please further confirm that:

- ☐ the precise energy efficient district heating related cost constitutes the eligible costs, if the costs of investing in environmental protection can be easily identified;

or

<sup>(1)</sup> The maximum aid intensity is 50 % of the eligible costs. If the aid is intended solely for the generation part of a district heating installation, energy-efficient district heating installations using renewable sources of energy or cogeneration, the maximum aid intensity is 60 % of the eligible costs.

<sup>(2)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

<sup>(3)</sup> For details of the genuinely competitive bidding process required, see point 123 of the Environmental aid guidelines.

<sup>(4)</sup> For details see points 124 and 125 of the Environmental aid guidelines.

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- ☐ the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment <sup>(1)</sup>;
- and
- ☐ eligible costs are calculated net of any operating benefits and operating costs related to the extra investment and arising during the first five years of the life of the investment concerned.
- (C) What form do the eligible costs take?
- ☐ investments in tangible assets;
- ☐ investments in intangible assets.
- (D) In the case of investments in tangible assets, please indicate the form(s) of investments concerned:
- ☐ investments in land which are strictly necessary in order to meet environmental objectives;
- ☐ investments in buildings intended to reduce or eliminate pollution and nuisances;
- ☐ investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- ☐ investments to adapt production methods with a view to protecting the environment.
- (E) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how), please confirm that any such intangible asset satisfies the following conditions:
- ☐ it is regarded as a depreciable asset;
- ☐ it is purchased on market terms, from an undertaking from which the acquirer has not power of direct or indirect control,
- ☐ it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years <sup>(2)</sup>.
- Furthermore, please confirm that if the intangible asset is sold during those five years:
- ☐ the yield from the sale will be deducted from the eligible costs;
- and
- ☐ all or part of the aid amount will be, where appropriate, reimbursed.
- (F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:
- .....
- .....
- .....
- .....
- .....
- For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by

<sup>(1)</sup> The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

<sup>(2)</sup> Please note that this condition does not apply if the intangible asset is technically out of date.

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reference to the counterfactual situation, and provide relevant evidence:

.....

.....

.....

.....

3.8. *Aid for waste management* <sup>(1)</sup>

3.8.1. **General conditions**

Please confirm that the following conditions are met:

- ☐ the aid is granted for the management of waste of other undertakings, including activities of re-utilisation, recycling and recovery, which is in accordance with the hierarchical classification of the principles of waste management <sup>(2)</sup>;
- ☐ the investment is aimed at reducing pollution generated by other undertakings (polluters) and does not extend to pollution generated by the beneficiary of the aid;
- ☐ the aid does not indirectly relieve the polluters from a burden that should be borne by them under Community law, or from a burden that should be considered as a normal company cost for the polluters;
- ☐ the investment goes beyond the 'state of the art' <sup>(3)</sup> or uses conventional technologies in an innovative manner;
- ☐ the treated materials would otherwise be disposed of, or be treated in a less environmentally friendly manner;
- ☐ the investment does not merely increase demand for the materials to be recycled without increasing collection of those materials.

Furthermore, please provide details and evidence demonstrating compliance with the above mentioned conditions:

.....

.....

.....

.....

3.8.2. **Aid intensities**

(A) What is the basic aid intensity applicable to the notified measure <sup>(4)</sup>? .....

(B) Is the SME bonus applied under the notified measure?

☐ yes ☐ no

If yes, please specify the level of bonus applicable <sup>(5)</sup>: ... ..

(C) In case of an aid scheme, specify the total aid intensity of the projects supported under the notified scheme (taking into account the bonuses) (%):

.....

.....

<sup>(1)</sup> Cf. Environmental aid guidelines, Section 3.1.9.

<sup>(2)</sup> Classification given in the Communication from the Commission on the review of the Community Strategy for Waste Management (COM(96) 399 final, 30.7.1996). For details see footnote 45 of the Environmental aid guidelines.

<sup>(3)</sup> For a definition see footnote 46 of the Environmental aid guidelines.

<sup>(4)</sup> The maximum aid intensity is 50 % of the eligible investment costs.

<sup>(5)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

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3.8.3. Eligible costs <sup>(1)</sup>

- (A) Please confirm that the eligible costs are limited to the extra investment costs necessary to realise an investment leading to waste management and borne by the beneficiary compared to the reference investment, i.e. a conventional production not involving waste management with the same capacity:
- ☐ yes
- (B) Please further confirm that:
- ☐ the precise waste management related costs constitute the eligible costs, if the cost of investing in waste management can be easily defined;
- or
- ☐ the extra investment costs are established by comparing the investment with the counterfactual situation in the absence of aid, i.e. the reference investment <sup>(2)</sup>;
- and
- ☐ the cost of such reference investment is deducted from the eligible costs;
- ☐ eligible costs are calculated net of any operating benefits and operating costs related to the extra investment for waste management and arising during the first five years of the life of the investment concerned.
- (C) What form do the eligible costs take?
- ☐ investments in tangible assets;
- ☐ investments in intangible assets.
- (D) In the case of investments in tangible assets, please indicate the form(s) of investments concerned:
- ☐ investments in land which are strictly necessary in order to meet environmental objectives;
- ☐ investments in buildings intended to reduce or eliminate pollution and nuisances;
- ☐ investments in plant and equipment intended to reduce or eliminate pollution and nuisances;
- ☐ investments to adapt production methods with a view to protecting the environment.
- (E) In the case of investments in intangible assets (technology transfer through the acquisition of operating licenses or of patented and non-patented know how), please confirm that any such intangible asset satisfies the following conditions:
- ☐ it is regarded as a depreciable asset;
- ☐ it is purchased on market terms, from an undertaking from which the acquirer has not power of direct or indirect control,
- ☐ it is included in the assets of the undertaking, and remains in the establishment of the recipient of the aid and is used there for at least five years <sup>(3)</sup>.
- Furthermore, please confirm that if the intangible asset is sold during those five years:
- ☐ the yield from the sale will be deducted from the eligible costs;
- and

<sup>(1)</sup> For details, see points 130 and 131 of the Environmental aid guidelines.

<sup>(2)</sup> The correct counterfactual is the cost of a technically comparable investment that provides a lower degree of environmental protection and that would credibly be realised without aid. See point 81(b) of the Environmental aid guidelines.

<sup>(3)</sup> Please note that this condition does not apply if the intangible asset is technically out of date.

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☐ all or part of the amount of the aid will, where appropriate, be reimbursed.

(F) For aid schemes, please provide a detailed calculation methodology, by reference to the counterfactual situation, which will be applied to all individual aid grants based on the notified scheme, and provide the relevant evidence:

.....  
.....  
.....  
.....  
.....

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, by reference to the counterfactual situation, and provide relevant evidence:

.....  
.....  
.....  
.....  
.....

3.9. *Aid for the remediation of contaminated sites* <sup>(1)</sup>

3.9.1. **General conditions**

Please confirm that the following conditions are fulfilled:

☐ the investment aid to undertakings repairing environmental damage by remediating contaminated sites <sup>(2)</sup>, leads to an improvement of environmental protection.

Please describe in detail the relevant improvement of the environmental protection, including, if applicable or available, information on the site, the type of contamination, a description of the activity that caused the contamination, and the proposed remediation procedure:

.....  
.....

☐ the polluter <sup>(3)</sup> responsible for the contamination of the site can not be identified or cannot be made to bear the costs.

Please provide details and evidence demonstrating the compliance with the above mentioned condition:

.....  
.....

3.9.2. **Aid intensities and eligible costs**

(A) What is the basic aid intensity applicable to the notified measure <sup>(4)</sup>?.....

(B) Please confirm that the total amount of aid will under no circumstances exceed the actual cost of the remediation work:

☐ yes

<sup>(1)</sup> Cf. Environmental aid guidelines, Section 3.1.10.

<sup>(2)</sup> The environmental damage concerned covers damage to the quality of the soil or of surface water or groundwater.

<sup>(3)</sup> In this context, 'polluter' refers to the person liable under the law applicable in each Member State, without prejudice to the adoption of Community rules in the matter.

<sup>(4)</sup> The aid may amount up to 100 % of the eligible costs.



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(C) Please specify the cost of the remediation work <sup>(1)</sup>:

.....  
.....

(D) Please confirm that the increase in the value of the land is deducted from the eligible costs:

☐ yes

Please provide details on how this is ensured:

.....  
.....

(E) For aid schemes, please provide a calculation methodology, in line with the above mentioned principles, which will be applied to all individual aid grants based on the notified scheme and provide relevant evidence:

.....  
.....  
.....  
.....

For individual aid measures, please provide a detailed calculation of the eligible costs of the notified investment project, complying with the above mentioned principles, and provide relevant evidence:

.....  
.....  
.....  
.....

3.10. *Aid for relocation of undertakings* <sup>(2)</sup>

3.10.1. General conditions

(A) Please confirm that:

☐ the change of location is dictated by environmental protection or prevention grounds and has been ordered by the administrative or judicial decision of a competent public authority or agreed between the undertaking and the competent public authority;

☐ the undertaking complies with the strictest environmental standards applicable in the new region where it is located.

Please provide details and evidence demonstrating compliance with the above mentioned conditions:

.....  
.....

(B) Please confirm that the beneficiary:

☐ is an undertaking established in an urban area or in a special area of conservation designated under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora <sup>(3)</sup>, which lawfully carries out an activity that creates major pollution and

<sup>(1)</sup> All expenditure incurred by an undertaking in remediating its site, whether or not such expenditure can be shown as a fixed asset on its balance sheet, ranks as eligible investment in the case of the remediation of contaminated sites.

<sup>(2)</sup> Cf. Environmental aid guidelines, Section 3.1.11.

<sup>(3)</sup> OJ L 206, 22.7.1992, p. 7.

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must, on account of this location, move from its place of establishment to a more suitable area;

or

- ☐ is an establishment or installation falling within the scope of Seveso II Directive <sup>(1)</sup>.

Please provide details and evidence:

.....  
.....

3.10.2. Aid intensities and eligible costs

- (A) What is the basic aid intensity applicable to the notified measure <sup>(2)</sup>?.....

- (B) Is an SME bonus applied under the notified measure?

☐ yes ☐ no

If yes, please specify the level of bonus applicable <sup>(3)</sup>:.....

- (C) Please provide details and the relevant evidence (if applicable) on the following elements linked to the relocation aid:

(a) benefits:

— the yield from the sale or renting of the plant or land abandoned:

.....  
.....

— the compensation paid in the event of expropriation:

.....  
.....

— any other gains connected with the transfer of the plant, notably gains resulting from an improvement, on the occasion of the transfer, in the technology used and accounting gains associated with better use of the plant:

.....  
.....

— investments relating to any capacity increase:

.....  
.....

— other potential benefits:

.....  
.....

(b) costs:

— the costs connected with the purchase of land or the construction of purchase of new plant of the same capacity as the plant abandoned:

.....  
.....

— any penalties imposed on the undertaking for having terminated the contract for the renting of land or buildings, if the administrative or judicial decision

<sup>(1)</sup> Council Directive 96/82/EC on the control of major-accidents hazards involving dangerous substances OJ L 10, 14.1.1997, p. 13.

<sup>(2)</sup> The maximum aid intensity is 50 % of the eligible investment costs.

<sup>(3)</sup> The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

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ordering the change of location results in the early termination of this contract:

.....  
.....

— other potential costs:

.....  
.....

- (D) For aid schemes, please provide a calculation methodology (e.g. based on a theoretical example) for eligible costs/aid amount, including the benefit/cost elements mentioned in point C, which will be applied to all individual aid grants based on the notified scheme:

.....  
.....  
.....  
.....

For individual aid measures, please provide a detailed calculation of the eligible costs/aid amount of the notified investment project, including the benefit/cost elements mentioned in point C, and provide the relevant evidence:

.....  
.....  
.....  
.....

3.11. *Aid involved in tradable permit schemes* <sup>(1)</sup>

- (A) Please describe in detail the tradable permit scheme, including, *inter alia*, the objectives, the granting methodology, the authorities/entities involved, the role of the State, the beneficiaries and the procedural aspects:

.....  
.....  
.....  
.....

- (B) Please explain how:

☐ the tradable permit scheme is set up in such a way as to achieve environmental objectives beyond those intended to be achieved on the basis of Community standards that are mandatory for the undertakings concerned:

.....  
.....  
.....

☐ the allocation is carried out in a transparent way and based on objective criteria and on data sources of the highest quality available:

.....  
.....

<sup>(1)</sup> Cf. Environmental aid guidelines, Section 3.1.12.

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- ☐ the total amount of tradable permits or allowances granted to each undertaking for a price below their market value is not higher than its expected needs as estimated for the situation in absence of the trading scheme:

.....  
.....

- ☐ the allocation methodology does not favour certain undertakings or certain sectors;

In case the allocation methodology favours certain undertakings or certain sectors, please explain how this is justified by the environmental logic of the scheme itself or is necessary for consistency with other environmental policies:

.....  
.....

Furthermore, please explain how:

- ☐ new entrants shall not in principle receive permits or allowances on more favourable conditions than existing undertakings operating on the same markets:

.....  
.....

- ☐ granting higher allocations to existing installations compared to new entrants should not result in creating undue barriers to entry:

.....  
.....

Please provide details and evidence demonstrating compliance with the above mentioned conditions:

.....  
.....

- (C) Please confirm that the following criteria <sup>(1)</sup> are respected by the scheme:

- ☐ the choice of beneficiaries is based on objective and transparent criteria and the aid is granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar factual situation;

and

- ☐ full auctioning leads to a substantial increase in production costs for each sector or category of individual beneficiaries;

and

- ☐ the cost increase from the tradable permit scheme can not be passed on to customers without leading to important sales reductions <sup>(2)</sup>;

and

- ☐ the best performing technique in the EEA was used as a benchmark for the level of the allowance granted.

<sup>(1)</sup> Please note that these criteria do not apply for the trading period ending on 31 December 2012 for tradable permit schemes in accordance with Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

<sup>(2)</sup> This analysis may be conducted on the basis of estimations of, *inter alia*, the product price elasticity of the sector concerned. These estimations will be made in the relevant geographic market. Estimates of lost sales as well as their impact on the profitability of the company may be used.

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Please provide details demonstrating how these criteria are applied:

.....  
.....

4. **Incentive effect and necessity of aid <sup>(1)</sup>**

4.1. *General conditions*

(A) Has/have the supported project(s) started prior to the submission of the application for the aid by the beneficiary/beneficiaries to the national authorities?

☐ yes ☐ no

If yes, the Commission considers that the aid does not present an incentive for the beneficiary <sup>(2)</sup>.

(B) If no, specify the relevant dates:

— The environmental project commenced on: ... ..

— The aid application by the beneficiary was submitted to the national authorities on: ... ..

Please provide the relevant supporting documents.

4.2. *Evaluation of the incentive effect*

If the aid is granted to

— non-SMEs,

— SMEs but must be assessed in accordance with the detailed assessment,

the Commission will require that the incentive effect is demonstrated by means of an evaluation. Go to the next questions. Otherwise, the Commission considers that the incentive effect is automatically met for the measure at hand.

4.2.1. **General conditions**

*If it is necessary to demonstrate an incentive effect for several beneficiaries participating in the notified project, please provide the information below for each of them.*

*In order to demonstrate the incentive effect, the Commission requires an evaluation by the Member State in order to prove that without the aid, i. e. in the counterfactual situation, the more environmentally friendly alternative would not have been retained. Please fill in the information below*

4.2.2. **Criteria**

(A) Please demonstrate how the counterfactual situation is credible:

.....  
.....

(B) Have the eligible costs been calculated in accordance with the methodology set out in points 81, 82 and 83 of the Environmental aid guidelines?

☐ yes ☐ no

Please provide details and evidence demonstrating the methodology used:

.....  
.....

(C) Would the investment have been sufficiently profitable without the aid?

☐ yes ☐ no

<sup>(1)</sup> Cf. the Environmental aid guidelines, Section 3.2.

<sup>(2)</sup> See point 143 of the Environmental aid guidelines.

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Please provide details and evidence of the relevant profitability <sup>(1)</sup>:

.....  
.....

5. **Compatibility of aid under Article 87(3)(b) of the EC Treaty**

*Aid for environmental protection to promote the execution of an important project <sup>(2)</sup> of common European interest may be considered to be compatible with the common market pursuant to Article 87(3)(b) of the EC Treaty.*

5.1. *General conditions (cumulative)*

(A) Please provide details and evidence of the terms of implementation of the notified project, including its participants, its objectives and its effects and the means to achieve the objectives <sup>(3)</sup>:

.....  
.....

(B) Please confirm that:

☐ the project is in the common European interest <sup>(4)</sup>: it contributes in a concrete, exemplary and identifiable manner to the Community interest in the field of environmental protection <sup>(5)</sup>;

and

☐ the advantage achieved by the objective of the project is not limited to one Member State or to the Member States implementing it, but extends to the Community as a whole <sup>(6)</sup>;

and

☐ the project makes a substantive contribution to the Community objectives.

Please provide details and evidence:

.....  
.....

(C) Please provide details and evidence illustrating that the aid is necessary AND presents an incentive for the execution of the project:

.....  
.....

(D) Please provide details and evidence demonstrating that the project involves a high level of risk:

.....  
.....

(E) Please provide details and evidence illustrating that the project is of great importance with regard to its volume <sup>(7)</sup>:

.....  
.....

<sup>(1)</sup> Due account being taken of the benefits associated with the investment without aid, including the value of tradable permits which may become available to the undertaking concerned following the environmentally friendly investment.

<sup>(2)</sup> The Commission may also consider a group of projects as together constituting a project.

<sup>(3)</sup> Please note that the projects must be specific and clearly defined as regards these aspects.

<sup>(4)</sup> Please note that the common European interest must be demonstrated in practical terms, for example it must be demonstrated that the project enables significant progress to be made towards achieving specific environmental Community objectives.

<sup>(5)</sup> Such as by being of great importance for the environmental strategy of the European Union.

<sup>(6)</sup> The fact that the project is carried out by undertakings in different Member States is not sufficient.

<sup>(7)</sup> Please note that it must be substantial in size and produce substantial environmental effects.

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(F) Please indicate the beneficiary's own contribution <sup>(1)</sup> to the project:

.....  
.....

(G) Please list the Member States from which the undertakings involved in the notified project come <sup>(2)</sup>.

.....  
.....

5.2. *Description of the project*

Please provide a detailed description of the project, including, *inter alia*, structure/organisation, beneficiaries, budget, amount of aid, aid intensity <sup>(3)</sup>, investments concerned and eligible costs. For guidance, please see Section 3 of this supplementary information sheet.

.....  
.....

6. **Aid in the form of reductions of or exemptions from environmental taxes**

6.1. *General conditions*

(A) Please explain how the tax reductions or exemptions contribute indirectly to an improvement of the level of the environmental protection and motivate why the tax reductions and exemptions do not undermine the general objective pursued:

.....  
.....

(B) For reductions of or exemptions from harmonised taxes at Community level, please confirm that:

- ☐ the aid is granted for a maximum period of 10 years;  
and  
☐ the beneficiaries pay at least the Community minimum tax level set by the relevant applicable directive <sup>(4)</sup>.

Please provide for each category of beneficiaries evidence regarding the payable minimum tax level (rate actually paid preferably in EUR and in the same units as the applicable Community legislation):

.....  
.....

- ☐ they are compatible with the relevant applicable Community legislation and comply with the limits and conditions set out therein:

Please refer to the relevant provision(s) and provide the relevant evidence:

.....  
.....

(C) For reductions of or exemptions from environmental taxes which have not been harmonised or for those which have been

<sup>(1)</sup> Please note that the Commission will consider the notified projects more favourably if they include a significant own contribution of the beneficiary to the projects.

<sup>(2)</sup> Please note that the Commission will consider the notified projects more favourably if they involve undertakings from a significant number of Member States.

<sup>(3)</sup> Please note that the Commission may authorise aid at higher rates than otherwise laid down in the Environmental aid guidelines.

<sup>(4)</sup> 'Community minimum tax level' means the minimum level of taxation provided for in Community legislation. For energy products and electricity, the Community minimum tax level means the minimum level of taxation laid down in Annex I to Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

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harmonised but beneficiaries pay less than the Community minimum tax level, please confirm that the aid is granted for a maximum period of 10 years:

☐ yes ☐ no

Furthermore, please provide the following:

— a detailed description of the exempted sector(s):

.....  
.....

— information for each sector, as to the best performing techniques within the EEA regarding the reduction of the environmental harm targeted by the tax:

.....  
.....

— a list of the 20 largest beneficiaries covered by the exemptions/reductions as well as a detailed description of their situation, in particular their turnover, their market shares and the size of the tax base:

.....  
.....

6.2. *Necessity of the aid*

Please confirm that:

☐ the choice of beneficiaries is based on objective and transparent criteria and the aid is granted in principle in the same way for all competitors in the same sector/relevant market if they are in a similar factual situation

and

☐ the environmental tax without reduction would lead to a substantial increase in production cost for each sector or category of individual beneficiaries <sup>(1)</sup>;

and

☐ without the aid the substantial increase in production costs would lead to important sales reductions if it would be passed on to customers <sup>(2)</sup>.

Please provide evidence related to the above mentioned conditions:

.....  
.....

6.3. *Proportionality of the aid*

Please specify which one of the following conditions is met:

(A) Does the scheme lay down criteria ensuring that each individual beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA?

☐ yes ☐ no

Please provide details and evidence demonstrating the compliance with this condition:

.....  
.....

<sup>(1)</sup> With regard to energy products and electricity 'energy-intensive business' as defined in Article 17(1)(a) of Directive 2003/96/EC shall be regarded as fulfilling this criterion as long as that provision remains in force.

<sup>(2)</sup> In this respect, Member States may provide estimations of, *inter alia*, the product price elasticity of the sector concerned in the relevant geographic market as well as estimates of lost sales and/or reduced profits for the companies in the sector/category concerned.



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(B) Are aid beneficiaries paying at least 20 % of the national tax?

☐ yes ☐ no

If no, please demonstrate how a lower rate can be justified in view of a limited distortion of competition:

.....  
.....

(C) Are the reductions or exemptions conditional on the conclusion of agreements between the Member State and the recipient undertakings or associations of undertakings?

☐ yes ☐ no

If yes, please provide details and evidence illustrating that the undertakings or associations of undertakings commit themselves to achieve environmental protection objectives which have the same effect as (i) the taxation linked to environmental performance <sup>(1)</sup>, or (ii) 20 % of the national tax <sup>(2)</sup> or (iii) if the Community minimum tax level is applied.:

.....  
.....

Please further confirm that:

- ☐ the substance of the agreements has been negotiated by the Member State and specifies the targets and fixes a time schedule for reaching targets;
- ☐ the Member State ensures independent and timely monitoring of the commitments concluded in these agreements;
- ☐ these agreements will be revised periodically in the light of technological and other developments and stipulate effective penalty arrangements applicable if the commitments are not met.

Specify per sector the targets and time schedule and describe the monitoring and review mechanisms (for example by whom and with what periodicity) as well as the penalty mechanism:

.....  
.....

7. **Criteria triggering a detailed assessment <sup>(3)</sup>**

Please indicate if the notified measure falls within the following categories of aid:

- ☐ for measures covered by a Block Exemption Regulation, the case was notified to the Commission pursuant to a duty to notify aid individually as prescribed in the BER;
- ☐ investment aid, where the aid amount exceeds EUR 7,5 million for one undertaking, (even if part of an approved aid scheme);
- ☐ operating aid for energy saving, where the aid amount exceeds EUR 5 million per undertaking for five years;
- ☐ operating aid for the production of renewable electricity and/or combined production of renewable heat, when the aid is granted to renewable electricity installations in sites where the resulting renewable electricity generation capacity exceeds 125 MW;
- ☐ operating aid for the production of biofuel, when the aid is granted to a biofuel production installation in sites, where the resulting production exceeds 150 000 t per year;

<sup>(1)</sup> Meaning the same effect as if the scheme laid down criteria ensuring that each individual beneficiary pays a proportion of the national tax level which is broadly equivalent to the environmental performance of each beneficiary compared to the performance related to the best performing technique within the EEA, see point 159(a) of the Guidelines.

<sup>(2)</sup> Unless a lower rate can be justified in view of a limited distortion of competition, see point 159(b) of the Guidelines.

<sup>(3)</sup> Cf. Environmental aid guidelines. Section 5.1.

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- ☐ operating aid for cogeneration, where aid is granted to cogeneration installation with the resulting cogeneration electricity capacity exceeding 200 MW <sup>(1)</sup>
- ☐ operating aid granted to new plants producing renewable energy on the basis of a calculation of the external costs avoided <sup>(2)</sup>.

In this case please provide a reasoned and quantified comparative cost analysis, together with an assessment of competing energy producers' external costs, so as to demonstrate that the aid does genuinely compensate for external costs avoided <sup>(3)</sup>.

If the notified measure falls within at least one of these aid categories, it is subject to a detailed assessment and additional information should be provided in order to enable the Commission to carry out a detailed assessment (Section 8 of this supplementary information sheet).

8. **Additional information for detailed assessment** <sup>(4)</sup>

*If there are several beneficiaries participating in the notified project subject to a detailed assessment, please provide the information below for each of them. This is without prejudice to the full description of the notified project, including participants, in the previous sections of this supplementary sheet.*

8.1. **General observations**

*The purpose of this detailed assessment is to ensure that high amounts of aid for environmental protection do not distort competition to an extent contrary to the common interest, but actually contribute to the common interest. This happens when the benefits of State aid in terms of additional environmental benefits outweigh the harm for competition and trade <sup>(5)</sup>.*

*The detailed assessment is conducted on the basis of the positive and negative elements which are specified in Sections 5.2.1 and 5.2.2 of the Environmental aid guidelines and they apply in addition to the criteria set out in Chapter 3 of the Environmental aid guidelines.*

*Provisions below represent a guidance as to the type of information the Commission may require in order to carry out a detailed assessment. The guidance is intended to make the Commission's decisions and their reasoning transparent and foreseeable in order to create predictability and legal certainty. Member States should provide all the elements that they consider useful for the assessment of the case.*

The Member States are in particular invited to rely on the information sources listed below. Please indicate if these supporting documents are attached to the notification:

- ☐ evaluations of past State aid schemes or measures;
- ☐ impact assessments made by the granting authority;
- ☐ other studies related to the environmental protection.

8.2. **Existence of a market failure** <sup>(6)</sup>

- (A) Please identify the expected contribution of the measure to environmental protection (in quantifiable terms) and provide the supporting documents:

.....  
.....

<sup>(1)</sup> Please note that aid for the production of heat from cogeneration will be assessed in the context of notification based on electricity.

<sup>(2)</sup> For details see point 161 of the Environmental aid guidelines.

<sup>(3)</sup> Please note that in order to calculate external avoided costs, the method of calculation used has to be internationally recognised and validated by the Commission. Please further note that in any event, the amount of aid granted to producers that exceeds the amount of aid resulting from option 1 (cf. point 109 of the Environmental aid guidelines) for operating aid for renewable sources of energy must be reinvested by the firms in renewable sources of energy in accordance with section 3.1.6.1.

<sup>(4)</sup> Cf. Environmental aid guidelines, Section 5.2.

<sup>(5)</sup> For details on detailed assessment and balancing the positive and negative elements see Section 1.3, 5.2.1 (points 166 to 174) and 5.2.2 (points 175 to 188).

<sup>(6)</sup> Cf. Environmental aid guidelines, Section 5.2.1.1.

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- (B) Please identify the level of environmental protection targeted, as compared to existing Community standards and/or standards in other Member States and provide the supporting documents:

.....  
.....

- (C) In the case of the aid for adapting to national standards going beyond the Community standards, please provide the following information and (if relevant) supporting documents:

- ☐ nature, type and location of the main competitors of the aid beneficiary:

.....  
.....  
.....

- ☐ the cost of implementation of the national standard (respectively tradable permit schemes) for the aid beneficiary had no aid been given:

.....  
.....  
.....

- ☐ the comparative costs of implementation of those standards for the main competitors of the aid beneficiary:

.....  
.....  
.....

8.3. *Appropriate instrument* <sup>(1)</sup>

Please indicate on what basis the Member State decided to use a selective instrument such as State aid in order to increase environmental protection and provide supporting documents:

- ☐ impact assessment of the proposed measure;  
☐ comparative analysis of other policy options considered by the Member State;  
☐ evidence that the polluter pays principle is respected;  
☐ others: ...

8.4. *Incentive effect and necessity of the aid* <sup>(2)</sup>

*In addition to the calculation of extra costs outlined in Chapter 3 of the Environmental aid guidelines please specify the elements listed below.*

- (A) Please provide evidence of the specific action(s) <sup>(3)</sup> that would not have been taken by the undertaking without the aid (counterfactual situation) and provide supporting documents:

.....  
.....

- (B) At least one of the following elements must be present for the purposes of demonstration of the expected environmental effect linked to the change in behaviour. Please specify those relevant for the notified measure and provide supporting documents.

- ☐ increase in level of environmental protection;  
☐ increase in speed of the implementation of future standards

<sup>(1)</sup> Cf. Environmental aid guidelines, Section 5.2.1.2.

<sup>(2)</sup> Cf. Environmental aid guidelines, Section 5.2.1.3.

<sup>(3)</sup> For instance, a new investment, a more environmentally friendly production process and/or a new product that is more environmentally friendly.

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- (C) The following elements may be used for the purposes of demonstration of an incentive effect. Please specify those relevant for the notified measure, and provide supporting documents <sup>(1)</sup>:

- ☐ production advantages;
- ☐ market conditions;
- ☐ possible future mandatory standards (if there are ongoing negotiations at Community level to introduce new or higher mandatory standards which the measure concerned would seek to target);
- ☐ level of risk;
- ☐ level of profitability

- (D) In the case of aid granted to undertakings adapting to a national standard or going beyond Community standards or adopted in the absence of Community standards, please provide the information and supporting documents showing that the aid beneficiary would have been affected substantially in terms of increased costs and would not have been able to bear the costs associated with the immediate implementation of national standards:

.....

.....

8.5. *Proportionality of the aid* <sup>(2)</sup>

- (A) Please provide an accurate calculation of the eligible costs demonstrating that they are indeed limited to the extra costs necessary to achieve the level of environmental protection:

.....

.....

- (B) Were the beneficiaries selected in an open selection process?

☐ yes ☐ no

Please provide details <sup>(3)</sup> and supporting documents:

.....

.....

- (C) Please explain how it is ensured that the aid is limited to the minimum necessary and provide supporting documents:

.....

.....

8.6 *Analysis of the distortion of competition and trade* <sup>(4)</sup>

8.6.1. Relevant markets and effects on trade

- (A) Please indicate whether the aid is likely to have impact on competition between undertakings in any product market.

☐ yes ☐ no

Please specify the product markets on which the aid is likely to have impact <sup>(5)</sup>:

.....

.....

- (B) For each of these markets please provide some indicative market share of the beneficiary:

.....

.....

<sup>(1)</sup> For details on different types of advantages see Section 5.2.1.3 (point (172) of the Environmental aid guidelines.

<sup>(2)</sup> Cf. Environmental aid guidelines, Section 5.2.1.4.

<sup>(3)</sup> For example information on how non-discrimination, transparency, openness are ensured.

<sup>(4)</sup> For details on negative effects of the aid measure see Section 5.2.2.

<sup>(5)</sup> For details see footnote 60 of the Environmental aid guidelines.

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For each of these markets please provide some indicative market shares of the other companies present in the market. If possible, please provide the associated Herfindahl-Hirschman Index (HHI):

.....  
.....

- (C) Please describe the structure and dynamics of the relevant markets and provide supporting documents:

.....  
.....

- (D) If relevant, please provide information on the effects on trade (shift of trade flows and location of economic activity):

.....  
.....

- (E) The following elements will be considered by the Commission when assessing the likelihood that the beneficiary may increase or maintain sales as a result of the aid. Please indicate those in relation to which supporting documents are provided <sup>(1)</sup>:

- ☐ reduction in or compensation of production unit costs.  
☐ more environmentally friendly production process.  
☐ new product.

8.6.2. **Dynamic incentives/crowding out**

The following elements will be considered by the Commission in its analysis of effects of the aid on competitors' dynamic incentives to invest <sup>(2)</sup>. Please indicate those in relation to which supporting documents are provided:

- ☐ amount of the aid;  
☐ frequency of the aid;  
☐ duration of the aid;  
☐ gradual decrease of the aid;  
☐ readiness to meet future standards;  
☐ level of the regulatory standards in relation to the environmental objectives;  
☐ the risk of cross subsidisation;  
☐ technological neutrality;  
☐ competing innovation.

8.6.3. **Maintaining inefficient firms afloat <sup>(3)</sup>**

The following elements will be considered by the Commission in its analysis of effects of the aid in order to prevent avoid unnecessary support to undertakings, which are unable to adapt to more environmentally friendly standards and technologies because of their low levels of efficiency <sup>(4)</sup>. Please, indicate those in relation to which details and supporting documents are provided:

- ☐ type of beneficiaries.  
☐ overcapacity in the sector targeted by the aid.  
☐ normal behaviour in the sector targeted by the aid.  
☐ relative importance of the aid.  
☐ selection process.  
☐ selectivity.

<sup>(1)</sup> For details see point 177 of the Environmental aid guidelines.

<sup>(2)</sup> For details see points 178 and 179 of the Environmental aid guidelines.

<sup>(3)</sup> For details see Section 5.2.2.2 of the Environmental aid guidelines.

<sup>(4)</sup> For details see Section 5.2.2.2. of the Environmental aid guidelines.

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8.6.4. Market power/exclusionary behaviour <sup>(1)</sup>

The following elements will be considered by the Commission in its analysis of effects of the aid on beneficiary's market power. Please, indicate those in relation to which details and supported documents are provided:

- ☐ market power of aid beneficiary and market structure
- ☐ new entry;
- ☐ product differentiation and price discrimination
- ☐ buyer power

8.6.5. Effects on trade and location <sup>(2)</sup>

Please provide evidence that the aid was not decisive for the choice of location for the investment:

.....  
.....

9. Cumulation <sup>(3)</sup>

(A) Is the aid granted under the notified measure combined with other aid <sup>(4)</sup>?

- ☐ yes      ☐ no

(B) If yes, please describe the cumulation rules applicable to the notified aid measure:

.....  
.....  
.....  
.....

(C) Please specify how the respect of cumulation rules will be verified under the notified aid measure:

.....  
.....  
.....  
.....

10. Reporting and monitoring <sup>(5)</sup>

10.1. Annual reports

*Please note that this reporting obligation is without prejudice to the reporting obligation pursuant to Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 <sup>(6)</sup>.*

Please undertake to submit annual reports on the implementation of the notified environmental aid measure to the Commission, which shall contain for each approved scheme as regards large undertakings, all the elements listed below:

- names of the beneficiaries;
- aid amount per beneficiary;

<sup>(1)</sup> For details see Section 5.2.2.3. of the Environmental aid guidelines.

<sup>(2)</sup> For details see Section 5.2.2.4. of the Environmental aid guidelines.

<sup>(3)</sup> Cf. Environmental aid guidelines, Chapter 6.

<sup>(4)</sup> Please note that aid for environmental protection must not be cumulated with *de minimis* aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in the Environmental aid guidelines.

<sup>(5)</sup> Cf. Environmental aid guidelines, Section 7.1, 7.2 and 7.3.

<sup>(6)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

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- aid intensity;
- description of the objective of the measure and of what type of environmental protection it is intended to promote;
- sectors of activity where the aided projects are undertaken;
- explanation of how the incentive effect has been respected.

☐ yes

In case of tax exemptions or reductions, please undertake to submit annual reports containing the elements listed below:

- legislative and/or regulatory text(s) establishing the aid;
- specification of the categories of undertakings benefiting from tax reductions or exemptions;
- specification of sectors of the economy most affected by these tax exemptions/reductions.

☐ yes

10.2. *Monitoring and evaluation*

- (A) Please undertake to maintain detailed records regarding the granting of aid, with all information necessary to establish that the eligible costs and maximum allowable aid intensity have been observed.

☐ yes

- (B) Please undertake to ensure that detailed records referred to in Section A above are maintained for 10 years from the date on which the aid was granted.

☐ yes

- (C) Please undertake to submit the records referred to in Section A above on request of the Commission.

☐ yes

11. **Other information**

Please give any other information you consider necessary to assess the measure(s) in question under the Environmental aid guidelines.

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PART III.11

**SUPPLEMENTARY INFORMATION SHEET ON RISK CAPITAL AID**

*This supplementary information sheet must be used for the notification of any aid scheme covered by the Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises <sup>(173)</sup>. Please note that if the scheme is covered by another framework or guidelines, the corresponding standard notification form for the relevant framework or guidelines should be used instead.*

**1. Possible beneficiaries and scope of the aid measure**

**1.1. Who is involved in the scheme <sup>(174)</sup> (please tick one or more boxes as appropriate):**

- ☐ investors setting up a fund or providing equity in a company or a set of companies. Please specify the advantage(s) granted:

.....  
.....  
.....

Please specify possible selection criteria for the beneficiary (e.g. a call for tender or a public invitation):

.....  
.....  
.....

Are the investments effected *pari passu* between public and private investors?

- ☐ yes ☐ no

Please provide details:

.....  
.....  
.....

- ☐ investment fund or other investment vehicle and/or its manager. Please specify the advantage(s) granted:

.....  
.....  
.....

Please specify possible selection criteria for the beneficiary (fund/investment vehicle and the management) and the way it has been selected (e.g. an open and transparent public tender procedure):

.....  
.....  
.....

Do the fund's managers or the management company receive a remuneration, which fully reflects the current market remuneration in comparable situations?

- ☐ yes ☐ no

If yes, please provide evidence and attach relevant documents:

.....  
.....  
.....

<sup>(173)</sup> Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ C 194, 18.8.2006, p. 2) thereafter 'the RCG'.

<sup>(174)</sup> For details see Section 3.2 of the RCG.



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▼ **M3**

Is the fund involved in any other activities?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

☐ the target SMEs invested in. Please specify the advantage(s):

.....  
.....  
.....

Please specify possible selection criteria for the beneficiary:

.....  
.....  
.....

1.2. Can you confirm that the risk capital <sup>(175)</sup> measure excludes <sup>(176)</sup>:

— aid to enterprises in the shipbuilding, coal and steel industry?

☐ yes

— and aid to enterprises in difficulty?

☐ yes

1.3. Can you confirm that the measure does not apply to aid to export to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity, as well as aid contingent upon the use of domestic in preference to imported goods <sup>(177)</sup>?

☐ yes

2. **Form of aid: the size and time frame of the measure**

2.1. The scheme envisages the following measure(s) and/or instrument(s) (please tick one or more boxes as appropriate) <sup>(178)</sup>:

☐ constitution of an investment fund (i.e. venture capital <sup>(179)</sup> fund) in which the State is a partner, investor, or participant. Please specify:

.....

☐ guarantees where the public coverage for potential losses does not exceed 50 % of the nominal amount of the investment guaranteed to risk capital investors or to venture capital funds, or in respect of loans to investors or funds for investment in risk capital. Please specify:

.....

.....

.....

☐ other financial instruments in favour of risk capital investors or of venture capital funds to provide extra capital for investment. Please specify:

.....

.....

.....

<sup>(175)</sup> For definition of 'risk capital' and 'risk capital measures' see Section 2.2(k), (l) of the RCG.

<sup>(176)</sup> Cf. Section 2.1 of the RCG.

<sup>(177)</sup> Idem.

<sup>(178)</sup> Cf. Section 4.2 of the RCG.

<sup>(179)</sup> For definition see Section 2.2(i) of the RCG.

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▼ **M3**

- ☐ fiscal incentives to investment funds and/or their managers or to investors to undertake risk capital investments. Please specify:

.....  
.....  
.....

- ☐ others. Please specify:

.....  
.....  
.....

- 2.2. *What is the overall size of budget of the measure and in case of a fund what is the size of the fund? Please specify:*

.....  
.....  
.....

Is the measure to be co-financed by Community funds (European Social Fund, European Regional Development Fund, other)? Please specify:

.....  
.....  
.....

- 2.3. *What is the duration of the measure or in case of a fund in which time period can the fund commit itself to investment and for how long can the fund hold the investments? Please specify:*

.....  
.....  
.....

3. **General information about the design of the measure**

- 3.1. *Maximum tranches of investments per target SME <sup>(180)</sup>*

What is the total maximum size of the tranche of finance (including both, the public and private investments) per target enterprise over a period of 12 months. Please specify:

.....  
.....  
.....

Are the target enterprises in which the investments can be made, restricted to SMEs <sup>(181)</sup> and not to large companies?

☐ yes

- 3.2. *Restrictions to seed, start-up and expansion financing <sup>(182)</sup>*

Are the investments restricted to financing (please tick one or more boxes as appropriate):

- ☐ up to the seed stage for small enterprises;  
☐ up to the seed stage for medium-sized enterprises;  
☐ up to start-up stage for small enterprises;  
☐ up to start-up stage for medium-sized enterprises;  
☐ up to expansion stage for small enterprises;

<sup>(180)</sup> For details and restrictions see Section 4.3.1 of the RCG.

<sup>(181)</sup> For definition see Section 2.2(q) of the RCG.

<sup>(182)</sup> For details see Section 4.3.2 of the RCG. For definitions of 'seed', 'start-up' and 'expansion capital' see Section 2.2(e), (f) and (h) of the RCG.

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▼ **M3**

- ☐ up to expansion stage for medium-sized enterprises located in assisted regions qualifying under Article 87(3)(a) of the EC Treaty and/or under Article 87(3)(c) of the EC Treaty;
- ☐ other restrictions. Please specify:

.....

.....

.....

Are the investments restricted to SMEs located in assisted regions qualifying under Article 87(3)(a) of the EC Treaty and/or under Article 87(3)(c) of the EC Treaty?

- ☐ yes ☐ no

3.3. *The composition of financing in the form of equity, quasi-equity and debt* <sup>(183)</sup>

Does the measure provide financing to SMEs in the form of equity <sup>(184)</sup>?

- ☐ yes ☐ no

If yes, please specify the details regarding the conditions on which the financing is invested (type of remuneration, level of subordination, securitisation, etc.):

.....

.....

.....

Does the measure provide financing to SMEs in the form of quasi-equity <sup>(185)</sup>?

- ☐ yes ☐ no

If yes, please specify the details regarding the conditions on which the financing is invested (type of remuneration, level of subordination, securitisation, etc.):

.....

.....

.....

Does the measure provide that at least 70 % of its total budget to SMEs is in the form of equity and quasi-equity investment instruments?

- ☐ yes ☐ no

Please specify the percentage of equity and quasi-equity, of the total budget:

.....

.....

.....

Does the measure provide financing to SMEs in the form of debt <sup>(186)</sup>?

- ☐ yes ☐ no

If yes, please specify the details regarding the conditions on which the debt is provided (type of remuneration, level of subordination, securitisation, etc.):

.....

.....

.....

Is the debt provided on market terms or is an aid element in the debt instrument authorised under an existing scheme, please specify:

.....

.....

.....

<sup>(183)</sup> For details and conditions see Section 4.3.3 of the RCG.

<sup>(184)</sup> For definition see Section 2.2(a) of the RCG.

<sup>(185)</sup> For definition see Section 2.2(c) of the RCG.

<sup>(186)</sup> For definition of 'debt' see Section 2.2(d) of the RCG.

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▼ **M3**

3.4. *Participation by private <sup>(187)</sup> investors <sup>(188)</sup>*

What percentage of funding of the investments in SMEs is provided directly or indirectly by private investors. Please specify:

.....  
.....  
.....

3.5. *Profit driven character of investment decisions <sup>(189)</sup>*

Does the measure ensure that at least 50 % of the funding of the investments is provided by private investors, or for at least 30 % in the case of measures targeting SMEs located in assisted areas <sup>(190)</sup>?

☐ yes ☐ no

Please provide details:

.....  
.....  
.....

Does the measure ensure that private investors invest on a commercial basis (that is only for profits) directly or indirectly in the equity of the target enterprises?

☐ yes ☐ no

Please provide details:

.....  
.....  
.....

Does the measure ensure that there is a business plan for each investment containing details of the product, sales and profitability development and establishing the ex ante viability of the project?

☐ yes ☐ no

Please provide details:

.....  
.....  
.....

Is there a clear and realistic exit strategy <sup>(191)</sup> for each investment?

☐ yes ☐ no

Please provide details:

.....  
.....  
.....

3.6. *Commercial management <sup>(192)</sup>*

Is there an agreement between a professional manager or a management company and participants in the fund which:

— provides that the manager's remuneration is linked to the performance?

☐ yes ☐ no

<sup>(187)</sup> For details concerning private investments/funding, see Section 2.2(b) and 3.2 (second paragraph) of the RCG.  
<sup>(188)</sup> For details and conditions see Section 4.3.4 of the RCG.  
<sup>(189)</sup> For details and conditions see Section 4.3.5 of the RCG.  
<sup>(190)</sup> For definition see Section 2.2(i) of the RCG.  
<sup>(191)</sup> For definition see Section 2.2(p) of the RCG.  
<sup>(192)</sup> For details and conditions, see Section 4.3.6 of the RCG.

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▼ **M3**

— sets out the objectives of the fund and proposed timing of investments?

☐ yes ☐ no

Please attach a copy of the agreement or an outline of the principles of the agreement.

Are private market investors represented in the decisionmaking, such as through an investors' advisory committee?

☐ yes ☐ no

If yes, please specify their role in the decisionmaking:

.....  
.....  
.....

Is there an application of best practice and regulatory supervision in the management of the fund?

☐ yes ☐ no

Please provide details:

.....  
.....  
.....

3.7. *Sectoral focus* <sup>(193)</sup>

Is the measure open to all sectors?

☐ yes ☐ no

If no, please specify the technologies or sectors and the underlying reason for the choice of these technologies or sectors:

.....  
.....  
.....

3.8. *Other information*

Please provide any further information considered relevant to clarify the answers above:

.....  
.....  
.....

4. **Establishing the need to conduct detailed assessment** <sup>(194)</sup>

Does the total maximum level of investment tranches (including both the public and private capital) exceed EUR 1,5 million per target SME over each period of 12 months?

☐ yes ☐ no

Does the measure provide financing up to the expansion stage for medium-sized enterprises in non-assisted areas?

☐ yes ☐ no

Does the measure provide for follow-on investments into target companies that already received aided capital injections to fund subsequent financing rounds even beyond the general safe-harbour thresholds and the companies' early-growth financing?

☐ yes ☐ no

<sup>(193)</sup> For details and conditions, see Section 4.3.7 of the RCG.  
<sup>(194)</sup> Cf. Section 5.1 of the RCG.

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▼ **M3**

Does the risk capital measure provide less than 70 % of its total budget in the form of equity and quasi-equity investment instruments into target SMEs?

☐ yes ☐ no

Does the measure provide less than 50 % of the funding of the investments provided by private investors for investments targeting SMEs in non-assisted areas or at least 30 % for SMEs in assisted areas?

☐ yes ☐ no

Does the measure provide seed capital to small enterprises which foresee (i) less or no private participation by private investors, and/or (ii) predominance of debt investment instruments as opposed to equity and quasi-equity?

☐ yes ☐ no

Does the measure specifically involve an investment vehicle (alternative stock markets specialised in SMEs including high-growth companies)?

☐ yes ☐ no

Does the measure cover costs linked to the first screening of companies (scouting costs)?

☐ yes ☐ no

Does the scheme envisage a measure(s) and/or instrument which is not covered by Section 4.2 of the RCG, i.e. necessitating that the fifth box others was ticked under Section 2.1 of this form, and is not explicitly referred to above?

☐ yes ☐ no

Does the measure involve any other element leading to non-compliance with one or more conditions set out in Section 4 of the RCG?

☐ yes ☐ no

If yes, please specify:

.....

.....

.....

**If the answer to one or more of the questions in this section 4 is yes, please go to section 5, otherwise go to section 6.**

5. **Additional information for the detailed assessment** <sup>(195)</sup>

5.1. *Positive effects of the aid*

5.1.1. *Existence and evidence of market failure* <sup>(196)</sup>

Please, attach supporting evidence of the presence of the market failure the measure is designed to tackle. In particular, for measures:

- providing tranches above EUR 1,5 million per target SME (including both, the public and private capital) over each period of twelve months,
- providing follow-on investments,
- financing of the expansion stage of medium-sized enterprises in non-assisted areas,
- specifically involving an investment vehicle.

The evidence must be based on a study showing the level of the equity gap with regard to the enterprises and sectors targeted by the risk capital measure. Please attach the study.

The relevant information concerns the supply of risk capital to SMEs and the capital raised by private investors, as well as the significance of the venture capital industry in the local economy. It should ideally be provided for periods of three to five years preceding the implementation of the measure and also for the future, on the basis of reasonable projections, if available. The evidence submitted could also include the following elements:

- development of the fundraising over the past five years, also in comparison with the correspondent national and/or European averages,

<sup>(195)</sup> For details on detailed assessment and balancing test see Sections 5(1) to (3) and 1.3 of the RCG.

<sup>(196)</sup> Cf. Section 5.2.1 of the RCG.

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▼ **M3**

- the current overhang of money, i.e. the difference between the amount of funds raised by private investors for investments and the amount actually invested,
- the share of government aided investment programs in the total venture capital investment over the preceding three to five years,
- the percentage of new start-ups receiving venture capital,
- the distribution of investments provided by private market investors by categories of amount of investment,
- a comparison of the number of business plans presented with the number of investments made by segment (amount of investment, sector, round of financing, etc.),
- any other relevant indicator showing the existence of market failure.

For measures targeting SMEs located in assisted areas, the relevant information must be supplemented by any other relevant evidence as regards the regional specificities which justify the features of the measure envisaged. The following elements may be relevant:

- estimation of the additional size of the equity gap caused by the peripherality and other regional specificities, in particular in terms of total amount of risk capital invested, number of funds or investment vehicles present in the territory or at a short distance, availability of skilled managers, number of deals and average and minimum size of deals if available;
- specific local economic data, social and/or historic reasons for an underprovision of risk capital, in comparison with the relevant average data and/or situation at national and/or Community level as appropriate;
- any other relevant indicator showing an increased degree of market failure.

5.1.2. Appropriateness of the instrument <sup>(197)</sup>

Is there an impact assessment of the measure?

☐ yes ☐ no

If yes, please attach a summary or the full text of the impact assessment.

Have other policy options to tackle the equity gap than State aid instruments been considered?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

Have other policy initiatives been taken to address the supply and demand side issues leading to the equity gap affecting the targeted SMEs?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

Are there evaluations of how these other policy initiatives will interact with the notified risk capital measure?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

<sup>(197)</sup> Cf. Section 5.2.2 of the RCG.

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▼ **M3**

5.1.3. Incentive effect and necessity of aid <sup>(198)</sup>

Is the risk capital measure or fund managed by professionals from the private sector?

☐ yes ☐ no

Is the measure managed by independent professionals chosen according to a transparent, non-discriminatory procedure, preferably an open tender?

☐ yes ☐ no

Will the management have a proven experience and a track record in capital market investments ideally in the same sector(s) targeted by the fund, as well as an understanding of the relevant legal and accounting background for the investment?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

Is there an investment committee, independent of the fund management company and composed of independent experts coming from the private sector with significant experience in the targeted sector, and preferably also of representatives of investors, or independent experts chosen according to a transparent, non-discriminatory procedure, preferably an open tender?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

Will the experts provide the managers or management company with analyses of the existing and the expected future market situation and would scrutinise and propose to them potential target enterprises with good investment prospects?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

Please specify the size of budget/size of the fund:

.....

Please specify the estimated transaction costs:

.....

Will there be a direct involvement from business angels <sup>(199)</sup> in investments in the seed stage?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

<sup>(198)</sup> Cf. Section 5.2.3 of the RCG.  
<sup>(199)</sup> For definition see Section 2.2(s) of the RCG.



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▼ **M3**

Are there other mechanisms in place to ensure an incentive effect and the necessity of aid?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

5.1.4. Proportionality <sup>(200)</sup>

Does the measure involve (Please tick one or more boxes as appropriate):

☐ open tender for managers or management company? Please specify:

.....  
.....  
.....

☐ call for tender or public invitation to investors? Please specify:

.....  
.....  
.....

☐ other mechanisms to ensure that management or investors are not overcompensated? Please specify:

.....  
.....  
.....

5.2. *Negative effects of the aid*

5.2.1. Crowding-out <sup>(201)</sup>

Please attach evidence as regards the risk of crowding-out of investments at the level of investors, funds and/or investment vehicles.

The following elements may for instance be relevant:

- the number of venture capital firms/funds/investment vehicles present at national level or in the area in case of a regional fund and the segments in which they are active,
- the targeted enterprises in terms of size of companies, growth stage, and business sector,
- the average deal size and possibly the minimum deal size the funds or investors would scrutinise,
- the total amount of venture capital available for the target enterprises, sector and stage targeted by the relevant measure.

If investments are not restricted to assisted regions and if they go beyond the start-up stage for medium-sized enterprises, is there a limit per enterprise on total funding through the measure.

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

<sup>(200)</sup> Cf. Section 5.2.4 of the RCG.

<sup>(201)</sup> Cf. Section 5.3.1 of the RCG.

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▼ **M3**

For measures providing for follow-on investment, does the measure foresee specific limits to the maximum amount to be invested into each target SME, to the investment stage eligible for intervention, and/or to the period during which aid may be granted, having also regard to the sector concerned and to the size of the fund?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

Does the measure foresee a limitation related to the number of investment rounds per target SME or a maximum amount which can be invested in on target enterprise?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

If follow-on investment is foreseen, is there a maximum amount to be invested into each target SME, to the investment stage eligible for intervention, and/or to the period during which aid may be granted, having also regard to the sector concerned and to the size of the fund?

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

If a lower participation of private investors is foreseen, is there a progressive increase of the participation of private investors over the life of the fund, having particular regard to the business stage, the sector, the respective levels of profit-sharing and subordination, and possibly the localisation in assisted areas of the target SMEs.

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

For measures providing seed capital only, is there any mechanism ensuring that the State receives an adequate return on its investment commensurate with the risks incurred for these investments, in particular where the State finances the investment in the form of quasi-equity or debt instruments, the return on which should, for instance, be linked to potential rights of exploitation (for example, royalties) generated by intellectual property rights created as a result of the investment.

☐ yes ☐ no

If yes, please specify:

.....  
.....  
.....

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▼ **M3**

5.2.2. Other distortions of competition <sup>(202)</sup>

What is the expected overall profitability of the firms invested in over time and prospects of future profitability? Please specify:

.....  
.....  
.....

What is the expected rate of enterprise failure targeted by the measure? Please specify:

.....  
.....  
.....

What is the total maximum size of investment tranche (including both the public and private investments) envisaged by the measure as compared to the turnover and costs of the target SMEs? Please specify:

.....  
.....  
.....

In case of sectoral focus of the measure, is there over-capacity of the sector benefiting from the aid? Please give a brief description of the economic situation in the sector(s):

.....  
.....  
.....

Are there any other mechanisms in place in order to limit the distortions of competition? Please specify:

.....  
.....  
.....

6. **Cumulation of the aid** <sup>(203)</sup>

Can be the aid granted under the notified measure combined with other aid <sup>(204)</sup>?

☐ yes ☐ no

If yes, please provide the details (e.g. type of aid with which the aid granted under the notified measure is combined):

.....  
.....  
.....

If yes, please confirm the following:

The Member State undertakes to reduce the relevant aid ceilings or maximum eligible amounts by 50 % in general and by 20 % for target SMEs located in assisted areas during the first three years of the first risk capital investment and up to the total amount received, where the capital provided to a target enterprise under the risk capital measure is used to finance initial investment or other costs eligible for aid under other block exemption regulations, guidelines, frameworks, or other State aid documents. This reduction does not apply to aid intensities provided for in the Community Framework for State aid for Research and Development <sup>(205)</sup> or any successor framework or block exemption regulation in this field.

☐ yes

<sup>(202)</sup> Cf. Section 5.3.2 of the RCG.

<sup>(203)</sup> Cf. Section 6 of the RCG.

<sup>(204)</sup> For cumulation of *de minimis* aid please see Article 2(5) of *de minimis* block exemption (Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 389, 28.12.2006, p. 5).

<sup>(205)</sup> OJ C 45, 17.2.1996, p. 5.

▼ **M3**

7. **Monitoring** <sup>(206)</sup>

The Member State undertakes to submit annual reports to the Commission containing a summary table with a breakdown of the investments effected by a fund or under the risk capital measure including a list of all the enterprise beneficiaries of risk capital measures as well as a brief description of the activity of investments funds with details of potential deals scrutinised and of the transactions actually undertaken as well as the performance of investment vehicles with aggregate information about the amount of capital raised through the vehicle.

☐ yes

The Member State undertakes to publish the full text of the final aid schemes as approved by the Commission on the Internet and to communicate the Internet address of the publication to the Commission

☐ yes

The Member State undertakes to maintain for at least 10 years detailed records regarding the granting of aid for the risk capital measure containing all information necessary to establish that the conditions laid down in the RCG have been observed, notably as regards the size of the tranche, the size of the company (small or medium-sized), the development stage of the company (seed, start-up or expansion), its sector of activity (preferably at 4 digit level of the NACE classification) as well as information on the management of the funds and on the other criteria mentioned in these guidelines.

☐ yes

The Member State undertakes to submit the records referred to above on request of the Commission.

☐ yes

8. **Other information**

Please indicate here any other information you consider relevant to the assessment of the measure(s) concerned under the *Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises*.

<sup>(206)</sup> Cf. Section 7.1 of the RCG.

▼ M2

▼ C3

PART III.12

INFORMATION SHEET FOR AGRICULTURE

*Please note that this State aid notification form only applies to activities related to the production, processing and marketing of agricultural products as defined in point 6 of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013<sup>(1)</sup>. Please note that the specific State aid rules for agriculture do not apply to measures related to the processing of Annex I products into non-Annex I products. For such measures you should complete the relevant notification form.*

1. **Products covered**

1.1. Does the measure apply to any of the following products which are not yet subject to a common market organisation:

- ☐ potatoes other than starch potatoes;
- ☐ horsemeat;
- ☐ coffee;
- ☐ cork;
- ☐ vinegars derived from alcohol;
- ☐ the measure does not apply to any of these products.

2. **Incentive effect**

A. *Aid schemes*

2.1. Will aid under an aid scheme only be granted in respect of activities undertaken or services received after the aid scheme has been set up and declared compatible with the EC Treaty by the Commission?

☐ yes ☐ no

*If no, please refer to point 16 of the Guidelines.*

2.2. If the aid scheme creates an automatic right to receive the aid, requiring no further administrative action at administrative level, may the aid itself only be granted for activities undertaken or services received after the aid scheme has been set up and declared compatible with the EC Treaty by the Commission?

☐ yes ☐ no

*If no, please refer to point 16 of the Guidelines.*

2.3. If the aid scheme requires an application to be submitted to the competent authority concerned, may the aid itself only be granted for activities undertaken or services received after the following conditions have been fulfilled:

- a) the aid scheme must have been set up and declared compatible with the EC Treaty by the Commission;
- b) an application for the aid must have been properly submitted to the competent authority concerned;
- c) the application must have been accepted by the competent authority concerned in a manner which obliges that authority to grant the aid, clearly indicating the amount of aid to be granted or how this amount will be calculated; such acceptance by the competent authority may only be made if the budget available for the aid or aid scheme is not exhausted?

☐ yes ☐ no

*If no, please refer to point 16 of the Guidelines.*

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

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▼ **C3**

B. *Individual aids:*

- 2.4. Will individual aid outside any scheme only be granted in respect to activities undertaken or services received after the criteria in point 2.3 (b) and (c) above have been satisfied?

☐ yes ☐ no

*If no, please refer to point 16 of the Guidelines.*

C. *Compensatory aids:*

- 2.5. Is the aid scheme compensatory in nature?

☐ yes ☐ no

*If yes, points A and B above do not apply.*

3. **Type of aid**

What type(s) of aid does the planned measure include:

**RURAL DEVELOPMENT MEASURES**

- A. Aids for investments in agricultural holdings
- B. Aids for investments in connection with the processing and marketing of agricultural products
- C. Agri-environmental and animal welfare aid
- C *bis*. Nature 2000 payments and payments linked to Directive 2000/60/EC <sup>(1)</sup>
- D. Aid to compensate for handicaps in certain areas
- E. Aid for meeting standards
- F. Aid for the setting up of young farmers
- G. Aid for early retirement or for the cessation of farming activities
- H. Aid for producer groups
- I. Aid for land re-parcelling
- J. Aid to encourage the production and marketing of quality agricultural products
- K. Provision of technical support in the agricultural sector
- L. Aid for the livestock sector
- M. Aid for the outermost regions and the Aegean Islands

**RISK AND CRISIS MANAGEMENT**

- N. Aid to compensate for damage to agricultural production or the means of agricultural production
- O. Aid for combating animal and plant diseases
- P. Aid towards the payment of insurance premiums
- Q. Aid for closing production, processing and marketing capacity

**OTHER AIDS**

- R. Aid for advertising of agricultural products
- S. Aid linked to tax exemptions under directive 2003/96/EC <sup>(2)</sup>,
- T. Aids for the forestry sector

<sup>(1)</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).

<sup>(2)</sup> Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity; OJ L 283, 31.10.2003, p. 51.

▼ **C3**

PART III.12.A

**SUPPLEMENTARY INFORMATION SHEET ON SUPPORT FOR  
INVESTMENTS IN AGRICULTURAL HOLDINGS**

*This information sheet relates to investments in agricultural holdings discussed in point IV.A of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(1)</sup>.*

**1. Objective of the aid**

1.1. Which of the following objectives does the investment pursue?

- ☐ Reduce production costs;
- ☐ Improve and redeploy production;
- ☐ Increase quality;
- ☐ Preserve and improve the natural environment, comply with animal hygiene and standards;
- ☐ Promote the diversification of farm activities;
- ☐ Other (please specify):

*If the investment pursues other aims, please note that only investments pursuing one or more of the objectives listed above are eligible for support for investments in agricultural holdings.*

1.2. Does the aid concern simple replacement investments?

- ☐ yes ☐ no

*If yes, please note that simple replacement investments are not eligible for support for investments in agricultural holdings.*

1.3. Is the aid linked to investments in products which are subject to restrictions on production or limitations of Community support at the level of individual farmers, holdings or processing plants under a common organisation of the market (including direct support schemes) financed by the EAGF, which would increase production capacity beyond these restrictions or limitations?

- ☐ yes ☐ no

*If yes, please note that, under point 37 of the Guidelines, no aid may be granted for such investments.*

**2. Beneficiaries**

Who are the beneficiaries of the aid?

- ☐ farmers;
- ☐ producer groups;
- ☐ other (please specify):

.....

**3. Aid intensity**

3.1. Please state the maximum rate of public support, expressed as a percentage of eligible investment:

- (a) ..... in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005 <sup>(2)</sup> (max. 50 %);

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(2)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1).

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- (b) ..... in other regions (max. 40 %);
- (c) ..... for young farmers in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005, carrying out the investment within five years of setting up (max. 60 %);
- (d) ..... for young farmers in other areas, carrying out the investment within five years of setting up (max. 50 %);
- (e) ..... in the outermost regions and on the smaller Aegean islands within the meaning of Regulation (EEC) No 2019/93 <sup>(1)</sup> (max. 75 %);
- (f) ..... for investments entailing extra costs linked to the preservation and improvement of the natural environment or improvements in the hygiene of livestock farms or the well-being of livestock carried out within the time-limits for transposition of the newly introduced minimum standards (max. 75 % in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005, and max. 60 % in other areas);
- (g) ..... for investments entailing extra costs linked to the preservation and improvement of the natural environment or improvements in the hygiene of livestock farms or the well-being of livestock carried out within three years following the date on which the investment must be authorised under Community legislation (max. 50 % in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005, and max. 40 % in other areas);
- (h) ..... for investments entailing extra costs linked to the preservation and improvement of the natural environment or improvements in the hygiene of livestock farms or the well-being of livestock carried out in the fourth year following the date on which the investment must be authorised under Community legislation (max. 25 % in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005, and max. 20 % in other areas);
- (i) ..... for investments entailing extra costs linked to the preservation and improvement of the natural environment or improvements in the hygiene of livestock farms or the well-being of livestock carried out in the fifth year following the date on which the investment must be authorised under Community legislation (max. 12,5 % in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005, and max. 10 % in other areas, *(no aid can be granted for expenses incurred beyond the fifth year)*);
- (j) ..... for additional investment expenditure made by those Member States who joined the Union on 1 May 2004 and 1 January 2007 respectively, for the purposes of implementing Directive 91/676/EEC <sup>(2)</sup> (max. 75 %);
- (k) ..... for additional investment expenditure made for the purposes of implementing Directive 91/676/EEC and which is the subject of support under Regulation (EC) No 1698/2005 (max. 50 % in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005, and max. 40 % in other areas);
- (l) ..... for investments made by young farmers in order to comply with Community or national standards in force (max. 60 % in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005, and max. 50 % in other areas).

<sup>(1)</sup> Council Regulation (EEC) No 2019/93 of 19 July 1993 introducing specific measures for the smaller Aegean islands concerning certain agricultural products (OJ L 184, 27.7.1993, p. 1).

<sup>(2)</sup> Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 375, 31.12.1991, p. 1).



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- 3.2. In the case of investments entailing extra costs linked to the preservation and improvement of the natural environment, improvements in the hygiene of livestock farms or the well-being of livestock, are the extra costs limited to investments either exceeding the minimum requirements currently prescribed by the Community or complying with newly introduced minimum standards? Are they strictly limited to eligible extra costs in connection with these objectives without resulting in an increased production capacity?

☐ yes ☐ no

- 3.3. In the case of investments made for the purposes of implementing Directive 91/676/EEC, is the envisaged aid intensity limited to necessary and eligible extra costs, and does it exclude investments leading to increased production capacity?

☐ yes ☐ no

- 3.4. In the case of investments made by young farmers in order to comply with Community or national standards in force, is the aid limited to extra costs as a result of implementing these standards and have these costs been incurred within 36 months after installation?

☐ yes ☐ no

4. **Eligibility criteria**

- 4.1. Is the aid limited to agricultural holdings not in difficulty?

☐ yes ☐ no

- 4.2. Is the aid intended for the manufacture and marketing of products which imitate or substitute for milk and milk products?

☐ yes ☐ no

5. **Eligible expenditure**

- 5.1. Do eligible expenses include:

- ☐ construction, acquisition or improvement of immovable property;
- ☐ the purchase or lease purchase of machinery and equipment, including computer software up to the market value of the asset, exclusive of costs connected with a leasing contract (tax, lessor's margin, interest refinancing costs, overheads, insurance charges etc);
- ☐ overheads connected with the two previous types of expenses (for instance architect's fees, engineer's fees, expert's fees, feasibility studies, acquisition of patents and licences)?

- 5.2. Does the aid cover the purchase of second-hand machinery?

☐ yes ☐ no

- 5.3. If yes, is eligibility limited to small and medium enterprises with a low technical level and limited capital?

☐ yes ☐ no

- 5.4. Are any of the following excluded from the aid scheme: the purchase of production rights, animals and annual plants, or the planting of annual plants?

☐ yes ☐ no

*If no, please note that according to point 29 of the Guidelines no aid may be granted for such types of expenditure.*

- 5.5. Is the share of purchases of land other than land for construction purposes in the eligible expenses for the planned investment limited to 10 %?

☐ yes ☐ no

*If no, please note that this 10 % ceiling is one of the eligibility criteria to be met under point 29 of the Guidelines.*

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**6. Aid for the conservation of traditional landscapes and buildings**

6.1. Does the aid concern investments or capital works intended for the conservation of *non-productive* heritage features located on agricultural holdings?

☐ yes ☐ no

6.1.1. If yes, what is the envisaged rate of aid (max. 100 %):

.....

6.1.2. Do the eligible expenses include remuneration for the work of the farmer or his workers?

☐ yes ☐ no

6.1.3. If yes, will this remuneration be limited to a maximum of EUR 10 000 per year?

☐ yes ☐ no

6.1.4. If no, please give reasons for exceeding the above limit.

.....

6.2. Does the aid concern investments or capital works intended to conserve the heritage features of *productive assets* on farms?

☐ yes ☐ no

6.2.1. If yes, does the investment entail any increase in the production capacity of the farm?

☐ yes ☐ no

6.2.2. What are the envisaged maximum aid rates for this type of investment?

☐ Investments without increase in capacity:

Maximum rate envisaged for less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005 (max. 75 %): .....

Maximum rate envisaged for other areas (max. 60 %): .....

☐ Investments with increase in capacity:

Maximum rate envisaged in cases where contemporary materials are used (max.: see point 3.1): .....

Maximum rate envisaged in cases where traditional materials are used, expressed as a percentage of the extra cost (max. 100 %): .....

**7. Relocation of farm buildings in the public interest**

7.1. Does the relocation result from expropriation?

☐ yes ☐ no

7.2. Is the relocation justified on grounds of public interest specified in the legal basis?

☐ yes ☐ no

*Please note that the legal basis must explain the public interest served by the relocation.*

7.3. Does relocation simply consist of the dismantling, removal and re-erection of existing facilities?

☐ yes ☐ no

7.3.1. If yes, what is the intensity of the aid? (max. 100 %)

.....

7.4. Does relocation result in the farmer benefiting from more modern equipment and facilities?

☐ yes ☐ no

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7.4.1. If yes, what is the farmer's own contribution, as a percentage of the added value of the facilities after relocation?

☐ In less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005 (min. 50 %)

.....

☐ In other areas (min. 60 %)

.....

☐ Young farmers in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005 (min. 45 %)

.....

☐ Young farmers in other areas (min. 55 %)

7.5. Does relocation result in an increase in production capacity?

☐ yes ☐ no

7.5.1. If yes, what is the farmer's own contribution, as a percentage of the expenditure linked to the increase?

☐ In less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005 (min. 50 %)

.....

☐ In other areas (min 60 %)

.....

☐ Young farmers in less-favoured areas or the areas referred to in Article 36(a)(i), (ii) or (iii) of Regulation (EC) No 1698/2005 (min. 45 %)

.....

☐ Young farmers in other areas (min 55 %)

8. **Other information**

8.1. Is the notification accompanied by documentation demonstrating how the State aid measure is consistent with the relevant rural development programme(s) concerned?

☐ yes ☐ no

*If yes, please provide this documentation below or in an annex to this supplementary information sheet*

.....

*If no, please note that this documentation must be provided under point 26 of the Guidelines*

8.2. Is the notification accompanied by documentation showing that support is targeted on clearly defined objectives reflecting identified structural and territorial needs and structural disadvantages?

☐ yes ☐ no

*If yes, please provide this documentation below or in an annex to this supplementary information sheet*

.....

*If no, please note that this documentation must be provided under point 36 of the Guidelines*

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PART III.12.B.

**SUPPLEMENTARY INFORMATION SHEET FOR AID FOR INVESTMENTS IN CONNECTION WITH THE PROCESSING AND MARKETING OF AGRICULTURAL PRODUCTS**

*This notification form applies to aid investments in the processing <sup>(1)</sup> and marketing <sup>(2)</sup> of agricultural products, as dealt with in point IV.B. of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(3)</sup>.*

1. **Scope & beneficiaries of the aid**

1.1. Please specify under which provision of the *Agricultural Guidelines* this notification is meant to fall:

1.1.1. ☐ *point IV.B.2. (a)* [Commission Regulation (EC) No 70/2001 <sup>(4)</sup> or any provision replacing it]

1.1.2. ☐ *point IV.B.2. (b)* [Commission Regulation (EC) No 1628/2006 <sup>(5)</sup>]

1.1.3. ☐ *point IV.B.2. (c)* [Commission guidelines on national regional aid for 2007 to 2013 <sup>(6)</sup>]

1.1.4. ☐ *point IV.B.2. (d)* [aid for intermediate companies in regions **not** eligible for regional aid]

1.2. **Commission Regulation (EC) No 70/2001 (State aid to small and medium-sized enterprises)**

Is the beneficiary a SME in the processing or marketing of agricultural products?

☐ yes ☐ no

*If no, the aid does not fulfil the necessary conditions under this Regulation and cannot be declared compatible with the Common Market under point IV.B.2.(a) of the Guidelines.*

*If yes, the aid is exempted from the obligation to notify. Please state the reasons why your authorities still would like to submit a notification. In this case, please refer to the relevant part of the general notification form (Annex I part I and III.1 of Regulation (EC) No 794/2004 <sup>(7)</sup>) or any provision replacing it).*

1.3. **Commission Regulation for regional investment aid**

Does the aid fulfil the conditions set out in this Regulation?

☐ yes ☐ no

*If no, the aid does not fulfil the necessary conditions under this Regulation and cannot be declared compatible with the Common Market under point IV.B.2.(b) of the Guidelines.*

*If yes, the aid is exempted from the obligation to notify. Please state the reasons why your authorities would still like to submit a notification. In this case, please refer to the specific notification form.*

1.4. **Commission guidelines on national regional aid for 2007 to 2013 <sup>(3)</sup>**

Does the aid fulfil the conditions set out in these Guidelines?

☐ yes ☐ no

<sup>(1)</sup> 'Processing of agricultural products' means any operation on an agricultural product resulting in a product which is also an agricultural product, except on farm activities necessary for preparing an animal or plant product for the first sale.

<sup>(2)</sup> 'Marketing of agricultural products' means holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale of a primary producer to resellers or processors and any activity preparing a product for such first sale; a sale by a primary producer to final consumers shall be considered as marketing if it takes place in separate premises reserved for that purpose.

<sup>(3)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(4)</sup> Commission Regulation (EC) No 70/2001, 12 January 2001; (OJ L 10, 13.1.2001, p. 33).

<sup>(5)</sup> OJ L 302, 1.11.2006, p. 29.

<sup>(6)</sup> OJ C 54, 4.3.2006, p. 13.

<sup>(7)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty; OJ L 140, 30.4.2004, p. 1.

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*If no, the aid does not fulfil the necessary conditions under these Guidelines and cannot be declared compatible with the Common Market under point IV.B.2.(c) of the Agricultural Guidelines.*

*If yes, note that the assessment of such aid is to be carried out on the basis of the Guidelines on National Regional aid. Please refer to the relevant part of the general notification form (Annex of Commission Regulation (EC) No 1627/2006 <sup>(1)</sup>).*

1.5. **Aid in regions NOT eligible for regional aid**

1.5.1. Are there beneficiaries, which are SMEs?

☐ yes ☐ no

*If yes, please refer to point 1.2. above [point IV.B.2 (a) of the Agricultural guidelines].*

1.5.2. Are there beneficiaries, which are large companies (i.e. 750 employees or more and EUR 200 million turnover or more)?

☐ yes ☐ no

*If yes, please note that the aid cannot be declared compatible with the Common Market under point IV.B.2(d) of the Agricultural guidelines.*

1.5.3. Are there beneficiaries, which are intermediate companies (i.e. less than 750 employees and/or less than EUR 200 million turnover)?

☐ yes ☐ no

*If yes, please refer to the relevant part of the general notification form (Annex of Commission Regulation (EC) No 1627/2006) regarding the eligible expenses.*

2. **Aid intensity**

2.1. If the beneficiaries are **SMEs** (Commission Regulation (EC) No 70/2001 or any provision replacing it):

Please state the maximum aid intensity for eligible investments in:

2.1.1. outermost regions: ..... (max. 75 %)

2.1.2. smaller Aegean Islands <sup>(2)</sup>: ..... (max. 65 %)

2.1.3. regions eligible under Art. 87(3)(a): .....(max. 50 %)

2.1.4. other regions: ..... (max. 40 %)

*If the rate is higher than the above ceiling, please note that the measure would not be in line with Art. 4 of Commission Regulation (EC) No 70/2001.*

2.2. For aid falling under the Commission Regulation for regional investment aid **or** the Commission guidelines on national regional aid for 2007 to 2013 please specify the maximum aid intensity for:

2.2.1. **SMEs**:

2.2.1.1. regarding eligible investments in regions under Article 87(3)(a) of the Treaty: ..... (max. 50 % or maximum amount determined in the regional map approved for the Member State concerned for the period 2007-2013)

2.2.1.2. regarding eligible investments in *other* regions eligible for regional aid: ..... (max. 40 % or maximum amount determined in the regional map approved for the Member State concerned for the period 2007 to 2013)

2.2.2. *intermediate enterprises in the meaning of Article 28 (3) of Council Regulation No 1698/2005 <sup>(3)</sup>(not SME but with less than 750 employees or less than EUR 200 million turnover):*

2.2.2.1. regarding eligible investments in regions eligible under Article 87(3)(a) of the Treaty: ..... (max. 25 % or maximum amount determined

<sup>(1)</sup> OJ L 302, 1.11.2006, p. 10.

<sup>(2)</sup> Council Regulation (EEC) No 2019/93 (OJ L 184, 27.7.93, p. 1).

<sup>(3)</sup> Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), OJ L 277, 21.10.2005, p. 1

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in the regional map approved for the Member State concerned for the period 2007-2013)

- 2.2.2.2. regarding eligible investments in *other* regions eligible for regional aid: ..... (max. 20 % or maximum amount determined in the regional map approved for the Member State concerned for the period 2007 to 2013)

*If aid rates are higher than the above ceilings, please note that the measure would not be in line with point IV.B.2.(c)(ii) of the Agricultural Guidelines.*

- 2.2.2.3. Do the beneficiaries fulfil all other conditions of Commission Recommendation 2003/361/EC <sup>(1)</sup>?

☐ yes ☐ no

*If no, the measure would not be in line with point IV.B.2.(c)(ii) of the Agricultural Guidelines.*

- 2.2.3. Are there beneficiaries that are larger than the intermediate enterprises mentioned under point 2.2.2. (i.e. large enterprises)?

☐ yes ☐ no

If yes, is the maximum aid intensity equal to or below the maximum amount determined in the regional aid map approved for the Member State concerned for the period 2007 to 2013?

☐ yes ☐ no

*If no, the aid cannot be declared compatible under point IV.B.2.(c) of the Agricultural Guidelines. If yes, please mention the maximum aid intensity in the aforementioned regional aid map. The relevant maximum aid intensity in the corresponding regional aid map is ..... %.*

- 2.3. For investment aid in favour of intermediate companies in regions **not** eligible for regional aid:

- 2.3.1. please specify the maximum aid intensity: ..... (max. 20 %)

*If aid rates are higher than the above ceilings, please note that the measure would not be in line with point IV.B.2.(d) of the Agricultural Guidelines.*

- 2.3.2. Do the beneficiaries fulfil all other conditions of Commission Recommendation 2003/361/EC?

☐ yes ☐ no

*If no, the measure would not be in line with point IV.B.2.(d) of the Agricultural Guidelines.*

3. **Eligibility criteria & expenses**

- 3.1. Does the aid concern the manufacture and marketing of products which imitate or substitute milk and milk products?

☐ yes ☐ no

*If you have answered yes, please note that the measure would not be in line with point IV.B. of the Agricultural Guidelines.*

- 3.2. Regarding *intermediate or large* companies, does the aid concern the purchase of second-hand equipment?

☐ yes ☐ no

*If you have answered yes, please note that the measure would not be in line with point IV.B. of the Agricultural Guidelines.*

- 3.3. For aid for investments in regions **not** eligible for regional aid:

Can you confirm that the eligibles expenses for investments correspond fully to the eligible expenses listed in the Commission guidelines on national regional aid for 2007 to 2013?

☐ yes ☐ no

<sup>(1)</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; (OJ L 124, 20.5.2003, p. 36).

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*If no:*

— *if the beneficiaries are not SME the measure would not be in line with point IV.B.2.(d) of the Agricultural Guidelines.*

— *if the beneficiaries are SME, are the eligible expenses in conformity with Articles 2 and 4 of Commission Regulation (EC) No 70/2001?*

☐ yes ☐ no

*If not, the measure would not be in line with point IV.B.2.(d) of the Agricultural Guidelines*

- 3.4. Could the aid support investments for which a common market organisation, including direct support schemes, financed by the EAGF places restrictions on production or limitations on Community support at the level of individual farmers, holdings or processing plants which would increase production beyond those restrictions or limitations?

☐ yes ☐ no

*If yes, please note that point 47 of the agricultural guidelines does not allow aid for these investments.*

4. **Other information**

- 4.1. Is the notification accompanied by documentation showing that that support is targeted on clearly defined objectives reflecting identified structural and territorial needs and structural disadvantages?

☐ yes ☐ no

*If yes, please provide that documentation hereunder or in an annex to this supplementary information sheet*

.....

*If not, please note that this documentation is requested in conformity with point 46 of the agricultural guidelines.*

- 4.2. Is the notification accompanied by documentation demonstrating that the State aid measure fits into and is coherent with the relevant rural development programme(s) concerned?

☐ yes ☐ no

*If yes, please provide that documentation hereunder or in an annex to this supplementary information sheet*

.....

*If no, please note that this documentation must be provided under point 26 of the Guidelines.*

5. **Individual notifications**

Could the eligible investments exceed EUR 25 million or the aid amount to EUR 12 million?

☐ yes ☐ no

*If yes, will an individual notification be done?*

☐ yes ☐ no

*If you have answered no, please note that the measure would not be in line with point IV.B of the Agricultural Guidelines.*

*PART III.12.C*

**SUPPLEMENTARY INFORMATION SHEET ON AGRI-ENVIRONMENTAL AND ANIMAL WELFARE AID**

*This form must be used for the notification of any State aid measure to support agricultural production methods designed to protect the environment and to maintain the countryside (agri-environment) or to improve animal welfare covered by point IV.C. of the Community Guidelines for State aid in the*

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*agriculture and forestry sector 2007 to 2013* <sup>(1)</sup> (hereinafter called 'the guidelines') and articles 39 and 40 of Council Regulation (EC) No 1698/2005 <sup>(2)</sup>.

- Does the measure concern compensation to farmers who **voluntarily** give agri-environmental commitments (Article 39(2) of Council Regulation (EC) No 1698/2005?

☐ yes ☐ no

If yes, please refer to the part of this Supplementary Information Sheet (SIS) relating to 'aid for agri-environmental commitments'.

- Does the measure concern compensation to farmers who **voluntarily** enter into animal welfare commitments (Article 40(1) of Council Regulation (EC) No 1698/2005?

☐ yes ☐ no

If yes, please refer to the part of this SIS relating to 'aid for animal welfare commitments'.

- Does the aid only concern environmental **investments** (point 62 of the guidelines)?

☐ yes ☐ no

If yes, please refer to SIS relating to 'Investment aids in the agricultural sector'.

- Does the environmental aid pursue other objectives such as **training** and **advisory services** to help agricultural producers (point IV.K of the guidelines)?

☐ yes ☐ no

If yes, please refer to SIS relating to point IV.K of the guidelines.

- Others?

Please provide a complete description of the measure(s) .....

- Is documentation demonstrating that the State aid fits into and is coherent with the relevant Rural Development plan attached to the notification?

☐ yes ☐ no

*If yes, please provide that documentation hereunder or in an annex to this supplementary information sheet*

.....

*If no, please note that this documentation is requested in conformity with point 26 of the agricultural guidelines.*

**Aid for agri-environmental commitments (point IV.C.2 of the guidelines)**

1. **Objective of the measure**

Which one of the following specific objectives does the support measure promote?

- ☐ ways of using agricultural land which are compatible with the protection and improvement of the environment, the landscape and its features, natural resources, the soil and genetic diversity and reducing production costs;
- ☐ an environmentally-favourable extensification of farming and management of low-intensity pasture systems, improve and redeployment of production ;
- ☐ the conservation of high nature-value farmed environments, which are under threat, and increase quality;

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(2)</sup> Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1).



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- ☐ the upkeep of the landscape and historical features on agricultural land;
- ☐ the use of environmental planning in farming practice. If the measure does not pursue any of the above objectives, please indicate which are the objectives aimed at in terms of environmental protection? (Please submit a detailed description)

.....  
.....  
*If the measure in question has already been applied in the past, what have been the results in terms of environmental protection?*  
.....  
.....

2. **Eligibility criteria**

- 2.1. Will the aid be granted to farmers and/or other land managers (Article 39(2) of Regulation (EC) No 1698/2005) who give agri-environmental commitments for a period of between five and seven years?

☐ yes ☐ no

- 2.2. Will a shorter or a longer period be necessary for all or particular types of commitments?

☐ yes ☐ no

*In the affirmative please provide the reasons justifying that period*  
.....  
.....

- 2.3. Please confirm that no aid will be granted to compensate for agri-environmental commitments that do not go beyond the relevant mandatory standards established pursuant to Articles 4 and 5 of, and Annexes III and IV to Regulation (EC) No 1782/2003 <sup>(1)</sup> as well as minimum requirements for fertiliser and plant protection product use and other relevant mandatory requirements established by national legislation and identified in the rural development programme.

☐ yes ☐ no

*If no, please note that Article 39(3) of Regulation (EC) No 1698/2005 does not allow for aid for agri-environmental commitments that do not involve more than the application of these standards and requirements.*

- 2.4. Please describe what the abovementioned standards and requirements are and explain how the agri-environmental commitments involve more than their application.  
.....  
.....

3. **Aid amount**

- 3.1. Please specify the maximum amount of aid to be granted based on the area of the holding to which agri-environmental commitments apply:

- ☐ for specialised perennial crops ..... (maximum payment of 900 EUR/ha)
- ☐ for annual crops ..... (maximum payment of 600 EUR/ha)
- ☐ for other land uses ..... (maximum payment of 450 EUR/ha)
- ☐ local breeds in danger of being lost to farming ..... (maximum payment of 200 EUR/live stock unit)
- ☐ other .....

<sup>(1)</sup> Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L 270, 21.10.2003, p. 1

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*If the maximum amounts mentioned are exceeded please justify the compatibility of the aid with the provisions of Article 39(4) of Regulation (EC) No 1698/2005.*

3.2. Is the support measure granted annually?

☐ yes ☐ no

*If no, please provide the reasons justifying other period*

.....  
.....

3.3. Is the amount of annual support calculated on the basis of:

- income foregone,
- additional costs resulting from the commitment given, and
- the need to provide compensation for transaction costs

☐ yes ☐ no

*Explain the calculation method used in fixing the amount of support and specify the income foregone, additional costs and possible transaction costs: .....*

3.4. Is the reference level for calculating income foregone and additional cost resulting from the commitments given, the standards and requirements as mentioned above under point 2.3?

☐ yes ☐ no

*If no please explain the reference level taken into consideration*

.....  
.....

3.5. Are the payments made per unit of production?

☐ yes ☐ no

*If yes please explain the reasons justifying that method and the initiatives undertaken to ensure that the maximum amounts per year eligible for Community support as set out in the Annex to Regulation (EC) No 1698/2005 are complied with.*

.....  
.....

3.6. Do you intend to give aid for transaction costs for the continuation of agri-environmental commitments already undertaken in the past?

☐ yes ☐ no

3.7. If yes, please demonstrate that such costs still continue to be incurred

.....

3.8. Do you intend to give aid for the costs of non-productive investments linked to the achievements of agri-environmental commitments (non-productive investments being investments which should not lead to a net increase in farm value or profitability)?

☐ yes ☐ no

3.9. If yes, which aid rate will be applied (max. 100 %)?

.....

**AID FOR ANIMAL WELFARE COMMITMENTS (POINT IV.C.2 OF THE GUIDELINES)**

**1. Objective of the measure**

For which of the following areas do the animal welfare commitments provide upgraded standards?

- ☐ water and feed closer to their natural needs;
- ☐ housing conditions such as space allowances, bedding, natural lights;

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- ☐ outdoor access;
- ☐ absence of systematic mutilations, isolation or permanent tethering,
- ☐ prevention of pathologies mainly determined by farming practices and/or keeping conditions.

(Please submit a detailed description)

.....  
.....

*If the measure in question has already been applied in the past, what have been the results in terms of animal welfare?*

.....

2. **Eligibility criteria**

- 2.1. Will the aid be exclusively granted to farmers who give animal welfare commitments for a period of between five and seven years?

☐ yes ☐ no

- 2.2. Will a shorter or a longer period be necessary for all or particular types of commitments?

☐ yes ☐ no

*In the affirmative please provide the reasons justifying that period*

.....  
.....

- 2.3. Please confirm that no aid will be granted to compensate for animal welfare commitments that do not go beyond the relevant mandatory standards established pursuant to Articles 4 and 5 of, and Annexes III and IV to, Regulation (EC) No 1782/2003<sup>(1)</sup> and other relevant mandatory requirements established by national legislation and identified in the rural development programme.

☐ yes ☐ no

*If no, please note that Article 40(2) of Regulation 1698/2005 does not allow for aid for animal welfare commitments that do not involve more than the application of these standards and requirements*

- 2.4. Please describe what the abovementioned standards and requirements are and explain how the animal welfare commitments involve more than their application.

.....  
.....

3. **Aid amount**

- 3.1. Please specify the maximum amount of animal welfare aid to be granted:

..... (maximum payment of EUR 500/live stock unit)

*If the amount exceeds EUR 500/live stock unit, please justify its compatibility with the provisions of Article 40(3) of Regulation (EC) No 1698/2005*

- 3.2. Is the support measure granted annually?

☐ yes ☐ no

*If no, please provide the reasons justifying other period*

.....  
.....

- 3.3. Is the amount of annual support calculated on the basis of:

- income foregone,
- additional costs resulting from the commitment given, and

<sup>(1)</sup> OJ L 270, 21.10.2003, p. 1.

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— the need to provide compensation for transaction costs ?

☐ yes ☐ no

*Explain the calculation method used in fixing the amount of support and specify the income foregone, additional costs, possible transaction costs and possible costs of any non remunerative capital works:*

.....  
.....

- 3.4. Is the reference level for calculating income foregone and additional cost resulting from the commitments given, the standards and requirements as mentioned above under point 2.3?

☐ yes ☐ no

*If no please explain the reference level taken into consideration*

.....  
.....

- 3.5. Are the payments made per livestock unit?

☐ yes ☐ no

*If no, please explain the reasons justifying the method chosen as well as the initiatives undertaken to ensure that the maximum amounts per year eligible for Community support as set out in the Annex to Regulation (EC) No 1698/2005 are complied with.*

- 3.6. Do you intend to give aid for transaction costs for the continuation of animal welfare commitments already undertaken in the past?

☐ yes ☐ no

- 3.7. If yes, please demonstrate that such costs still continue to be incurred

.....

- 3.8. Do you intend to give aid for the costs of non-productive investments linked to the achievements of agri-environmental commitments (non-productive investments being investments which should not lead to a net increase in farm value or profitability)?

☐ yes ☐ no

- 3.9. If yes, which aid rate will be applied (max. 100 %)?

...

*PART III 12 Cbis*

**SUPPLEMENTARY INFORMATION SHEET ON AID CONCERNING  
NATURA 2000 PAYMENTS AND PAYMENTS LINKED TO  
DIRECTIVE 2000/60/EC**

*This form must be used by Member State to notify aids under Natura 2000 payments and payments linked to Directive 2000/60/EC <sup>(1)</sup>, as dealt with in Part IV.C.3 of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(2)</sup>.*

**1. objective of the measure**

- 1.1. Is the measure aimed to compensate farmers for costs incurred and income foregone resulting from disadvantages in the areas concerned related to the implementation of Directives 79/409/EEC <sup>(3)</sup>, 92/43/EEC <sup>(4)</sup> and 2000/60/EC?

☐ Yes ☐ No

<sup>(1)</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).

<sup>(2)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(3)</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.4.1979, p. 1).

<sup>(4)</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7).

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1.1.1. *If no, please note that Part IV.C.3 of the Agricultural Guidelines does not allow for aid to compensate for costs other than those related to the disadvantages related to the implementation of Directives 79/409/EEC, 92/43/EEC and 2000/60/EC.*

2. **Eligibility criteria**

2.1. Are costs incurred and income foregone resulting from disadvantages in the areas concerned related to the implementation of Directives 79/409/EEC, 92/43/EEC and 2000/60/EC?

☐ Yes ☐ No

2.1.1. *If yes please provide all the details concerning the relevant provisions of the Directive(s) in question*

.....  
.....

2.1.2. *If no, please note that Part IV.C.3 of the Agricultural Guidelines does not allow for aid to compensate for other costs than those resulting from disadvantages related to the implementation of Directives 79/409/EEC, 92/43/EEC and 2000/60/EC.*

2.2. Are the planned compensation payments necessary to solve specific problems arising from the Directive(s)?

☐ Yes ☐ No

2.2.1. *If yes please explain why this measure is necessary*

.....  
.....

2.2.2. *If no, please note that according to Part IV.C.3 of the Agricultural Guidelines only payments that are necessary to solve specific problems arising from these Directives can be authorised*

2.3. Is the support granted only for obligations going beyond cross compliance obligations?

☐ Yes ☐ No

2.3.1. *If no, please justify its compatibility with the provisions of Part IV.C.3 of the Agricultural Guidelines*

.....  
.....

2.4. Is the support granted for obligations going beyond conditions set out by Article 5 of Council Regulation (EC) No 1782/2003 <sup>(1)</sup>?

☐ Yes ☐ No

2.4.1. *If no, please justify its compatibility with the provisions of Part IV.C.3 of the Agricultural Guidelines*

.....  
.....

2.5. Is the aid granted in breach of the polluter pays principle?

☐ Yes ☐ No

2.5.1. *If yes, please provide all elements justifying its compatibility with the provisions of Part IV.C.3 of the Agricultural Guidelines and that it is exceptional, temporary and degressive*

.....  
.....

<sup>(1)</sup> Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ L 270, 21.10.2003, p. 1).

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3. **Aid amount**

3.1. Please specify the maximum amount of aid, based on the utilised agricultural area (UAA):

- ☐ ..... (initial maximum Natura 2000 payment for a period not exceeding five years of 500 EUR/hectare of UAA)
- ☐ ..... (normal maximum Natura 2000 payment of 200 EUR/hectare of UAA)
- ☐ ..... (maximum amount of support linked to Directive 2000/60/EC is fixed in accordance with the procedure referred to in Article 90 (2) of Regulation (EC) No 1698/2005)

3.1.1 *With regard to payments linked to Directive 2000/60/EC please provide additional information.*

.....

3.1.2. *If you intend to grant a higher amount of aid, please justify its compatibility with the provisions of Part IV.C.3 of the Agricultural Guidelines and Article 38 of Regulation (EC) No 1698/2005 <sup>(1)</sup>.*

.....

3.2. Please explain the measures taken to ensure that payments are fixed at a level which avoids overcompensation

.....

4. **Other Information**

Is documentation demonstrating that the State aid fits into and is coherent with the relevant Rural Development plan attached to the notification?

☐ yes ☐ no

*If yes, please provide that documentation hereunder or in an annex to this supplementary information sheet*

.....

*If no, please note that this documentation is requested in conformity with point 26 of the agricultural guidelines.*

*PART III.12.D*

**SUPPLEMENTARY INFORMATION SHEET ON AID TO COMPENSATE FOR HANDICAPS IN CERTAIN AREAS**

*This form must be used for the notification of aid aiming to compensate for natural handicaps in certain areas, which is dealt with in point IV.D. of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(2)</sup>.*

1. **Questions relevant for all notifications of aid to compensate for handicaps in certain areas**

1. Describe the handicap in question:

.....

.....

.....

.....

.....

<sup>(1)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD); OJ L 277, 21.10.2005, p. 1.

<sup>(2)</sup> OJ C 319, 27.12.2006, p. 1.

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2. Provide proof that the amount of compensation to be paid avoids any overcompensation to farmers of the effect of the handicaps:

3. If there are areas of handicaps where the average impact of handicaps per hectare of comparable farms differs, demonstrate that the level of compensatory payments is proportionate to the economic impact of the handicaps in the different areas:

4. Is it within human control to reverse the economic impact of the permanent handicap?

☐ yes ☐ no

If yes, please note that only the economic impact of permanent handicaps that lie outside of human control may be taken into account for calculating the amount of compensatory payments. Structural disadvantages open to improvement through modernisation of farms or factors like taxes, subsidies or the implementation of the CAP reform may not be taken into account.

If no, explain why it is outside human control to reverse the economic impact of the permanent handicap:

Could you specify the size of the farms that will benefit from these payments?

5. Is the amount of compensation established by comparing the average income per hectare of farms in areas with handicaps with the income of same-sized farms producing the same products in areas without handicaps situated in the same Member State, or when a whole Member State is considered as consisting of areas with handicaps, with the income of same-sized farms in similar areas in other Member States in which the production conditions can be meaningfully compared to those in the first Member State? The income to be taken into account in this respect shall be direct income from farming and notably leave aside taxes paid or subsidies received.

☐ yes ☐ no

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Describe how the comparison was made:

.....  
.....  
.....  
.....  
.....  
.....

6. Is the aid measure combined with support under Articles 13, 14 and 15 of the Council Regulation (EC) No 1257/1999 <sup>(1)</sup>?

☐ yes ☐ no

7. Can you confirm that the total support granted to the farmer will not exceed the amount determined in accordance with Article 15 of Regulation (EC) No 1257/1999?

☐ yes ☐ no

Specify the amount .....

*If no, please note that, according to point 72 of the Agricultural Guidelines, the maximum aid that can be granted in the form of compensatory allowance cannot exceed the above amount.*

8. Does the measure provide that the following eligibility criteria must be fulfilled?

☐ Farmers are required to farm a minimum area of land (please specify the minimum area)

☐ .....  
Farmers must undertake to pursue their farming activity in a less-favoured area for at least five years from the first payment of a compensatory allowance;

☐ Farmers must apply the relevant mandatory standards established pursuant to Articles 4 and 5 of, and Annexes III and IV to, Regulation (EC) No 1782/2003 <sup>(2)</sup> as well as minimum requirements for fertiliser and plant protection product use and other mandatory requirements established by national legislation and identified in the rural development programme

☐ yes ☐ no

9. Does the measure provide that, in the event of obstruction on the part of the owner or holder of the animals when inspections are being carried out and the necessary samples are being taken in application of national residue-monitoring plans, or when the investigations and checks provided for under Directive 96/23/EC are being carried out, the penalties provided for under question 4 shall apply?

☐ yes ☐ no

10. In case of aid schemes still in force at the date of the entry into force of Articles 37 and 88(3) of Council Regulation (EC) No 1698/2005 <sup>(3)</sup>, will the aid scheme be amended to comply with the provisions of those articles as from that date?

☐ yes ☐ no

If no, please note that from the entry into force of Articles 37 and 88 (3) of the abovementioned regulation new rules will be applied to measures

<sup>(1)</sup> Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations; OJ L 160, 26.6.1999, p. 80.

<sup>(2)</sup> Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support scheme for farmers (OJ L 270, 21.10.2003, p. 1).

<sup>(3)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD); (OJ L 277, 21.10.2005, p. 1).



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aiming to compensate for natural handicaps in certain areas and that aid measures that do not fulfil all the criteria of these Articles and any implementing rules adopted by the Council or the Commission will have to be put to an end.

2. **Other Information**

Is documentation demonstrating that the State aid fits into and is coherent with the relevant Rural Development plan attached to the notification?

☐ yes ☐ no

*If yes, please provide that documentation hereunder or in an annex to this supplementary information sheet*

.....

*If no, please note that this documentation is requested in conformity with point 26 of the agricultural guidelines*

*PART III.12.E*

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR MEETING STANDARDS**

*This information sheet relates to investments in agricultural holdings discussed in point IV.E of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(1)</sup>.*

1. Does the planned aid apply only to primary producers (farmers)?

☐ yes ☐ no

2. Are the new standards based on Community standards?

☐ yes ☐ no

3. If no, will the aid be limited to expenses resulting from standards likely to create a genuine competition handicap for the farmers involved?

☐ yes ☐ no

4. Please demonstrate this handicap on the basis of mean net profit margins for average agricultural holdings in the (sub-)sector involved:

.....

5. Is the aid farmers are entitled to over a period of five years for costs or loss of income incurred as a result of applying one or more standards to be provided on a diminishing scale and limited to a total of EUR 10 000?

☐ yes ☐ no

6. Please describe the diminishing scale of the aid:

.....

7. If the total of EUR 10 000 is exceeded: is the aid limited to 80 % of costs and loss of income incurred by farmers, and to EUR 12 000 per agricultural holding, and is account taken of any Community aid provided?

☐ yes ☐ no

8. Does the aid pertain to standards which can be shown to be the direct cause of:

— an increase in the operating costs of at least 5 % for the product or products affected by the standard?

☐ yes ☐ no

— a loss of income equal to at least 10 % of net profits derived from the product or products affected by the standard?

☐ yes ☐ no

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1

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9. Please demonstrate the abovementioned parameters (*please note that they must be calculated for an average agricultural holding in the sector and in the Member State affected by the standard*):

10. Does the aid apply only to standards resulting in an increase in operating costs or loss of income equal to at least 25 % of all agricultural holdings of the (sub-) sector in the Member State concerned?

☐ yes ☐ no

11. Is the notification accompanied by documentation demonstrating how the State aid measure is consistent with the relevant rural development programme(s) concerned?

☐ yes ☐ no

*If yes, please provide this documentation below or in an annex to this supplementary information sheet*

*If no, please note that this documentation must be provided under point 26 of the Guidelines*

PART III.12.F

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR THE  
SETTING UP OF YOUNG FARMERS**

*This notification form applies to aid granted for the setting up of young farmers, as dealt with in chapter IV.F of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(1)</sup>.*

**1. Eligibility Criteria**

*Please note that State aid for the setting up of young farmers may only be granted if it fulfils the same conditions set out in the Rural Development Regulation <sup>(2)</sup> for co-financed aid, and in particular the eligibility criteria of Article 22 thereof.*

- 1.1. Is the support measure granted only to primary production ?

☐ yes ☐ no

*If no, please note that according to point 82 of the Guidelines, the support may not be granted for activities other than primary production.*

- 1.2. Are the following conditions fulfilled?

- the farmer is under 40 years of age ;
- the farmer possesses adequate occupational skills and competence ;
- the farmer is setting up on an agricultural holding as head of the holding for the first time ;
- the farmer submitted a business plan for the development of his/her farming activity;

☐ yes ☐ no

*If you answered no to any of these questions, please note that the measure would not be in line with the requirements of Article 22 of the Rural Development Regulation and could not be authorised under the Guidelines.*

- 1.3. Does the measure provide that the above eligibility requirements must be met at the time the individual decision to grant support is taken?

☐ yes ☐ no

- 1.4. Does the measure comply with existing Community or national standards?

☐ yes ☐ no

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(2)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD); (OJ L 277, 21.10.2005, p. 1).

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1.4.1. If not, is the aim to comply with existing Community or national standards identified in the submitted business plan?

☐ yes ☐ no

1.4.2. Does the period of grace within which the standard needs to be met exceed 36 months from the date of setting up?

☐ yes ☐ no

2. **Maximum allowable aid**

2.1. Is the setting up support granted in the form of

☐ a single premium? (max. EUR 40 000)

(please specify the amount)

.....

and/or

☐ an interest rate subsidy? (max. capitalised value of EUR 40 000)

If yes, please describe the conditions of the loan — interest rate, duration, period of grace, etc.)

.....

2.2. Can you confirm that the aid combined with the support granted under the Rural Development Regulation will not exceed EUR 55 000 and the maximum amounts laid down for either form of aid (EUR 40 000 for single premium; EUR 40 000 for subsidised loan) will be respected?

☐ yes ☐ no

3. **Other Information**

Is documentation demonstrating that the State aid fits into and is coherent with the relevant Rural Development plan attached to the notification?

☐ yes ☐ no

*If yes, please provide that documentation hereunder or in an annex to this supplementary information sheet*

.....

*If no, please note that this documentation is requested in conformity with point 26 of the agricultural guidelines.*

*PART III.12.G*

**SUPPLEMENTARY INFORMATION SHEET FOR AID FOR EARLY RETIREMENT OR FOR THE CESSATION OF FARMING ACTIVITIES**

*This form must be used for the notification of any State aid schemes which are designed to encourage older farmers to take early retirement as described by chapter IV.G of the Community Guidelines for State aid in the agricultural and forestry sector 2007 to 2013 <sup>(1)</sup>.*

1. **Types of aid**

1.1. Is the support measure granted only to primary production?

☐ yes ☐ no

*If no, please note that according to point 85 of the Guidelines, the support may not be granted for other activities than primary production.*

1.2. Is the early retirement support granted:

☐ to farmers who decide to stop their agricultural activity for the purpose of transferring the holdings to other farmers?

☐ to farm workers who decide to stop all farming work definitively upon the transfer of the holding?

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

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Please describe the envisaged measures:  
.....

2. **Eligibility criteria**

- 2.1. Will the aid be exclusively granted when the *transferor* of the farm,
- stops all commercial farming activity definitively,
  - is not less than 55 years old but not yet of normal retirement age at the time of transfer or not more than 10 years younger than the normal retirement age in the Member State concerned at the time of transfer and
  - has practised farming for the 10 years preceding transfer?
- ☐ yes ☐ no

*If no please note that according to point 87 of the Guidelines combined with article 23 of Council Regulation No 1698/2005 <sup>(1)</sup>, no aid can be authorised if the transferor does not fulfil all those conditions.*

- 2.2. Will the aid be exclusively granted when the *transferee* of the farm:
- succeeds the transferor by setting up as a young farmer as provided for in Article 22 of Council Regulation No 1698/2005, is less than 40 years of age and is setting up for the first time on an agricultural holding as head of the holding, possesses adequate occupational skills and competence and submits a business plan for the development of his farming activities, or
  - is a farmer of less than 50 years old or a private law body and takes over the agricultural hold released by the transferor to increase the size of the agricultural holding?
- ☐ yes ☐ no

*If no, please note that according to point 87 of the Guidelines combined with Article 23 of Council Regulation (EC) No 1698/2005 no aid can be authorised if the transferee does not fulfil all those conditions.*

- 2.3. When the aid planned for early retirement support includes measures to provide an income for *farm workers*, please confirm that no aid will be granted if the worker does not fulfil all the following conditions:
- stop all farm work definitively upon the transfer of the holding,
  - be not less than 55 years old but not yet of normal retirement age or more than 10 years younger than the normal retirement age in the Member State concerned,
  - have devoted at least half of his working time as a family helper or farm worker to farm work during the preceding five years,
  - have worked on the transferor's agricultural holding for at least the equivalent of two years full-time during the four-year period preceding the early retirement of the transferor, and
  - belong to a social security scheme.
- ☐ yes ☐ no

*Please note that according to point 87 of the Guidelines and Article 23 of Council Regulation (EC) No 1698/2005, no aid can be authorised to provide an income for farm workers if they do not fulfil all those conditions.*

3. **Aid amount**

- 3.1. Is the aid measure combined with support under the Rural Development Regulation?
- ☐ yes ☐ no
- 3.1.1. If yes, please provide a brief description of the modalities and amount of such co-financed support
- .....
- .....

<sup>(1)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1).

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- 3.2. Please specify what is the maximum amount of aid to be granted per transferor:

☐ ..... per transferor and year (maximum annual amount of EUR 18 000/transferor and maximum total amount of EUR 180 000/transferor)

*If the maximum amounts are not respected please justify its compatibility with the provisions of point 87 of the Guidelines. Please note that the Guidelines allow for support going above the maximum amounts set out in the Regulation provided that the Member State demonstrates that such payment is not passed on to active farmers.*

- 3.3. Please specify what is the maximum amount of aid to be granted per worker:

☐ ..... per worker and year (maximum annual amount of EUR 4 000/worker and maximum total amount of EUR 40 000/worker)

*If the maximum amounts are not respected please justify its compatibility with the provisions of point 87 of the Guidelines. Please note that the Guidelines allow for support going above the maximum amounts set out in the Regulation provided that the Member State demonstrates that such payment is not passed on to active farmers.*

- 3.4. Does the transferor receive a normal retirement pension paid by the Member State?

☐ yes ☐ no

- 3.4.1. If yes, is the planned early retirement support granted as a supplement taking into account the amount of the national retirement pension?

☐ yes ☐ no

*If no, please note that point 87 of the Guidelines combined with Article 23 of Council Regulation (EC) No 1698/2005 requires that the amount paid as a normal retirement pension is taken into account in the calculation of the maximum amounts to be granted under the early retirement schemes.*

4. **Duration**

- 4.1. Can it be assured that duration of planned early retirement support shall not exceed a total period of 15 years for the transferor and for the farm worker and that, at the same time, it shall not go beyond the 70th birthday of a transferor and not go beyond the normal retirement age of a worker?

☐ yes ☐ no

*If no, please note that point 87 of the Guidelines combined with Article 23 of Council Regulation (EC) No 1698/2005 does not allow for aid if all those requirements are not assured in the planned scheme.*

PART III 12.III.H

**SUPPLEMENTARY INFORMATION SHEET ON AID TO PRODUCER GROUPS**

*This form must be used for the notification of any State aid measures meant to provide aid to producer groups as described by chapter IV.H. of the Community Guidelines for State aid in the agricultural and forestry sector 2007 to 2013 <sup>(1)</sup>*

1. **Type of aid**

- 1.1. Does the aid concern start-up aid to newly established producer groups?

☐ yes ☐ no

- 1.2. Does the aid concern start-up aid to newly established producer associations (i.e. a producer association consists of recognised producer groups and pursues the same objectives on a larger scale)?

☐ yes ☐ no

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

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- 1.3. Is the aid granted towards eligible expenses limited to and resulting from a year-on-year increase in turnover of the beneficiary by at least 30 % due to the accession of new members and/or the coverage of new products?

☐ yes ☐ no

- 1.3.1. If yes, how much is the increase in turnover of the beneficiary?

- 1.3.2. Is the increase in turnover of the beneficiary due to

☐ the accession of new members  
☐ the coverage of new products  
☐ both

- 1.4. Is aid granted to cover the start-up costs of associations of producers, which are responsible for the supervision of the use of geographical indications and designations of origin or quality marks in conformity with Community law?

☐ yes ☐ no

- 1.5. Is the aid granted to other producer groups or associations, which undertake tasks at the level of agricultural production, such as mutual support and farm relief and farm management services, in the members' holdings without being involved in the joint adaptation of supply to the market?

☐ yes ☐ no

*If yes, please note that aid to these groups or associations is not covered by chapter IV.H. of the Guidelines. Please refer to the relevant legal basis.*

- 1.6. Is aid granted to producer groups or associations to cover expenses, which are not linked to setting-up costs, such as investments or promotion activities?

☐ yes ☐ no

*If yes, the aid will be assessed in accordance with the specific rules governing such aids. Please refer to the relevant sections of the notification form.*

- 1.7. In case of an aid scheme, can you confirm that it will be adjusted to take account any change in the regulations governing the common organisations of the market?

☐ yes ☐ no

- 1.8. Is aid granted directly to producers to offset their contributions to the cost of running the groups or associations during the first five years following the formation of the group or association?

☐ yes ☐ no

- 1.8.1. If yes, will the overall amount granted directly to producers respect the limit for maximum support (EUR 400 000)?

☐ yes ☐ no

**2. Beneficiary**

- 2.1. Is the start-up aid granted exclusively to small and medium-sized enterprises?

☐ yes ☐ no

- 2.2. Is start-up aid granted to producer groups or producer associations which are entitled to assistance under the legislation of the Member State concerned?

☐ yes ☐ no

*If the answer is no, please refer to Article 9(2) of Commission Regulation (EC) No ...<sup>(1)</sup>.*

<sup>(1)</sup> Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) 70/2001 (OJ L 358, 16.12.2006, p. 3).

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2.3. Is the aid granted only if all the following rules are respected:

- The obligation on members to market production in accordance with the rules on supply and placing on the market, drawn up by the group or association (the rules may permit a proportion of the production to be marketed directly by the producer);

☐ yes ☐ no

- the obligation for producers joining the group or the association to remain members for at least three years and give at least 12 months notice of withdrawal;

☐ yes ☐ no

- common rules on production, in particular relating to product quality, or use of organic practices, common rules for placing goods on the market and rules on product information, with particular regard to harvesting and availability?

☐ yes ☐ no

*If any of the answers to Section 2.3 above is no, please refer to Article 9(2) of Commission Regulation (EC) No 1857/2006 for the list of eligibility criteria for support to producer groups or associations.*

2.4. Does the producer group or association comply fully with all relevant provisions of competition law, in particular Articles 81 and 82 of the Treaty?

☐ yes ☐ no

2.5. Does the aid measure/scheme clearly exclude production organisations such as companies or co-operatives the objective of which is the management of one or more agricultural holdings and which are therefore in effect single producers?

☐ yes ☐ no

*If no, please note that, according to Article 9(5) of Commission Regulation (EC) No 1857/2006, producers should remain responsible for managing their holdings.*

2.6. Does the aid measure/scheme clearly exclude any aid to producer groups or associations the objectives of which are incompatible with a Council regulation setting up a common market organisation?

☐ yes ☐ no

*If no, please note that, under Article 9(8) of Commission Regulation (EC) No 1857/2006, under no circumstances can the Commission approve an aid which is incompatible with the provisions governing a common organisation of the market or which would interfere with the proper functioning of the common organisation*

3. **Aid intensity and eligible costs**

3.1. Can you confirm that the total amount of aid granted to a producer group or association will not exceed EUR 400 000?

☐ yes ☐ no

3.2. Does the aid measure/scheme clearly exclude that aid is paid in respect of costs incurred after the fifth year?

☐ yes ☐ no

3.3. Does the aid measure/scheme clearly exclude that aid is paid following the seventh year after recognition of the producer organisation?

☐ yes ☐ no

*If the answer to any of the questions of point 3.2 and 3.3 above is no, please note that Article 9(4) of Commission Regulation (EC) No 1857/2006 clearly excludes aid for costs incurred after the fifth year and aid paid after the seventh year after recognition of the producer organisation.*

3.4. Do the eligible expenses, both in case of aid granted to producers groups or associations and in case of aid granted directly to producers, include only:

- the rental of suitable premises, or

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- the purchase of suitable premises (the eligible expenses are limited to rental costs at market rates),
- the acquisition of office equipment, including computer hardware and software, administrative staff costs, overheads and legal and administrative fees?

☐ yes ☐ no

*If the answer is no, please refer to the list of eligible expenses set in Article 9(3) of Commission Regulation (EC) No 1857/2006.*

*PART III.12.I*

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR LAND RE-PARCELLING**

*This form must be used for the notification of any State aid schemes designed to cover the legal and administrative costs, including survey costs, of re-parcelling as described by Chapter IV.I of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(1)</sup>.*

1. Is the aid measure part of a general programme of land re-parcelling operations undertaken in accordance with the procedures laid down by the legislation of the Member State concerned?

☐ yes ☐ no

2. Do the eligible expenses include exclusively the legal and administrative costs, including survey costs, of re-parcelling ?

☐ yes ☐ no

*If the eligible expenses also cover other items, please note that Article 13 of Regulation (EC) No 1857/2006 authorises only the eligible expenses indicated.*

3. What is the planned rate of aid (max. 100 %)? ...

*PART III.12.J*

**SUPPLEMENTARY INFORMATION SHEET ON AID TO ENCOURAGE THE PRODUCTION AND MARKETING OF QUALITY AGRICULTURAL PRODUCTS**

*This form must be used for the notification of any State aid measures which are designed to encourage the production and marketing of quality agricultural products as described by chapter IV.J of the Community Guidelines for State aid in the agricultural and forestry sector 2007 to 2013 <sup>(2)</sup>.*

(A) PRIMARY PRODUCERS (FARMERS)

1. **Type of products**

- 1.1. Does the aid only refer to quality products fulfilling the criteria to be defined pursuant to Article 32 of Regulation (EC) No 1698/2005 <sup>(3)</sup>?

☐ yes ☐ no

*If the aid does not concern quality products please note that, under Chapter IV.J of the Agricultural Guidelines, aid is limited to quality agricultural products.*

2. **TYPE OF AIDS**

- 2.1. Which of the following types of aid can be financed by the aid scheme/ individual measure?

☐ market research activities, product conception and design;

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(2)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(3)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1).



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- ☐ aids granted for the preparation of applications for recognition of denominations of origin or certificates of specific character in accordance with the relevant Community regulations;
- ☐ consultancy and similar support for the introduction of quality assurance schemes such as the ISO 9000 or 14000 series, systems based on hazard analysis and critical control points (HACCP), traceability systems, systems to assure respect of authenticity and marketing norms or environmental audit systems;
- ☐ the costs of training personnel for the introduction of quality assurance schemes such as ISO 9000 or 14000 series, systems based on hazard analysis and critical control points (HACCP), traceability systems, systems to assure respect of authenticity and marketing norms or environmental audit systems;
- ☐ the costs of the charges levied by recognised certifying bodies for the initial certification of quality assurance and similar systems;
- ☐ the costs of compulsory control measures undertaken pursuant to Community or national legislation by or on behalf of the competent authorities, unless Community legislation requires enterprises to bear such costs;
- ☐ the costs for participation in measures referred to in article 14(2)(f) of Regulation No 1857/2006 <sup>(1)</sup>, provided that:
  - (a) only agricultural products for human consumption are covered;
  - (b) it concerns a Community food quality scheme or a food quality scheme recognised by a Member State complying with the precise criteria established according to Article 32(1)(b) of Regulation 1698/2005;
  - (c) the annual incentive payment whose level is determined according to the level of the fixed costs arising from the participation in such schemes for a maximum duration of five years.
  - (d) the support is limited to EUR 3 000 per year and holding.

*Note: Schemes whose sole purpose is to provide a higher level of control of respect of obligatory standards under Community or national law shall not be eligible for support.*

- 2.2. Does the aid measure include investments, which are necessary to upgrade production facilities?

☐ yes ☐ no

*If yes, please refer to chapter IV.A of the Agricultural Guidelines.*

- 2.3. Are the controls undertaken by or on behalf of third parties, such as:

- ☐ the competent regulatory authorities or bodies acting on their behalf;
- ☐ independent organisms responsible for the control and supervision of the use of denominations of origin, organic labels, or quality labels;
- ☐ others (please specify, indicating how the independence of the control body is assured)

.....  
.....

- 2.4. Does Community legislation provide that the cost of control is to be met by producers, without specifying the actual level of charges?

☐ yes ☐ no

3. **Beneficiaries**

- 3.1. Who are the beneficiaries of the aid?

- ☐ farmers;
- ☐ producer groups

<sup>(1)</sup> OJ L 358, 16.12.2006, p. 3.

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☐ other (please specify)

.....

3.2. Are large companies excluded as beneficiaries?

☐ yes ☐ no

3.3. With the exception of support for the participation in measures referred to in Article 14(2)(f) of Regulation No 1857/2006, are direct payments of money to producers excluded?

☐ yes ☐ no

3.3.1. Is the aid available to all the farmers eligible in the area concerned based on objectively defined conditions?

☐ yes ☐ no

3.3.2. Does the aid measure exclude compulsory membership of the producers group/organisation or intermediate entity managing the aid in order to benefit from aid?

☐ yes ☐ no

3.3.3. Is the contribution towards the administrative costs of the group or organisation concerned limited to the costs of providing the service?

☐ yes ☐ no

4. **Aid Intensity**

4.1. Please state the maximum rate of public support of the following measures:

(a) .....; market research activities, product conception and design (max. 100 %);

(b) .....; aids granted for the preparation of applications for recognition of denominations of origin or certificates of specific character in accordance with the relevant Community regulations (max. 100 %);

(c) .....; consultancy and similar support for the introduction of quality assurance schemes such as the ISO 9000 or 14000 series, systems based on hazard analysis and critical control points (HACCP), traceability systems; systems to assure respect of authenticity and marketing norms or environmental audit systems (max. 100 %);

(d) .....; the costs of training personnel for the introduction of quality assurance schemes such as ISO 9000 or 14000 series, systems based on hazard analysis and critical control points (HACCP), traceability systems, systems to assure respect of authenticity and marketing norms or environmental audit systems (max. 100 %);

(e) .....; the cost of the charges levied by recognised certifying bodies for the initial certification of quality assurance and similar systems (max. 100 %);

(f) .....; the costs of compulsory control measures undertaken pursuant to Community or national legislation by or on behalf of the competent authorities, unless Community legislation requires enterprises to bear such costs;

(g) .....; the costs for participation in measures referred to in Article 14(2)(f) of Regulation No 1857/2006.

(B) **COMPANIES ACTIVE IN THE PROCESSING AND MARKETING OF AGRICULTURAL PRODUCTS**

1. **Type of products**

1.1. Does the aid only refer to quality products fulfilling the criteria to be defined pursuant to Article 32 of Regulation (EC) No 1698/2005?

☐ yes ☐ no

*If the aid does not concern quality products please note that, under Chapter IV.J of the Agricultural Guidelines, aid is limited to quality agricultural products.*

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**2. TYPE OF AIDS AND ELIGIBLE COSTS**

**2.1. Are eligible costs limited to:**

- ☐ costs for services provided by outside consultants and other services providers; in particular:
- ☐ market research activities
  - ☐ product conception and design
  - ☐ applications for recognition of certificates of specific character in accordance with the relevant Community regulations
  - ☐ the introduction of quality assurance schemes such as the ISO 9000 or 14000 series, systems based on hazard analysis and critical control points (HACCP), traceability systems, systems to assure respect of authenticity and marketing norms or environmental audit systems
  - ☐ other (please specify)

.....  
.....  
*Please note that such services should not be a continuous or periodic activity nor relate to the enterprise's usual operating expenditure, such as routine tax consultancy services, regular legal service or advertising.*

**2.2. Please indicate the maximum aid intensity expressed in gross terms:**

.....  
If the aid intensity exceeds 50 % gross please indicate in detail why this aid intensity should be necessary:  
.....

**2.3. Please indicate the maximum ceiling for cumulated aid:**

.....  
.....

**3. Beneficiaries**

**3.1. Who are the beneficiaries of the aid?**

- ☐ companies active in the processing and marketing of agricultural products
- ☐ producer groups active in the processing and marketing of agricultural products
- ☐ other (please specify)
- .....

**3.2. Are large companies excluded as beneficiaries?**

☐ yes ☐ no

**4. Necessity of the aid**

**4.1 Does the aid foresee that any application for aid must be submitted before work on the project is started?**

☐ yes ☐ no

**4.2. If not has the Member State adopted legal provisions establishing a legal right to aid according to objective criteria, and without further exercise of discretion by the Member States?**

☐ yes ☐ no

*PART III.12.K*

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR THE  
PROVISION OF TECHNICAL SUPPORT IN THE AGRICULTURE  
SECTOR**

*This form must be used for the notification of any State aid measure whose aim is the provision of technical support in the agricultural sector as described by*

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*chapter IV.K of the Community Guidelines for State aid in the agricultural and forestry sector 2007 to 2013 <sup>(1)</sup>*

1. TYPE OF AIDS

A. AID TO PRIMARY PRODUCERS

1.1. Which of the following types of aid can be financed by the aid scheme/ individual measure:

- ☐ education and training of farmers and farm workers;
- ☐ provision of farm replacement services;
- ☐ consultancy services provided by third parties;
- ☐ organisation and participation in forums to share knowledge between businesses, in competitions, exhibitions and fairs;
- ☐ vulgarisation of scientific knowledge,

For this aid, can you confirm that individual companies, brands or — except for products covered by Council Regulation (EC) No 510/2006 <sup>(2)</sup> and by Articles 54 to 58 of Council Regulation (EC) No 1493/99 of 17 May 1999 on the common market in wine <sup>(3)</sup>, provided that the references correspond exactly to those references which have been registered by the Community — origin are not named?

☐ yes ☐ no

- ☐ factual information on quality systems open to products from other countries, on generic products and on the nutritional benefits of generic products and suggested uses for them;

For this aid, can you confirm that individual companies, brands or — except for products covered by Council Regulation (EC) No 510/2006 <sup>(2)</sup> and by Articles 54 to 58 of Council Regulation (EC) No 1493/99 of 17 May 1999 on the common market in wine, provided that the references correspond exactly to those references which have been registered by the Community — origin are not named?

☐ yes ☐ no

- ☐ publications such as catalogues or websites presenting factual information about producers from a given region or producers of a given product.

For this aid, can you confirm that the information and presentation is neutral and that all producers concerned have equal opportunities to be represented in the publication?

☐ yes ☐ no

1.2. Please describe the envisaged measures:

.....  
.....

1.3. Will the aid for the abovementioned measures be granted in favour of large companies?

☐ yes ☐ no

*If yes, please note that according to point 106 of the Guidelines, the Commission will not authorise State aid for abovementioned measures in favour of large companies.*

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1

<sup>(2)</sup> Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ L 93, 31.3.2006 p. 12).

<sup>(3)</sup> OJ L 179, 14.7.1999, p. 1, Regulation as last amended by Regulation (EC) No 2165/2005, OJ L 345, 28.12.2005, p. 1.

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B. AID TO COMPANIES ACTIVE IN THE PROCESSING AND MARKETING OF AGRICULTURAL PRODUCTS.

1.4. Which of the following types of aid can be financed by the aid scheme/ individual measure:

- ☐ services provided by outside consultants not being continuous or periodic activity and not related to the enterprise's usual operating expenditure;
- ☐ first participation in fairs and exhibitions.

Please describe the envisaged measures:

.....

.....

1.5. Will the aid for the abovementioned measures be granted in favour of large companies?

- ☐ yes ☐ no

*If yes, please note that according to point 106 of the Guidelines, the Commission will not authorise State aid for abovementioned measures in favour of large companies.*

C. AID TO PRIMARY PRODUCERS AND COMPANIES ACTIVE IN THE PROCESSING AND MARKETING OF AGRICULTURAL PRODUCTS FOR THE VULGARISATION OF NEW TECHNIQUES

1.6. Will the aid be granted in favour of other activities for the vulgarisation of new techniques, such as reasonable small scale pilot projects or demonstration projects?

- ☐ yes ☐ no

1.7. If yes please give a clear description of the project including an explanation of the novelty character of the project and of the public interest in granting support for it:

.....

.....

1.8. Does the project respect the following conditions:

Are the number of participating companies and the duration of the pilot scheme limited to what is necessary for proper testing?

- ☐ yes ☐ no

Will the results of the pilot scheme be made publicly available?

- ☐ yes ☐ no

2. **Eligible costs and aid intensity**

A. AID TO PRIMARY PRODUCERS

2.1. Concerning education and training, do the eligible costs include only the actual cost of organising the training programme, travel and subsistence expenses and the cost of the provision of replacement services during the absence of the farmer or the farm worker?

- ☐ yes ☐ no

*If no, please note that according to point 104 of the Guidelines combined with article 15.2 of Commission Regulation (EC) No 1857/2006 <sup>(1)</sup>, aid to cover other costs cannot be authorised.*

2.2. Concerning the farm replacement services, do the eligible costs include only the actual costs of the replacement of the farmer, the farmer's partner, or a farm worker during illness and holidays?

- ☐ yes ☐ no

*If no, please note that according to point 103 of the Guidelines combined with article 15.2 of Commission Regulation (EC) No 1857/2006 aid to cover other costs cannot be authorised.*

<sup>(1)</sup> OJ L 358, 16.12.2006, p. 3.

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- 2.3. Concerning consultancy services provided by third parties, do the eligible costs include only the fees for services which do not constitute a continuous or periodic activity nor relate to the enterprise's usual operating expenditure (such as routine tax consultancy services, regular legal services or advertising) ?

☐ yes ☐ no

*If no, please note that according to point 103 of the Guidelines combined with Article 15.2 of Commission Regulation (EC) No 1857/2006 aid to cover costs of continuous or periodic activities or relating to the enterprise's usual expenditure cannot be authorised.*

- 2.4. In the case of organisation of, and/or participation in, forums to share knowledge between businesses, competitions, exhibitions and fairs, do the eligible costs only include: participation fees, travel costs, costs of publications, rent of exhibition premises and symbolic prizes awarded in the framework of competitions, up to a value of EUR 250 per prize and winner?

☐ yes ☐ no

*If no, please note that according to point 103 of the Guidelines combined with article 15.2 of Commission Regulation (EC) No 1857/2006, aid to cover other costs cannot be authorised.*

- 2.5. Please state the aid intensity .....

- 2.6. Will the aid involve direct payments to producers?

☐ yes ☐ no

*Please note that according to point 103 of the Guidelines combined with Article 15.3 of Regulation (EC) No 1857/2006 aid must not involve direct payments to producers.*

**B. AID TO COMPANIES ACTIVE IN THE PROCESSING AND MARKETING OF AGRICULTURAL PRODUCTS**

- 2.7. Concerning the services provided by outside consultants, are the eligible expenses limited only to costs of activities of non-continuous or non-periodic character, not relating to the enterprise's usual operating expenditure?

☐ yes ☐ no

*If no, please note that according to point 105 of the Guidelines combined with Article 5 of Commission Regulation (EC) No 70/2001 (or any provision replacing it) aid towards financing services being a continuous or periodic activity or related to the enterprise's usual operating expenditure, such as routine tax consultancy services, regular legal services or advertising can not be authorised.*

- 2.8. Concerning the participation in fairs and exhibitions, are the eligible costs limited only to the additional costs incurred for renting, setting up and running the stand and apply only to the first participation of an enterprise in a particular fair or exhibition?

☐ yes ☐ no

*If no, please note that aid for costs other than specified in point 105 of the Guidelines combined with Article 5 of Regulation (EC) No 70/2001 (or any provision replacing it) cannot be authorised.*

- 2.9. Please state the aid intensity: ..... (max. 50 %)

*Please note that according to point 105 of the Guidelines combined with Article 5 of Regulation (EC) No 70/2001 (or any provision replacing it) aid rates higher than the abovementioned ceiling cannot be authorised.*

**C. AID TO PRIMARY PRODUCERS AND COMPANIES ACTIVE IN THE PROCESSING AND MARKETING OF AGRICULTURAL PRODUCTS FOR THE VULGARISATION OF NEW TECHNIQUES**

- 2.10. Concerning the activities for the vulgarisation of new techniques, such as reasonable small scale pilot projects or demonstration projects, can you confirm that the total amount of aid for such projects granted to a company will not exceed EUR 100 000 over three fiscal years?

☐ yes ☐ no

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2.11. Please state the aid intensity .....

3. **Beneficiaries**

3.1. Who are the beneficiaries of the aid?

- ☐ farmers;  
☐ producer groups;  
☐ other (please specify)  
.....

3.2. If farmers are not the direct beneficiaries of the aid:

3.2.1. Is the aid available to all the farmers eligible in the area concerned based on objectively defined conditions?

☐ yes ☐ no

3.2.2. Where the provision of technical support is undertaken by producer groups or other organisations is membership of such groups or organisations a condition for access to the service?

☐ yes ☐ no

3.2.3. Is the contribution of non-members towards the administrative costs of the group or organisation concerned limited to the costs of providing the service?

☐ yes ☐ no

*PART III.12.L*

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR THE LIVESTOCK SECTOR**

*This form must be used for the notification of any State aid measures designed to support the livestock sector as described by point IV.L of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(1)</sup>.*

1. **Eligible expenses**

1.1. Which of the following eligible expenses does the support measure cover:

- ☐ the administrative costs of the establishment and maintenance of herd books?  
☐ tests to determine the genetic quality or yield of livestock (tests undertaken by or on behalf of third parties)?  
☐ eligible costs for investments in the introduction at farm level of innovative animal breeding techniques or practices?

*If the planned measure includes other eligible expenses, please note that Article 16(1) of Regulation (EC) No 1857/2006 <sup>(2)</sup> only allows this aid to cover the eligible expenses listed above. Checks carried out by the owner of the herd and routine checks on the quality of the milk are excluded.*

2. **Amount of aid**

2.1. Please specify the maximum rate of public support expressed as a volume of eligible expenses:

- ..... to cover the administrative costs of the establishment and maintenance of herd books (max. 100 %);  
— ..... for costs of tests to determine the genetic quality or yield of livestock (max. 70 %);  
— ..... eligible costs for investments centring on the introduction at farm level of innovative animal breeding techniques or practices (max. 40 %, and up to 31 December 2011).

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1

<sup>(2)</sup> Commission Regulation (EC) No 1857/2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) 70/2001 (OJ L 358, 16.12.2006, p. 3).

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- 2.2. What measures have been taken to avoid overcompensation and to verify compliance with the above aid intensities?

.....  
.....

3. **Beneficiaries**

- 3.1. Is the aid limited to firms which meet the Community definition of small and medium-sized undertakings?

☐ yes ☐ no

*If no, please note that, under point 109 of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013, large companies are excluded from receiving aid.*

*PART III.12.M*

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR THE  
OUTERMOST REGIONS AND THE AEGEAN ISLANDS**

*This form must be used by Member State to notify aids for the outermost regions and the Aegean islands, as dealt with in point IV.M of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(1)</sup>.*

1. Does the proposed aid for the outermost regions and the Aegean Islands depart from the other provisions set out in the Guidelines?

☐ yes ☐ no

— if no, please complete the notification form relevant to the type of aid (investment aid, technical support, etc).

— if yes, please continue to complete this form.

2. Does the measure involve the granting of operating aid?

☐ yes ☐ no

3. Is the aid intended to mitigate the specific constraints on farming in the outermost regions as a result of their remoteness, insularity and distant location?

☐ yes ☐ no

- 3.1. If yes, please determine the amount of the additional costs resulting from these specific constraints and the method of calculation:

.....  
.....  
.....

- 3.2. How can the authorities establish the link between the additional costs and the factors entailing them (like remoteness or distant location)?

.....  
.....

4. Is this aid intended to offset in part additional transport costs?

☐ yes ☐ no

- 4.1. If yes, please provide proof of the existence of these additional costs and the method of calculation used to determine their amount <sup>(2)</sup>:

.....  
.....

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(2)</sup> The description should reflect how the authorities intend to ensure that the aid is given only in respect of the extra cost of transport of goods inside national borders, is calculated on the basis of the most economical form of transport and the shortest route between the place of production or processing and commercial outlets, and cannot be given towards the transport of the products of businesses without an alternative location.



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- 4.2. If yes, indicate what will be the maximum amount of aid (on the basis of an aid-per-kilometre ratio or on the basis of an aid-per-kilometre and aid-per-unit-weight ratio) and the percentage of the additional costs covered by the aid:

.....

5. In the case of Spain, is the aid intended for the production of tobacco in the Canary Islands <sup>(1)</sup>?

☐ yes ☐ no

- 5.1. If yes, is the aid limited to EUR 2 980,62 per tonne and to a maximum of 10 tonnes each year?

☐ yes ☐ no

- 5.2. How can the Spanish authorities guarantee that the aid will not result in discrimination between producers in the islands?

.....

.....

PART III.12.N

**SUPPLEMENTARY INFORMATION SHEET ON AID TO COMPENSATE FOR DAMAGE TO AGRICULTURAL PRODUCTION OR THE MEANS OF AGRICULTURAL PRODUCTION**

*This form must be used by Member States for the notification of any State aid measures which are designed to compensate for damage to agricultural production or the means of agricultural production as described by points V. B.2 and V.B.3 of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(2)</sup>.*

1. **Aid to make good the damage caused by natural disasters or exceptional occurrences (point V.B.2. of the Guidelines)**

- 1.1. Which disaster or exceptional occurrence caused the damage for which the compensation is envisaged?

.....

- 1.2. What kind of physical damage was caused?

.....

- 1.3. What rate of compensation for material damage is contemplated?

.....

- 1.4. Is compensation planned for losses of income? If yes, what level of compensation is contemplated and how will income losses be calculated?

.....

- 1.5. Is the compensation to be calculated for each individual recipient?

.....

- 1.6. Are insurance payments to be deducted from the aid? How will it be checked whether insurance companies have made any payments?

.....

2. **Aid to compensate farmers <sup>(3)</sup> for losses caused by bad weather (point V.B.3 of the Guidelines)**

- 2.1. What weather event has justified the aid?

.....

- 2.2. Please give the weather data demonstrating the exceptional nature of the event:

.....

<sup>(1)</sup> Foreseen in Article 21 of Regulation (EC) No 247/2006 (OJ L 42, 14.2.2006, p. 1).

<sup>(2)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(3)</sup> That is, farmers to the exclusion of processing and marketing undertakings.

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- 2.3. Please indicate the last date until which aid may be granted <sup>(1)</sup>:  
.....
- 2.4. What is the threshold of loss, in relation to normal production of the relevant crop <sup>(2)</sup> in a normal year, above which farmers will qualify for aid?  
.....  
  
Please note that the Commission will declare aid granted for losses due to adverse weather conditions compatible with Article 87(3)(c) of the Treaty only if those events can be assimilated to natural disasters as defined by Article 2(8) of Regulation (EC) No 1857/2006 <sup>(3)</sup>. A climatic event may be assimilated to a natural disaster and qualify for compensation when it destroys more than 30 % of the normal crop production in question.
- 2.5. Please give normal production figures for each of the crops affected by the weather event and eligible for compensation. Describe the method by which this figure has been arrived at <sup>(4)</sup>.  
.....
- 2.6. In the case of damage to the means of production (e.g. destruction of trees), explain how the threshold of loss to qualify for the aid has been calculated.  
.....
- 2.7. Is the amount eligible for aid calculated as follows: (mean level of production in a given normal period x average price for the same period) - (actual production during the year of the event x average price for that year)?  
.....
- 2.8. Are losses calculated for each individual holding or for a whole area? In the latter case, please show that the averages used are representative and not likely to lead to considerable over-compensation for some beneficiaries.  
.....
- 2.9. Will insurance payments be deducted from the amount eligible for aid?  
.....
- 2.10. Will the normal costs no longer faced by the farmer (e.g. because there was no actual harvest) be taken into account in calculating the aid?  
.....
- 2.11. If such normal costs go up because of the weather event, is additional aid envisaged to cover the extra costs? If yes, what percentage of the extra costs will the aid cover?  
.....
- 2.12. Will aid be paid to compensate for damage caused by the weather event to buildings and equipment? If yes, what percentage of the damage will it cover?  
.....

<sup>(1)</sup> Under Article 11(10) of the Exemption Regulation, aid must be disbursed within four years after the expenses or losses have been incurred.

<sup>(2)</sup> The reference to crops does not mean that livestock are excluded from aid. The principles set out in point V.B.3 of the Guidelines will apply mutatis mutandis to aid intended to compensate for losses involving livestock due to adverse weather.

<sup>(3)</sup> Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001. Under point 126 of the guidelines, the Commission will declare aid granted for losses due to adverse weather conditions compatible with Article 87(3)(c) of the Treaty, if all conditions of Article 11 of Regulation (EC) No 1857/2006 are met.

<sup>(4)</sup> Normal gross annual production should be calculated either in proportion to the mean production of a farmer determined over the three preceding years or in proportion to the three-yearly average based on the five preceding years and excluding the top and bottom value. Other methods of calculating normal production (including regional reference figures) may however be accepted, provided that they are representative and not based on abnormally high production figures.

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- 2.13. Please indicate the maximum rate of public aid as a percentage of eligible damage <sup>(1)</sup>:

..... in less-favoured areas <sup>(2)</sup> (max. 90 %);

..... in other zones (max. 80 %).

- 2.14. Will aid be paid directly to farmers or in some circumstances to the producer organisations to which those farmers belong? In the latter case, what mechanisms will be used to check that the amount of aid collected by a farmer will not be more than the losses suffered?

- 2.15. From 1 January 2010 will the compensation granted be reduced by 50 % if the farmer concerned has not taken insurance covering at least 50 % of mean annual production or of income related to production and the statistically most frequent climatic risks in the Member State or region concerned?

☐ yes ☐ no

If no, please note that under point 126 of the Guidelines the Commission will declare aid granted for losses due to adverse weather conditions compatible with Article 87(3)(c) of the Treaty only if all conditions of Article 11 of Regulation (EC) No 1857/2006 are met and that this condition is explicitly laid down by that Article 11. Please show too that, despite all reasonable efforts, no financially accessible insurance policy covering the statistically most frequent climatic risks in the Member State or region concerned was available at the time the damage was incurred.

- 2.16. For aid pertaining to drought-related losses incurred after 1 January 2011, has the Member State fully implemented Article 9 of Directive 2000/60/EC of the European Parliament and of the Council <sup>(3)</sup> with regard to agriculture:

☐ yes ☐ no

and does it guarantee that all costs for water services in the agricultural sector are recovered from the sector (Article 11(9) of Regulation (EC) No 1857/2006)?

☐ yes ☐ no

If no, please note that under point 126 of the Guidelines the Commission will declare aid granted for losses due to adverse weather conditions compatible with Article 87(3)(c) of the Treaty only if all conditions of [Article 11 of Regulation (EC) No 1857/2006] are met and that the above two conditions are explicitly laid down by that Article 11.

PART III.12.O

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR  
COMBATING ANIMAL AND PLANT DISEASES**

*This form must be used by Member States for the notification of any State aid measures designed to compensate for damage to agricultural production or the means of agricultural production as described by point V.B.4 of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(4)</sup>.*

**1. Animal and plant diseases**

1. What disease is involved?

.....

2. Does this disease appear on the list of animal diseases drawn up by the World Organisation for Animal Health?

☐ yes ☐ no

<sup>(1)</sup> This rate applies to the amount of aid as calculated according to the method indicated under 2.6 or 2.8, minus any insurance payments and normal costs not faced by the farmer, plus extra costs faced by the farmer as a result of the exceptional event.

<sup>(2)</sup> This rate applies to less-favoured areas or the areas referred to in Article 36(a)(i), (ii) and (iii) of Regulation (EC) No 1698/2005.

<sup>(3)</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).

<sup>(4)</sup> OJ C 319, 27.12.2006, p. 1.

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*If the disease has been caused by adverse weather*

3. Please answer the questions in the Information Sheet 'Part III.12.N', providing any relevant information for making the cause-and-effect link between the weather event and the disease.

*If the disease has not been caused by adverse weather*

4. Is there provision for aid for firms involved in the processing and marketing of agricultural products?

☐ yes ☐ no

If yes, please refer to point 131 of the Guidelines.

5. Has the aid scheme been introduced within three years of the expenses or losses?

☐ yes ☐ no

6. Please indicate the last date until which aid may be granted <sup>(1)</sup>.

7. Please show that there are Community-level or national legislative, regulatory or administrative provisions empowering the authorities to act against the disease, either by adopting measures to eradicate it (in particular mandatory measures giving entitlement to financial compensation) or by establishing an early-warning system combined, where necessary, with aid to encourage private individuals to participate in prevention schemes on a voluntary basis <sup>(2)</sup>.

8. Tick the applicable purpose of the aid scheme:

- ☐ preventative in that it involves screening measures or analyses, the extermination of pests which may transmit the disease, preventative vaccinations of animals or treatment of crops, and preventative slaughtering of livestock or destruction of crops;
- ☐ compensation, because the infected animals have to be slaughtered or the crops destroyed by order of, or on the recommendation of, the public authorities or because animals die as a result of vaccination or any other measure recommended or ordered by the competent authorities;
- ☐ combined prevention and compensation, because a programme to deal with losses resulting from the disease is subject to the condition that the beneficiaries must make a commitment to take subsequent appropriate preventive measures as ordered by the official authorities.

9. Please show that the aid intended for controlling the disease is compatible with the specific aims and provisions of the European Union's veterinary or plant health legislation.

10. Please give a detailed description of the proposed control measures.

11. What will be the costs or losses covered by the aid?

- ☐ costs of health checks, tests and other screening measures, purchase and administration of vaccines, medicines and plant protection products, slaughter and destruction costs of animals and costs of destruction of crops;
- ☐ losses caused by animal or plant diseases or by parasite infections;

<sup>(1)</sup> Under Article 10(8) of the Exemption Regulation (Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001, aid must be introduced within three years after the expenses or losses have been incurred. The aid must be disbursed within four years after the expenses or losses have been incurred.

<sup>(2)</sup> The programme must contain clear definitions of the diseases and parasitic infections, together with a description of the measures envisaged.

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- ☐ loss of income caused by the difficulties involved in rebuilding herds or replanting crops, or by any period of quarantine or waiting period ordered or recommended by the competent authorities to enable eradication of the disease before herd rebuilding or crop replanting.
12. Will aid designed to compensate costs of health checks, tests and other screening measures, purchase and administration of vaccines, medicines and plant protection products, slaughter and destruction costs of animals and costs of destruction of crops be granted through subsidised services without involving direct payments to farmers?
- ☐ yes ☐ no
- If no, please refer to Article 10(1)(b) of Commission Regulation (EC) 1857/2006.
13. Is the amount of aid for losses due to animal or plant diseases or parasite infections calculated in relation to:
- a. the market value of animals killed or plants destroyed by the disease or parasite infection or of animals killed or plants destroyed by public order as part of a compulsory public prevention or eradication programme;
- ☐ yes ☐ no
- If no, please refer to Article 10(2)(a)(i) of Commission Regulation (EC) 1857/2006.
- b. income losses due to quarantine obligations and difficulties in restocking or replanting;
- ☐ yes ☐ no
14. Please indicate the maximum aid intensity as a percentage of eligible costs.
- ..... % of costs of health checks, tests and other screening measures, purchase and administration of vaccines, medicines and plant protection products, slaughter and destruction costs of animals and costs of destruction of crops (gross aid intensity may not exceed 100 %).
- ..... % of the losses caused by animal or plant diseases (gross aid intensity may not exceed 100 %).
15. If aid is envisaged to make good the loss of profit due to any quarantine or waiting period imposed or recommended by the competent authorities to enable the elimination of the disease before the holding is restocked or replanted, or to any difficulties in restocking or replanting, please indicate all elements establishing that there is no risk of over-compensating the profit loss.
- .....
16. Has Community aid been envisaged for the same purpose? If yes, indicate the date and references of the Commission decision approving it.
- .....
17. Will insurance payments be deducted from the amount of aid?
- ☐ yes ☐ no
18. Will the calculation of the aid take account of costs not incurred because of the disease, which would otherwise have been incurred?
- ☐ yes ☐ no
2. **TSE Tests**
1. Please indicate the maximum aid intensity for TSE TESTS as a percentage of eligible costs. Under Article 16(1) of Commission Regulation (EC) 1857/2006, aid may be granted for up to 100 % of real costs incurred. Please note that Community payments regarding TSE TESTS must be included.
- ..... %
2. Does the measure relate to the obligatory BSE testing of bovine animals slaughtered for human consumption?
- ☐ yes ☐ no

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Please note that the obligation to perform screening can be based on Community or national legislation.

3. If yes, does the total direct and indirect aid for these tests exceed EUR 40 per individual test (including Community payments)?

☐ yes ☐ no

4. If yes, please refer to the second subparagraph of Article 16(1) of Commission Regulation (EC) 1857/2006.

5. Will the aid be paid directly to farmers?

☐ yes ☐ no

If yes, please refer to Article 16(3) of Commission Regulation (EC) 1857/2006.

3. **Fallen stock and slaughterhouse waste**

1. Is the measure linked with a consistent programme for monitoring and ensuring the safe disposal of all fallen stock in the Member State?

☐ yes ☐ no

If no, please refer to Article 16(2) of Commission Regulation (EC) 1857/2006.

2. Is aid for fallen stock and slaughterhouse waste granted to processing and marketing firms?

☐ yes ☐ no

If yes, please refer to point 137(i) of the Guidelines.

3. Will the aid to cover the costs of eliminating slaughterhouse waste produced after these Guidelines came into force?

☐ yes ☐ no

If yes, please refer to point 137(ii) of the Guidelines.

4. Is the aid granted directly to producers?

☐ yes ☐ no

If yes, please refer to Article 16(3) of Commission Regulation (EC) 1857/2006.

5. If no, will aid be paid to firms active downstream from the farmer, providing services linked to the removal and/or destruction of fallen stock?

☐ yes ☐ no

If no, please refer to Article 16(3) of Commission Regulation (EC) 1857/2006.

6. Please indicate the maximum aid intensity as a percentage of eligible costs.

a. .... % of the costs of removal (max. 100 %)

b. .... % of the costs of destruction (max. 75 %)

7. Under Article 16(1)(a) of Commission Regulation (EC) 1857/2006, aid up to an equivalent amount may *alternatively* be granted towards the costs of premiums paid by farmers for insurance covering the costs of removal and destruction of fallen stock. Does the notified measure include this type of payment?

☐ yes ☐ no

8. Under Article 16(1)(b) of Commission Regulation (EC) 1857/2006, Member States may grant aid of up to 100 % for costs of removal and destruction of carcasses where the aid is financed through fees or through compulsory contributions destined for the financing of the destruction of such carcasses, provided that such fees or contributions are limited to and directly imposed on the meat sector. Does the notified measure include this type of payment?

☐ yes ☐ no

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9. Under Article 16(1)(c) of Commission Regulation (EC) 1857/2006, Member States may grant State aid of up to 100 % for the costs of removal and destruction of fallen stock, where there is an obligation to perform TSE tests on the fallen stock concerned. Does such an obligation exist?

☐ yes ☐ no

*PART III.12.P*

**SUPPLEMENTARY INFORMATION SHEET ON AID TOWARDS THE  
PAYMENT OF INSURANCE PREMIUMS**

*This form must be used by Member States for the notification of State aid measures which are designed to partially pay insurance premiums of primary agricultural producers, as described by point V.B. 5 of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(1)</sup>*

1. Does the aid measure foresee payment of insurance premiums in favour of large companies and/or companies active in the processing and marketing of agricultural products?

☐ yes ☐ no

If yes, please note that pursuant to paragraph 142 of the Guidelines the Commission cannot authorise such aid.

2. Please specify which losses will be covered by the insurance for which the premium will be partly financed under the notified aid measure:

- ☐ only losses caused by adverse climatic events which can be assimilated to natural disasters, as defined in Article 2 point 8 of Commission Regulation (EC) No 1857/2006 <sup>(2)</sup>
- ☐ the losses referred to above plus other losses caused by climatic events.
- ☐ losses caused by animal or plant diseases or pest infestations (whether in combination with other losses mentioned in this point or not).

3. What is the level of aid proposed?

.....

Please note that if only the first case above applies, the maximum aid rate is 80 %, in all other cases (i.e. where box two and/or three has been ticked) 50 %.

4. Does the aid cover a re-insurance programme?

☐ yes ☐ no

If yes, please provide all necessary information to enable the Commission to check possible aid components at the different levels involved (i.e. at the level of the insurer and/or re-insurer) and the compatibility of the proposed aid with the common market. In particular please submit sufficient information to enable the Commission to check that the final benefit of the aid is passed on to the farmer.

5. Is the possibility of covering the risk linked to only one insurance company or group of companies?

☐ yes ☐ no

6. Is the aid conditional on the insurance contract being concluded with a company established in the Member State concerned?

☐ yes ☐ no

Please note that under Article 12(3) of Commission Regulation (EC) No 1857/2006 the Commission cannot authorise aid towards insurance premiums which constitute a barrier to the operation of the internal market for insurance services.

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(2)</sup> Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) 70/2001.

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*PART III.12.Q*

**SUPPLEMENTARY INFORMATION SHEET FOR AID FOR CLOSING  
PRODUCTION, PROCESSING AND MARKETING CAPACITY**

*This form must be used for the notification of any State aid schemes designed to promote the abandonment of capacity as described by chapter V.C. of the Community Guidelines for State aid in the agricultural and forestry sector <sup>(1)</sup>.*

**1. Requirements**

- 1.1. Does the planned scheme provide that,
- the aid must be in the general interest of the sector concerned
  - there must be a counterpart on the part of the beneficiary
  - the possibility of the aid being for rescue and restructuring must be excluded and that
  - there must be no over-compensation of loss of capital value and of future income?
- ☐ yes                      ☐ no

*If no, please note that according to chapter V.C. of the Guidelines no aid can be granted if those conditions are not fulfilled.*

***‘The aid must be in the general interest of the sector concerned’***

- 1.2. What is/are the sector(s) covered by the scheme?
- .....
- .....

- 1.3. Is/are that/those sector(s) subject to production limits or quotas?
- ☐ yes                      ☐ no

If yes, please describe

.....

.....

- 1.4. Can that sector those sectors be considered to be in excess of capacity either at regional or national level?
- ☐ yes                      ☐ no

- 1.4.1. If yes:

- 1.4.1.1. Is the planned aid scheme coherent with any Community arrangements to reduce production capacity?

☐ yes                      ☐ no

Please describe this arrangements and the measures taken to assure the coherence

.....

- 1.4.1.2. Is the planned aid scheme part of a programme for the restructuring of the sector which has defined objectives and a specific timetable?

☐ yes                      ☐ no

*If yes, please describe the programme*

.....

- 1.4.1.3. What is the duration of the planned aid scheme? .....

*Please note that according to point 147(b) of the Guidelines the Commission can only authorised this type of aid when they provide for a limited duration. The duration of schemes aimed at reducing over-capacity should normally be limited to a period of not more than six months for collecting applications for participation and a further 12 months for actually closing down.*

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.



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1.4.2. If no, is the capacity being closed for sanitary or environmental reasons?

☐ yes ☐ no

If yes, please describe:

.....

1.5. Can it be assured that no aid may be paid which would interfere with the mechanisms of the common organisations of the market (OCM) concerned?

☐ yes ☐ no

*If no, please note that according to point 147(e) of the Guidelines any aid interfering with the mechanisms of the OCM concerned cannot be authorised*

1.6. Is the aid scheme accessible to all economic operators in the sector concerned on the same conditions and a transparent system of calls for interest is used?

☐ yes ☐ no

*If no, please note that according to point 147(k) of the Guidelines, to be authorised by the Commission the aid scheme must assure the respect of this condition.*

1.7. Are only enterprises fulfilling compulsory minimum standards eligible for aid?

☐ yes ☐ no

*Please note that enterprises are excluded which do not fulfil these standards and which would be obliged to stop production anyway.*

1.8. In case of open farmland or orchards: Which measures have been taken in order to avoid erosion or other negative effects on the environment?

.....

.....

1.9. In case of installations covered by Council Directive 96/61 <sup>(1)</sup>: which measures have been taken in order to avoid any pollution risk and ensure that the site of operation is returned to a satisfactory state?

.....

.....

***‘There must be a counterpart on the part of the beneficiary’***

1.10. What is the nature of the counterpart required to the beneficiary by the planned scheme? .....

1.11. Does it consist of a definitive and irrevocable decision to scrap or irrevocably close the production capacity concerned?

☐ yes ☐ no

1.11.1. If yes,

— can it be proved that these commitments are legally binding for the beneficiary?

☐ yes ☐ no

Please justify:

.....

— can it be assured that these commitments must also bind any future purchaser of the facility concerned?

☐ yes ☐ no

Please justify:

.....

<sup>(1)</sup> Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ L 257, 10.10.1996, p. 26).

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- 1.11.2. If no, please describe the nature of the counterpart on the part of the beneficiary:

.....  
*Please note that according to point 147(g) of the guidelines where the production capacity has already closed definitively, or where such closure appears inevitable, there is no counterpart on the part of the beneficiary, and aid may not be paid.*

***'The possibility of the aid being for rescue and restructuring must be excluded'***

- 1.12. Does the planned scheme provides that, when the beneficiary of the aid is in financial difficulty, the aid will be assessed in accordance with the Community guidelines on rescue and restructuring of firms in difficulty <sup>(1)</sup>?

☐ yes ☐ no

*If no, please note that according to point 147(j) of the Guidelines, the Commission cannot authorise an aid for the abandonment of capacity of a company in difficulties and that the aid must be evaluated under the rescue and/or restructuring aid.*

***'There must be no over-compensation of loss of capital value and of future income'***

- 1.13. Please specify what is the maximum amount of aid, if any, to be granted per beneficiary?

.....  
.....

- 1.14. Is the amount of aid calculated on the basis of the loss of value of the assets plus an incentive payment which may not exceed 20 % of the value of the assets, and eventually, the obligatory social costs resulting from the implementation of the scheme?

☐ yes ☐ no

*If no, please note that according to point 147(l) of the Guidelines, the amount of aid should be strictly limited to compensation for those items.*

- 1.15. Does the planned aid scheme provide that, where capacity is closed for other reasons than health or environmental, at least 50 % of the costs of these aids should be met by a contribution from the sector, either through voluntary contributions or by means of compulsory levies?

☐ yes ☐ no

*If no, please note that according to point 147(m) of the Guidelines, the Commission cannot authorise the aid.*

- 1.16. Does the planned scheme provide for the submission of an annual report on the implementation of the scheme?

☐ yes ☐ no

**PART III.12.R.**

**SUPPLEMENTARY INFORMATION SHEET ON AID FOR THE PROMOTION AND ADVERTISING OF AGRICULTURAL PRODUCTS**

*This notification form must be used for State aid for advertising of products listed in Annex I to the EC-Treaty.*

*Please note that promotion operations as defined as the dissemination to the general public of scientific knowledge, the organisation of trade fairs or exhibitions, participation in these and similar public relations exercises, including surveys and market research, are not considered as advertising. State aid for such promotion in the broader sense is subject to points IV.j and IV.k of the*

<sup>(1)</sup> Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

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*Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013* <sup>(1)</sup>.

1. **Advertising campaigns within the Community**

1.1. Where will the measure be carried out?

- ☐ on the market of another Member State;  
☐ on the home market.

Who will carry out the advertising campaign ?

- ☐ producer groups or other organisations, regardless of their size;  
☐ others (please explain):

.....

1.2. Can your authorities submit samples or mock-ups of the advertising material to the Commission?

- ☐ yes ☐ no

If not, please explain why.

.....

1.3. Please provide an exhaustive list of the eligible expenses.

.....

1.4. Who are the beneficiaries of the aid ?

- ☐ farmers ;  
☐ producer groups and/or producer organisations;  
☐ enterprises active in the processing and marketing of agricultural products;  
☐ others (please specify)

.....

1.5. Can your authorities give the assurance that all producers of the products concerned are able to benefit from the aid in the same manner?

- ☐ yes ☐ no

1.6. Will the advertising campaign be earmarked for quality products defined as products fulfilling the criteria to be established pursuant to Article 32 of Regulation (EC) No 1698/2005 <sup>(2)</sup> ?

- ☐ yes ☐ no

1.7. Will the advertising campaign be earmarked for EU-recognized denominations with reference to the origin of the products ?

- ☐ yes ☐ no

1.8. If yes, will the said reference correspond exactly to the references which have been registered by the Community ?

- ☐ yes ☐ no

1.9. Will the advertising campaign be earmarked for products using a national or regional quality label ?

- ☐ yes ☐ no

1.10. Does the label make any reference to the national origin of the products concerned?

- ☐ yes ☐ no

<sup>(1)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(2)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1).

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1.11. If yes, demonstrate that the reference to the origin of the products will be subsidiary in the message.

1.12. Is the advertising campaign of generic character and in the benefit of all producers of the type of product concerned?

☐ yes ☐ no

1.13. If yes, will the advertising campaign be carried out without reference to the origin of the products ?

☐ yes ☐ no

If no, please note that under point VI.D of the Guidelines no aid may be granted for such campaigns.

1.14. Will the advertising campaign be dedicated directly to the products of particular companies ?

☐ yes ☐ no

If yes, please note that under point VI.D of the Guidelines no aid may be granted for such campaigns.

1.15. Will the advertising campaign comply with the provisions of Article 2 of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to labelling, presentation and advertising of foodstuffs, as well as, where relevant, with the specific labelling rules laid down for various products (wine, dairy products, eggs and poultry) <sup>(1)</sup>?

☐ yes ☐ no

If no, please note that under point VI.D of the Guidelines no aid may be granted for such campaigns.

1.16. The aid rate will be the following:

- ☐ up to 50 % (indicate the exact rate: ... %) because the sector will finance the rest of the campaign itself;
- ☐ up to 100 % (indicate the exact rate: ... %) because the sector will finance the rest of the campaign through parafiscal levies or compulsory contributions;
- ☐ up to 100 % (indicate the exact rate: ... %) because the advertising campaign is generic and in the benefit of all producers of the type of product concerned.

**2. Advertising campaigns in third countries**

2.1. Is the advertising campaign in line with the principles of Council Regulation (EC) No 2702/1999 <sup>(2)</sup> ?

☐ yes ☐ no

If no, please note that under point VI.D of the Guidelines no aid may be granted for such campaigns.

If yes, provide the elements demonstrating the compliance with the principles of Council Regulation (EC) No 2702/1999

2.2. Is the advertising campaign granted towards specific enterprises ?

☐ yes ☐ no

If yes, please note that under point VI.D of the Guidelines no aid may be granted for such campaigns.

2.3. Does the advertising campaign risk endangering sales of or denigrate products from other Member States ?

☐ yes ☐ no

If yes, please note that under point VI.D of the Guidelines no aid may be granted for such campaigns.

<sup>(1)</sup> OJ L 109, 6.5.2000, p. 29.

<sup>(2)</sup> Council Regulation (EC) No 2702/1999 of 14 December 1999 on measures to provide information on, and to promote, agricultural products in third countries (OJ L 327, 21.12.1999, p. 7)

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*PART III.12.S*

**SUPPLEMENTARY INFORMATION SHEET ON AIDS LINKED TO  
TAX EXEMPTIONS UNDER DIRECTIVE 2003/96/EC**

*This form must be used for the notification of any State aid measure linked to tax exemptions under directive 2003/96/EC <sup>(1)</sup>.*

1. Which measure is envisaged ?  
☐ tax reduction for motor fuels used in primary agricultural production;  
☐ tax reduction for energy products and electricity used in primary agricultural production.
2. What is the level of the envisaged reduction ?  
.....
3. Under which article of Council Directive 2003/96/EC do you want to apply this exemption ?  
.....
4. Will there be any differentiation in the level of exemption within the sector concerned ?  
☐ yes ☐ no
5. If the possibility of applying a level of taxation down to zero to energy products and electricity used for agriculture is repealed by the Council, will the exemption envisaged fulfil all the relevant provisions of the directive, without tax differentiation within the sector concerned ?  
☐ yes ☐ no

Please indicate which article(s) of the directive will be applied:

*PART III.12.T*

**SUPPLEMENTARY INFORMATION SHEET ON AIDS FOR THE  
FORESTRY SECTOR**

*This form must be used for the notification of any State aid measure to support forestry covered by Chapter VII of the Community Guidelines on State aid in the agriculture and forestry sector <sup>(2)</sup>.*

1. **Objective of the measure**
  - 1.1. Does the measure contribute to maintaining, restoring or improving ecological, protective and recreational functions of forests, biodiversity and a healthy forest ecosystem or does it concern the eligible costs mentioned in points 175 to 181 in Chapter VII of the Guidelines?  
☐ yes ☐ no  
  
If not, please note that only measures concerning at least one of these objectives or eligible costs can be approved under this Chapter.
2. **Eligibility criteria**
  - 2.1. Does the measure exclude aid to forest based industries or for commercially viable extraction of timber, transportation of timber or for the processing of wood or other forestry resources into products or for energy generation?  
☐ yes ☐ no  
  
If not, please note that aid for the above purposes is excluded from the scope of this Chapter. Please refer to other State aid rules for such aid.
3. **Type of aid**
  - 3.1. Does the measure include aid for planting, felling, thinning and pruning of trees and other vegetation (point VII.C. a)?  
☐ yes ☐ no

<sup>(1)</sup> Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51).

<sup>(2)</sup> OJ C 319, 27.12.2006, p. 1.

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▼ C3

If yes, please indicate whether the eligible costs concern:

- ☐ planting, felling and pruning in general;
- ☐ removal of fallen trees;
- ☐ restoring forests damaged by air pollution, animals, storms, floods, fire or similar events;

*If one of the above apply, please describe the measures and confirm that the primary objective of the measure is to maintain and restore forest ecosystem and biodiversity or the traditional landscape and that no aid is granted for felling whose primary purpose is commercially viable extraction of timber or for restocking where the felled trees are replaced by equivalent ones:*

.....  
.....  
.....

- ☐ afforestation to increase forest cover;

*Please describe the environmental reasons justifying the afforestation to increase forest cover and confirm that no aid will be granted for afforestation with species cultivated in the short term:*

.....  
.....  
.....

- ☐ afforestation to promote biodiversity;

*Please describe the measure and indicate the areas concerned:*

.....  
.....  
.....

- ☐ afforestation to create wooded areas for recreational purposes;

*Are the above wooded areas accessible to the public at no cost for recreational purposes? If not, is access restricted to protect sensitive areas?*

.....  
.....  
.....

- ☐ afforestation to combat erosion and desertification or to promote a comparable protective function of the forest;

*Please describe the measures specifying the areas concerned, the protective function envisaged, tree species to be planted and any accompanying and maintenance measures to be undertaken:*

.....  
.....  
.....  
.....  
.....

- ☐ other (please explain).

.....  
.....

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▼ **C3**

- 3.2. Does the measure include aid for maintaining and improving soil quality in forests and/or ensuring balanced and healthy tree growth (point VII.C. b)?

☐ yes ☐ no

If yes, please indicate whether the eligible costs concern:

- ☐ fertilisation;  
☐ other soil treatments;

*Please specify the type of fertilisation and/or other soil treatment*

.....  
.....

- ☐ reduction of excessive vegetation density;  
☐ ensuring sufficient water retention and proper drainage.

*Please confirm that the above measures will not reduce biodiversity, cause nutrient leaching or adversely affect natural water ecosystems or water protection zones and describe how this will be controlled in practice:*

.....  
.....  
.....  
.....

- 3.3. Does the measure include aid for preventing, eradicating and treating pests, pest damage and tree diseases or preventing and treating damage done by animals or targeted measures to prevent forest fires (point VII.C. c)?

☐ yes ☐ no

If yes, please indicate whether the eligible costs concern:

- ☐ prevention and treatment of pests and tree diseases and pest damage or prevention and treatment of damage done by animals;

*Please indicate the pests and diseases or animals in question:*

.....  
.....  
.....  
.....

*Please describe the prevention and treatment methods and mention any necessary products, appliances and materials. Are biological and mechanical prevention and treatment methods preferred when granting aid? If not, please demonstrate that they are not sufficient to fight the disease or pest in question:*

.....  
.....  
.....  
.....

- ☐ targeted measures to prevent forest fires.

*Please describe the measures:*

.....  
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.....  
.....

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▼ **C3**

Is aid granted to compensate for the value of stock destroyed by animals or on the order of the authorities to fight the disease or pest in question?

☐ yes ☐ no

*Please describe how the value of stock will be calculated and confirm that the compensation will be limited to the value thus determined:*

.....

.....

.....

.....

- 3.4. Does the measure include aid for the restoration and maintenance of natural pathways, landscape elements and features and the natural habitat for animals (point VII.C. d)?

☐ yes ☐ no

*If yes, please describe the measures:*

.....

.....

.....

.....

.....

- 3.5. Does the measure include aid for constructing, improving and maintaining forest roads and/or visitors' infrastructures (point VII.C.e)?

☐ yes ☐ no

*If yes, please describe the measures:*

.....

.....

.....

.....

.....

Are the forests and infrastructures used for recreation open to the public at no cost for recreational purposes?

☐ yes ☐ no

*If not, is access restricted to protect sensitive areas or to ensure the proper and safe use of the infrastructures? Please describe the restrictions and the reasons for imposing them:*

.....

.....

.....

- 3.6. Does the measure include aid for the costs of information materials and activities (point VII.C.f)?

☐ yes ☐ no

*If yes, please describe the measures and confirm that the supported actions and materials disseminate general information concerning forests and do not contain references to named products or producers or promote domestic products:*

.....

.....

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▼ **C3**

- 3.7. Does the measure include aid for the costs of purchase of forestry land for nature protection purposes (point VII.C.g)?

☐ yes ☐ no

*If yes, please describe in detail the nature protection use of the forestry land in question and confirm that this land is entirely and permanently secured for nature protection by means of a statutory or contractual obligation:*

.....  
.....  
.....  
.....

- 3.8. Does the measure include aid for the costs of afforestation of agricultural or non-agricultural land, establishment of agro forestry systems on agricultural land, Natura 2000 payments, forest-environment payments, restoring forestry potential and introducing prevention actions as well as non productive investments, pursuant to Articles 43 to 49 of Regulation (EC) No 1698/2005 <sup>(1)</sup> or any replacing legislation?

☐ yes ☐ no

*If yes please demonstrate that the measure fulfils the conditions laid down in Articles 43-49 of Regulation (EC) No 1698/2005 or any replacing legislation:*

.....  
.....  
.....  
.....

- 3.9. Does the measure include aid for the additional costs and income foregone due to the use of environmentally friendly forest technology?

☐ yes ☐ no

*If yes, please describe in detail the technology used and confirm that it goes beyond the relevant mandatory requirements:*

.....  
.....  
.....  
.....

Is the compensation paid on the basis of a voluntary commitment that the forest owner has entered and that satisfies the conditions of Article 47 of Regulation (EC) No 1698/2005 or any replacing legislation?

☐ yes ☐ no

*If not, please note that the aid cannot be authorized under Chapter VII of the Guidelines. If yes, describe the commitments:*

.....  
.....  
.....  
.....

<sup>(1)</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1.)

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▼ **C3**

- 3.10. Does the measure include aid for the costs of purchase of forestry land (other than forestry land for environmental protection purposes, see point 3.7 above)?

☐ yes ☐ no

*If yes, please describe the measure and indicate the aid intensity:*

.....

.....

.....

.....

- 3.11. Does the measure include aid for the costs of training, consultancy services, such as, establishment of business plans or forestry management plans, feasibility studies, as well as participation in competitions, exhibitions and fairs?

☐ yes ☐ no

*If yes please demonstrate that the measure fulfils the conditions laid down in Article 15 of the Exemption Regulation:*

.....

.....

.....

.....

- 3.12. Does the measure include aid for the setting up of forestry associations?

☐ yes ☐ no

*If yes please demonstrate that the measure fulfils the conditions laid down in Article 9 of the Exemption Regulation:*

.....

.....

.....

.....

- 3.13. Does the measure include aid in favour of vulgarisation of new techniques, such as reasonable small scale pilot projects or demonstration projects?

☐ yes ☐ no

*If yes please describe the measures and demonstrate that they fulfil the conditions set out in point 107 of the Guidelines:*

.....

.....

.....

.....

4. **Amount of aid**

- 4.1. Is the aid for measures indicated under points 3.1 to 3.7 limited to 100 % of the eligible costs and overcompensation excluded?

☐ yes ☐ no

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▼ **C3**

*Please describe how the exclusion of overcompensation will be controlled:*

.....  
.....  
.....

- 4.2. Is the aid for measures indicated under point 3.8 limited to the maximum intensity or amount laid down in Regulation (EC) No 1698/2005 or any replacing legislation?

☐ | yes | ☐ | no

Are the measures indicated under point 3.8 being co-financed under Regulation (EC) No 1698/2005 or any replacing legislation or is such co-financing envisaged or possible?

☐ yes ☐ no

*If yes, please describe how any double funding leading to overcompensation will be excluded:*

.....  
.....  
.....

- 4.3. Can the compensation for measures indicated under point 3.9 be granted above the maximum aid rate for aid under Article 47 fixed in the Annex of Regulation (EC) No 1698/2005, but in no case more than the demonstrated additional costs and income foregone?

☐ yes ☐ no

*In both cases, please indicate the aid amount and describe how it is calculated. If yes, please describe the specific circumstances and the effect of the measure to the environment and present calculations showing that the additional amounts of aid are limited to the demonstrated additional costs and/or income foregone:*

.....  
.....  
.....

- 4.4. Is the aid for the measures indicated under point 3.10 limited to the maximum aid intensity laid down in Article 4 of the Exemption Regulation for the purchase of agricultural land?

☐ yes ☐ no

*Please describe how the exclusion of overcompensation will be controlled:*

.....  
.....  
.....

- 4.5. Is the aid for measures indicated under points 3.11 to 3.13 limited to the maximum aid intensity laid down in the applicable rules of the Exemption Regulation or the Guidelines?

☐ yes ☐ no

*Please describe how the exclusion of overcompensation will be controlled:*

.....  
.....  
.....

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▼ **B**

PART III.13.A

**SIS ON AID FOR RESTRUCTURING FIRMS IN DIFFICULTY IN THE AVIATION SECTOR**

*This annex must be used for the notification of individual restructuring aid for airlines covered by the Community Guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(1)</sup> and those on State aid in the aviation sector <sup>(2)</sup>.*

**1. Eligibility**

- 1.1. Is the firm a limited company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months?

☐ yes ☐ no

- 1.2. Is the firm an unlimited company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding months?

☐ yes ☐ no

- 1.3. Does the firm fulfil the criteria under domestic law for being the subject of collective insolvency proceedings?

☐ yes ☐ no

If you have answered yes on any of the above questions, please attach the relevant documents (latest profit and loss account with balance sheet, or court decision opening an investigation into the company under national company law)

If you have answered no to all of the above questions, please submit evidence supporting that the firm is in difficulties and thus eligible for rescue aid.

- 1.4. When has the firm been created? .....

- 1.5. Since when is the firm operating? .....

- 1.6. Does the company belong to a larger business group?

☐ yes ☐ no

If you have answered yes, please submit full details about the group (organisation chart, showing the links between the group's members with details on capital and voting rights) and attach proof that the company's difficulties are its own and are not the result of an arbitrary allocation of costs within the group and that the difficulties are too serious to be dealt with by the group itself.

- 1.7. Has the firm (or the group to which it belongs) in the past received any restructuring aid?

☐ yes ☐ no

If yes, please provide full details (date, amount, reference to previous Commission decision if applicable, etc.)

**2. Restructuring plan**

- 2.1. Please supply a copy of the survey of the market(s) served by the firm in difficulty, with the name of the organisation which carried it out. The market survey must give in particular:

- 2.1.1. A precise definition of the product and geographical market(s).

- 2.1.2. The names of the company's main competitors with their shares of the world, Community or domestic market, as appropriate.

<sup>(1)</sup> Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288, 9.10.1999, p. 2.

<sup>(2)</sup> Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10.12.1994, p.5.

▼ **B**

- 2.1.3. The evolution of the company's market share in recent years.
- 2.1.4. An assessment of total production capacity and demand at Community level, concluding whether or not there is excess capacity on the market.
- 2.1.5. Community-wide forecasts for trends in demand, aggregate capacity and prices on the market over the five years ahead.
- 2.2. Please attach the restructuring plan. As aid must form part of a comprehensive restructuring programme, at least the following information should be included:
  - 2.2.1. Presentation of the different market assumptions arising from the market survey.
  - 2.2.2. Analysis of the reason(s) why the firm has run into difficulty.
  - 2.2.3. Presentation of the proposed future strategy for the firm and how this will lead to viability.
  - 2.2.4. Complete description and overview of the different restructuring measures planned and their cost.
  - 2.2.5. Timetable for implementing the different measures and the final deadline for implementing the restructuring plan in its entirety.
  - 2.2.6. Information on the production capacity of the company, and in particular on utilisation of this capacity and capacity reductions, especially when needed by the restoration of the financial viability of the firm and/or the situation of the market.
  - 2.2.7. Full description of the financial arrangements for the restructuring, including:
    - Use of capital still available;
    - Sale of assets or subsidiaries to help finance the restructuring;
    - Financial commitment by the different shareholders and third parties (like creditors, banks);
    - Amount of public assistance and demonstration of the need for that amount.
  - 2.2.8. Projected profit and loss accounts for the next five years with estimated return on capital and sensitivity study based on several scenarios.
  - 2.2.9. Commitment of the Member State authorities not to grant any further aid to the firm.
  - 2.2.10. Commitment of the Member State authorities not to interfere in the management of the company other than due to ownership rights and allowing the company to be run according to commercial principles.
  - 2.2.11. Commitments taken by the Member State authorities in order to limit the aid to the purposes of the restructuring programme and to prevent the firm to acquire shareholdings in other air carriers during the restructuring period.
  - 2.2.12. Name(s) of the author(s) of the restructuring plan and date on which it was drawn up.
- 2.3. Describe the compensatory measures proposed with a view to mitigating the distortive effects on competition at Community level and especially the impact of the capacity and offer reduction contained in the restructuring plan of the firm on its competitors.
- 2.4. Provide all relevant information on aid of any kind granted to the firm receiving restructuring aid, whether under a scheme or not, until the restructuring period comes to an end.
- 2.5. Provide all relevant information to describe the modalities of transparency and control scheduled for the notified measure.

▼ **B**

PART III.13.B

**SIS ON TRANSPORT INFRASTRUCTURE AID**

*This SIS must be used for the notification of any individual aid or any scheme in favour of transport infrastructure. It should also be used in the case of individual aid or scheme, which is notified to the Commission for reasons of legal certainty.*

1. **Type of infrastructure**

- 1.1 Please specify the kind of infrastructure eligible under the measure.
- 1.2 Is the infrastructure in question open and accessible to all potential users on non-discriminatory terms or is it dedicated to one or more particular undertakings?
- 1.3 Is the infrastructure part of the public domain and operated as such or is it operated/managed by an entity separated from the public administration?
- 1.4 Please specify the conditions under which the infrastructure will be operated.
- 1.5 Does the scheme or individual measure relate to new infrastructure or the extension/upgrading of existing infrastructure?

2. **Eligible costs and aid intensity**

- 2.1 Does the scheme or the individual measure relate to:
- ☐ investment costs
- ☐ operating costs
- ☐ other (please specify)
- 2.2 What are the total costs for the project in question and to what extent will the beneficiary contribute to these costs.
- 2.3 By what means have the amount of aid been established, e.g. a tendering procedure, market studies, etc.?
- 2.4 Please justify the necessity of the public contributions and explain how it has been ensured that the public participation has is kept at the minimum necessary.

3. **Beneficiary**

- 3.1 By what means have the beneficiary been choosen.
- 3.2 Will the beneficiary also operate the infrastructure?
- ☐ yes ☐ no

If, no, please explain how the operator has been selected.

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▼ **B**

PART III.13.C

**SIS ON AID FOR MARITIME TRANSPORT**

*This SIS must be used for the notification of any aid scheme covered by the Community guidelines on State aid to maritime transport <sup>(1)</sup>.*

1. **Types of scheme**

Does the scheme constitute or include:

- (a) ☐ a Tonnage Tax
- (b) ☐ a reduction in social contributions
- (c) ☐ a reduction in the income tax applicable to seafarers
- (d) ☐ a reduction in local taxes
- (e) ☐ a reduction in registration fees
- (f) ☐ aids for training
- (g) ☐ aids for transferring lorries from roads to sea ways
- (h) ☐ a public service contract or award procedure thereof
- (i) ☐ aids of social character?
- (j) ☐ other, please describe:

2. **Eligibility**

For (a) (b) (c) (d) (e) (f) (g)

- 2.1. What are the eligibility criteria for companies?
- 2.2. What are the eligibility criteria for boats, in particular is there an obligation on the flag?
- 2.3. Where appropriate, what are the eligibility criteria for seafarers?
- 2.4. Describe the list of eligible activities. In particular, does the regime concern
  - ☐ tug activities? ☐ dredging activities?
- 2.5. What are the ring-fence measures to avoid spill-over into after activities of the same company?
- 2.6. For (h): What are the public services obligations, the method for calculating the compensations, the different offers submitted in the tender and the reasons for the choice of the designated company?
- 2.7. For (i): What are the routes concerned, the populations of users concerned and the conditions attached to the award of individual grants?

3. **Aid intensity**

For (a):

- 3.1. What are the rates used to calculate the taxable income per 100 NT?
  - Up to 1 000 NT
  - Between 1 001 and 10 000 NT
  - Between 10 001 and 20 000 NT
  - More than 20 001 NT
- 3.2. Are companies obliged to set up separate accountings when operating both eligible and non eligible activities?

<sup>(1)</sup> Community guidelines on State aid to maritime transport, OJ C 205, 5.7.1997, p. 5.

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- 3.3. How should be treated groups of companies and intra-group transactions?  
For (b) (c) (d) (e):
- 3.4. What is the aid intensity in terms of percentage of the social/fiscal contributions or of the tax or fees that the seafarer or the shipowner should have normally been subject to? \_\_ %
- 3.5. Or to what level in absolute terms these contributions, fees or taxes have been limited?
- 3.6. For (f): What is the aid intensity in terms of the cost of the training or the salary of the trainee?
- 3.7. For (g): What is the amount of aid per tonne kilometer transferred?
- 3.8. For (i): What is the amount of individual grants?

PART III.13.D

**SIS ON AID FOR COMBINED TRANSPORT**

*This SIS must be used for the notification of any individual aid or any scheme for combined transport purposes . It should also be used in the case of individual aid or scheme, which is notified to the Commission for reasons of legal certainty.*

1. **Type of scheme or measure**

Does the scheme or the individual measure relate to:

Acquisition of combined transport equipment

☐ yes ☐ no

If yes, please give a description of the eligible assets:

.....

Construction of infrastructure related to combined transport

☐ yes ☐ no

If yes, please give a description of the measure:

.....

Granting of non-remboursable subsidies to reduce the costs of access to combined transport services

☐ yes ☐ no

If yes, please provide a study justifying such a mesure: .....

Other:

.....

.....

.....

2. **Eligible costs**

Are maritime containers (ISO 1) eligible under the scheme?

☐ yes ☐ no



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Are wagons and locomotives eligible under the scheme?

☐ yes ☐ no

If yes, please specify the beneficiaries:

.....

Will the eligible items be exclusively used for combined transport operations?

☐ yes ☐ no

.....

Other eligible costs under the individual aid or scheme:

.....

3. **Aid intensity**

Is the aid intensity for combined transport equipment higher than 30% of the eligible costs?

☐ yes ☐ no

Is the aid intensity for combined transport infrastructure higher than 50% of the eligible costs?

☐ yes ☐ no

If yes, please provide documentary evidence justifying it:

.....

For subsidies to reduce the costs of access to combined transport services, please provide a study justifying the planned aid intensity

▼ M5

PART III.14

**SUPPLEMENTARY INFORMATION SHEET FOR AID TO FISHERIES  
AND AQUACULTURE**

This supplementary information sheet must be used for the notification of any aid scheme or individual aid covered by Guidelines for the examination of State aid to fisheries and aquaculture (the Guidelines).

**OBJECTIVES OF THE SCHEME or AID** (*tick as appropriate and insert the required information*):

*This Section follows the order of the subparagraphs of paragraph 4 of the Guidelines: 'Aid which may be declared compatible'.*

- ☐ *Point 4.1 of the Guidelines: Aid for measures of the same kind as those covered by a block exemption Regulation*

**General remarks concerning this kind of aid**

Two block exemption regulations are in force: Commission Regulation (EC) No 736/2008 <sup>(1)</sup> which applies to the fisheries and aquaculture sector and Commission Regulation (EC) No 800/2008 <sup>(2)</sup> which is the general exemption regulation applying to all sectors.

Therefore, such aid should not in principle be notified.

However, according to recital 6 of Regulation No 736/2008 and recital 7 of Regulation No 800/2008, these regulations should be without prejudice to the possibility for Member States of notifying State aid, the objectives of which correspond to objectives covered by these Regulations.

In addition, the following kinds of aid cannot benefit from the exemption provided by Regulations (EC) No 736/2008 and (EC) No 800/2008: aid exceeding specified ceilings, as referred to in Article 1(3) of Regulation (EC) No 736/2008 or in Article 6 of Regulation (EC) No 800/2008, or having specific characteristics, in particular aid granted to undertakings other than SMEs, aid to undertakings in difficulty, non-transparent aid, aid for an undertaking which is subject to an outstanding recovery order following a Commission decision declaring an aid incompatible with the common market.

**Characteristics of the aid notified**

- ☐ Aid of the same kind as aid covered by Regulation (EC) No 736/2008
- ☐ Aid of the same kind as aid covered by Regulation (EC) No 800/2008
- ☐ Aid exceeding the ceiling specified
- ☐ Aid granted to undertakings other than SMEs
- ☐ Aid which is not transparent
- ☐ Aid for an undertaking which is subject to an outstanding recovery
- ☐ Other characteristics: specify it

**Compatibility with the common market**

The Member State is requested to provide detailed and reasoned justification as to why the aid can be considered compatible with the common market.

- ☐ *Point 4.2 of the Guidelines: Aid falling within the scope of certain horizontal Guidelines*

The Member State is requested to provide the reference to the relevant Guidelines which are considered to be applicable to the aid measure concerned as well as a detailed and reasoned justification as to why the aid is considered compatible with those Guidelines.

The Member State is requested to complete also the other relevant summary information sheets annexed to this Regulation.

— training aid — sheet in part III.2,

— employment aid — sheet in part III.3,

— aid for research and development — sheet in parts III.6.A or III.6.B as appropriate,

<sup>(1)</sup> OJ L 201, 30.7.2008, p. 16.

<sup>(2)</sup> OJ L 214, 9.8.2008, p. 3.

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- aid for rescuing and restructuring firms in difficulty — sheet in parts III.7 or III.8 as appropriate,
- environmental aid — sheet III.10.

☐ *Point 4.3 of the Guidelines: Aid for investment on board fishing vessels*

The Member State is requested to provide the information demonstrating the compatibility of the aid with the conditions set out in Article 25(2) and (6) of Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund <sup>(1)</sup>.

It is also requested to provide a justification why this aid is not part of the operational programme co-financed by this Fund.

☐ *Point 4.4 of the Guidelines: Aid to make good damage caused by natural disaster, exceptional occurrences or specific adverse climatic event*

The Member State is requested to provide the following information demonstrating the compatibility of the aid:

- detailed information on the existence of a natural disaster or exceptional occurrence, including technical and/or scientific reports,
- proof of a causal link between the event and the damages,
- method of calculation of damages,
- other means of justification.

☐ *Point 4.5 of the Guidelines: Tax relief and labour related costs concerning Community fishing vessels operating outside Community waters*

The Member State is requested to provide information demonstrating the compatibility of the aid with the conditions of point 4.5 of the Guidelines.

That information must in particular include details showing the risk of deregistration from the fishing fleet register of the vessels concerned by the scheme.

☐ *Point 4.6 of the Guidelines: Aid financed through Para fiscal charges*

The Member State is requested:

- to indicate how the funds acquired by means of the Para fiscal charges will be used and,
- to demonstrate how and on which basis their use is compatible with State aid rules.

In addition, it must show how the scheme will benefit both domestic and imported products.

☐ *Point 4.7 of the Guidelines: Aid for marketing of fishery products from the outermost regions*

The Member State is requested to provide the information demonstrating the compatibility of the aid with the conditions of this Point and the relevant conditions of Council Regulation (EC) No 791/2007 of 21 May 2007 introducing a scheme to compensate for the additional costs incurred in the marketing of certain fishery products from the outermost regions the Azores, Madeira, the Canary Islands, French Guiana and Réunion <sup>(2)</sup>.

☐ *Point 4.8 of the Guidelines: Aid concerning the fishing fleet in outermost regions*

The Member State is requested to provide the information demonstrating the compatibility of the aid with the conditions of this Point and the relevant conditions of Council Regulation (EC) No 639/2004 of 30 March 2004 on the management of fishing fleets registered in the Community outermost regions <sup>(3)</sup> and Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector <sup>(4)</sup>.

☐ *Point 4.9 of the Guidelines: Aid for other measures*

The Member State is requested to describe very precisely the kind of aid and its objectives.

<sup>(1)</sup> OJ L 223, 15.8.2006, p. 1.

<sup>(2)</sup> OJ L 176, 6.7.2007, p. 1.

<sup>(3)</sup> OJ L 102, 7.4.2004, p. 9.

<sup>(4)</sup> OJ L 337, 30.12.1999, p. 10.

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▼ M5

In addition, it is requested to provide a detailed and reasoned justification on the compatibility of the aid with the conditions of point 3 of the Guidelines and to demonstrate how this aid serves the objectives of the common fisheries policy.

GENERAL PRINCIPLES

The Member State is requested to declare that no aid will be granted in respect of operations that the beneficiary has already begun to implement and for aid for activities in which the beneficiary would already engage under market conditions alone.

The Member State is requested to declare that no aid will be granted in circumstances where Community law, and in particular the rules of the Common Fisheries Policy, are not complied with.

In that sense, the Member State is requested to declare that the aid measure explicitly provides that, during the grant period, the beneficiaries of the aid shall comply with the rules of the Common Fisheries Policy and that, if during this period it is found that the beneficiary does not comply with rules of the Common Fisheries Policy, the grant must be reimbursed in proportion to the gravity of the infringement.

The Member State is requested to declare that the aid is limited to a maximum of 10 years, or, if this is not the case, undertakes to re-notify the aid at least two months before the tenth anniversary of its entry into force.

OTHER REQUIREMENTS

The Member State is requested to provide a list of all supporting documents submitted with the notification as well as a summary of those documents (e.g. socioeconomic data on the recipient regions, scientific and economic justification).

The Member State is requested to indicate that this aid is not cumulated with another aid for the same eligible expenses or for the same compensation.

If such accumulation exists, the Member State is requested to indicate the references of the aid (aid scheme or individual aid) with which there is accumulation and to demonstrate that the whole aid granted remains compatible with the relevant rules. For that purpose, the Member State shall take into account every kind of State aid, including *de minimis* aid.

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*ANNEX II*

**SIMPLIFIED NOTIFICATION FORM**

This form may be used for the simplified notification pursuant to Article 4(2) of Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(1)</sup>.

**1. Prior approved aid scheme <sup>(2)</sup>.**

- 1.1. Aid number allocated by the Commission: .....
- 1.2. Title: .....
- 1.3. Date of approval [by reference to the letter of the Commission SG(..)D/...]: .....
- 1.4. Publication in the *Official Journal of the European Union*: .....
- 1.5. Primary objective (please specify one): .....
- 1.6. Legal basis: .....
- 1.7. Overall budget: .....
- 1.8. Duration: .....

**2. Instrument subject to notification**

- ☐ New budget (please specify the overall as well as the annual budget in the respective national currency): .....
- ☐ New duration (please specify the starting date from which the aid may be granted and the last date until which the aid may be granted): .....
- ☐ Tightening of criteria (please indicate if the amendment concerns a reduction of aid intensity or eligible expenses and specify details): .....

**3. Validity of commitments**

- ☐ Please confirm that the commitments provided by the Member State for the purposes of the prior approved aid scheme are valid in their entirety also for the new notified measure.

Please attach a copy (or a web link) of the relevant extracts of the final text(s) of the legal basis.

<sup>(1)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 20.4.2004, p. 1). Regulation as last amended by Regulation No 1935/2006 (OJ L 407, 30.12.2006, p. 1).

<sup>(2)</sup> If the aid scheme has been notified to the Commission on more than one occasion, please provide details for the latest complete notification that has been approved by the Commission.

▼B

ANNEX III A

STANDARDISED REPORTING FORMAT FOR EXISTING STATE AID

(This format covers all sectors except agriculture)

With a view to simplifying, streamlining and improving the overall reporting system for State aid, the existing Standardised Reporting Procedure shall be replaced by an annual updating exercise. The Commission shall send a pre-formatted spreadsheet, containing detailed information on all existing aid schemes and individual aid, to the Member States by 1 March each year. Member States shall return the spreadsheet in an electronic format to the Commission by 30 June of the year in question. This will enable the Commission to publish State aid data in year *t* for the reporting period *t-1* <sup>(1)</sup>.

The bulk of the information in the pre-formatted spreadsheet shall be pre-completed by the Commission on the basis of data provided at the time of approval of the aid. Member States shall be required to check and, where necessary, modify the details for each scheme or individual aid, and to add the annual expenditure for the latest year (*t-1*). In addition, Member States shall indicate which schemes have expired or for which all payments have stopped and whether or not a scheme is co-financed by Community Funds.

Information such as the objective of the aid, the sector to which the aid is directed, etc shall refer to the time at which the aid is approved and not to the final beneficiaries of the aid. For example, the primary objective of a scheme which, at the time the aid is approved, is exclusively earmarked for small and medium-sized enterprises shall be aid for small and medium-sized enterprises. However, another scheme for which all aid is ultimately awarded to small and medium-sized enterprises shall not be regarded as such if, at the time the aid is approved, the scheme is open to all enterprises.

The following parameters shall be included in the spreadsheet. Parameters 1-3 and 6-12 shall be pre-completed by the Commission and checked by the Member States. Parameters 4, 5 and 13 shall be completed by the Member States.

1. Title
2. Aid number
3. All previous aid numbers (e.g., following the renewal of a scheme)
4. Expiry

Member States should indicate those schemes which have expired or for which all payments have stopped.

5. Co-financing

Although Community funding itself is excluded, total State aid for each Member State shall include aid measures that are co-financed by Community funding. In order to identify which schemes are co-financed and estimate how much such aid represents in relation to overall State aid, Member States are required to indicate whether or not the scheme is co-financed and if so the percentage of aid that is co-financed. If this is not possible, an estimate of the total amount of aid that is co-financed shall be provided.

6. Sector

The sectoral classification shall be based largely on NACE <sup>(2)</sup> at the [three-digit level].

7. Primary objective
8. Secondary objective

A secondary objective is one for which, in addition to the primary objective, the aid (or a distinct part of it) was exclusively earmarked at the time the aid was approved. For example, a scheme for which the primary objective is research and development may have as a secondary objective small and medium-sized enterprises (SMEs) if the aid is earmarked exclusively for SMEs. Another scheme for which the primary objective is SMEs may

<sup>(1)</sup> *t* is the year in which the data are requested.

<sup>(2)</sup> NACE Rev.1.1 is the Statistical classification of economic activities in the European Community.

▼ **B**

have as secondary objectives training and employment if, at the time the aid was approved, the aid is earmarked for x% training and y% employment.

9. Region(s)

Aid may, at the time of approval, be exclusively earmarked for a specific region or group of regions. Where appropriate, a distinction should be made between the Article 87(3)a regions and the Article 87(3)c regions. If the aid is earmarked for one particular region, this should be specified at NUTS <sup>(1)</sup> level II.

10. Category of aid instrument(s)

A distinction shall be made between six categories (Grant, Tax reduction/exemption, Equity participation, Soft loan, Tax deferral, Guarantee).

11. Description of aid instrument in national language

12. Type of aid

A distinction shall be made between three categories: Scheme, Individual application of a scheme, Individual aid awarded outside of a scheme (ad hoc aid).

13. Expenditure

As a general rule, figures should be expressed in terms of actual expenditure (or actual revenue foregone in the case of tax expenditure). Where payments are not available, commitments or budget appropriations shall be provided and flagged accordingly. Separate figures shall be provided for each aid instrument within a scheme or individual aid (e.g. grant, soft loans, etc.) Figures shall be expressed in the national currency in application at the time of the reporting period. Expenditure shall be provided for t-1, t-2, t-3, t-4, t-5.

<sup>(1)</sup> NUTS is the nomenclature of territorial units for statistical purposes in the Community.

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ANNEX III B

STANDARDISED REPORTING FORMAT FOR EXISTING STATE AID

(This format covers the agricultural sector)

With a view to simplifying, streamlining and improving the overall reporting system for State aid, the existing Standardised Reporting Procedure shall be replaced by an annual updating exercise. The Commission shall send a pre-formatted spreadsheet, containing detailed information on all existing aid schemes and individual aid, to the Member States by 1 March each year. Member States shall return the spreadsheet in an electronic format to the Commission by 30 June of the year in question. This will enable the Commission to publish State aid data in year *t* for the reporting period *t-1* <sup>(1)</sup>.

The bulk of the information in the pre-formatted spreadsheet shall be pre-completed by the Commission on the basis of data provided at the time of approval of the aid. Member States shall be required to check and, where necessary, modify the details for each scheme or individual aid, and to add the annual expenditure for the latest year (*t-1*). In addition, Member States shall indicate which schemes have expired or for which all payments have stopped and whether or not a scheme is co-financed by Community Funds.

Information such as the objective of the aid, the sector to which the aid is directed, etc shall refer to the time at which the aid is approved and not to the final beneficiaries of the aid. For example, the primary objective of a scheme which, at the time the aid is approved, is exclusively earmarked for small and medium-sized enterprises shall be aid for small and medium-sized enterprises. However, another scheme for which all aid is ultimately awarded to small and medium-sized enterprises shall not be regarded as such if, at the time the aid is approved, the scheme is open to all enterprises.

The following parameters shall be included in the spreadsheet. Parameters 1-3 and 6-12 shall be pre-completed by the Commission and checked by the Member States. Parameters 4, 5, 13 and 14 shall be completed by the Member States.

1. Title
2. Aid number
3. All previous aid numbers (e.g., following the renewal of a scheme)
4. Expiry

Member States should indicate those schemes which have expired or for which all payments have stopped.

5. Co-financing

Although Community funding itself is excluded, total State aid for each Member State shall include aid measures that are co-financed by Community funding. In order to identify which schemes are co-financed and estimate how much such aid represents in relation to overall State aid, Member States are required to indicate whether or not the scheme is co-financed and if so the percentage of aid that is co-financed. If this is not possible, an estimate of the total amount of aid that is co-financed shall be provided.

6. Sector

The sectoral classification shall be based largely on NACE <sup>(2)</sup> at the [three-digit level].

7. Primary objective

8. Secondary objective

A secondary objective is one for which, in addition to the primary objective, the aid (or a distinct part of it) was exclusively earmarked at the time the aid was approved. For example, a scheme for which the primary objective is research and development may have as a secondary objective small and medium-sized enterprises (SMEs) if the aid is earmarked exclusively for SMEs. Another scheme for which the primary objective is SMEs may have as secondary objectives training and employment aid if, at the time

<sup>(1)</sup> *t* is the year in which the data are requested

<sup>(2)</sup> NACE Rev.1.1 is the Statistical classification of economic activities in the European Community.



▼ **B**

the aid was approved the aid is earmarked for x% training and y% employment.

9. Region(s)

Aid may, at the time of approval, be exclusively earmarked for a specific region or group of regions. Where appropriate, a distinction should be made between Objective 1 regions and less-favoured areas.

10. Category of aid instrument(s)

A distinction shall be made between six categories (Grant, Tax reduction/exemption, Equity participation, Soft loan, Tax deferral, Guarantee).

11. Description of aid instrument in national language

12. Type of aid

A distinction shall be made between three categories: Scheme, Individual application of a scheme, Individual aid awarded outside of a scheme (ad hoc aid).

13. Expenditure

As a general rule, figures should be expressed in terms of actual expenditure (or actual revenue foregone in the case of tax expenditure). Where payments are not available, commitments or budget appropriations shall be provided and flagged accordingly. Separate figures shall be provided for each aid instrument within a scheme or individual aid (e.g. grant, soft loans, etc.) Figures shall be expressed in the national currency in application at the time of the reporting period. Expenditure shall be provided for t-1, t-2, t-3, t-4, t-5.

14. Aid intensity and beneficiaries

Member States should indicate:

- the effective aid intensity of the support actually granted per type of aid and of region
- the number of beneficiaries
- the average amount of aid per beneficiary.

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▼**B**

*ANNEX III C*

**INFORMATION TO BE CONTAINED IN THE ANNUAL REPORT TO  
BE PROVIDED TO THE COMMISSION**

The reports shall be provided in computerised form. They shall contain the following information:

1. Title of aid scheme, Commission aid number and reference of the Commission decision
2. Expenditure. The figures have to be expressed in euros or, if applicable, national currency. In the case of tax expenditure, annual tax losses have to be reported. If precise figures are not available, such losses may be estimated. For the year under review indicate separately for each aid instrument within the scheme (e.g. grant, soft loan, guarantee, etc.):
  - 2.1. amounts committed, (estimated) tax losses or other revenue forgone, data on guarantees, etc. for new assisted projects. In the case of guarantee schemes, the total amount of new guarantees handed out should be provided;
  - 2.2. actual payments, (estimated) tax losses or other revenue forgone, data on guarantees, etc. for new and current projects. In the case of guarantee schemes, the following should be provided: total amount of outstanding guarantees, premium income, recoveries, indemnities paid out, operating result of the scheme under the year under review;
  - 2.3. number of assisted projects and/or enterprises;
  - 2.4. estimated overall amount of:
    - aid granted for the permanent withdrawal of fishing vessels through their transfer to third countries;
    - aid granted for the temporary cessation of fishing activities;
    - aid granted for the renewal of fishing vessels;
    - aid granted for modernisation of fishing vessels;
    - aid granted for the purchase of used vessels;
    - aid granted for socio-economic measures;
    - aid granted to make good damage caused by natural disasters or exceptional occurrences;
    - aid granted to outermost regions;
    - aid granted through parafiscal charges;
  - 2.5. regional breakdown of amounts under point 2.1. by regions defined as Objective 1 regions and other areas;
3. Other information and remarks.



### **c. Public service compensation**

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>





18. Community framework for State aid in the form of public service compensation, OJ  
2005 C 297/4

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



**Community framework for State aid in the form of public service compensation**

(2005/C 297/04)

**1. PURPOSE AND SCOPE**

1. It is apparent from the case-law of the Court of Justice of the European Communities <sup>(1)</sup>, that public service compensation does not constitute State aid within the meaning of Article 87(1) of the EC Treaty if it fulfils certain conditions. However, if public service compensation does not meet these conditions and if the general criteria for the applicability of Article 87(1) are satisfied, such compensation constitutes State aid.
2. Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest <sup>(2)</sup> lays down the conditions under which certain types of public service compensation constitute State aid compatible with Article 86(2) of the EC Treaty and exempts compensation satisfying those conditions from the prior notification requirement. Public service compensation which constitutes State aid and does not fall within the scope of Decision 2005/842/EC on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest will still be subject to the prior notification requirement. The purpose of this framework is to spell out the conditions under which such State aid can be found compatible with the common market pursuant to Article 86(2).
3. This framework is applicable to public service compensation granted to undertakings in connexion with activities subject to the rules of the EC Treaty, with the exception of the transport sector, and the public service broadcasting sector covered by the Communication from the Commission on the application of State aid rules to public service broadcasting <sup>(3)</sup>.
4. The provisions of this framework apply without prejudice to the stricter specific provisions relating to public service obligations contained in sectoral Community legislation and measures.
5. This framework applies without prejudice to the Community provisions in force in the field of public procurement and competition (in particular Articles 81 and 82 of the EC Treaty).

<sup>(1)</sup> Judgments in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ('Altmark') [2003] ECR I-7747 and Joined Cases C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* [2003] ECR I-14243.

<sup>(2)</sup> OJ L 312, 29.11.2005, p. 67.

<sup>(3)</sup> OJ C 320, 15.11.2001, p. 5.

**2. CONDITIONS GOVERNING THE COMPATIBILITY OF PUBLIC SERVICE COMPENSATION THAT CONSTITUTES STATE AID**

**2.1. General provisions**

6. In its judgment in *Altmark*, the Court laid down the conditions under which public service compensation does not constitute State aid as follows:

'[...] First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. [...].

[...] Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. [...] Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 87(1) of the Treaty.

[...] Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit [...].

[...] Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'

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7. Where these four criteria are met, public service compensation does not constitute State aid, and Articles 87 and 88 of the EC Treaty do not apply. If the Member States do not respect these criteria and if the general criteria for the applicability of Article 87(1) of the EC Treaty are met, public service compensation constitutes State aid.

8. The Commission considers that at the current stage of development of the common market, such State aid may be declared compatible with the Treaty under Article 86(2) of the EC Treaty if it is necessary to the operation of the services of general economic interest and does not affect the development of trade to such an extent as would be contrary to the interests of the Community. The following conditions should be met in order to achieve such balance.

#### 2.2. Genuine service of general economic interest within the meaning of Article 86 of the EC Treaty

9. It is apparent from the case-law of the Court of Justice that with the exception of the sectors in which there are Community rules governing the matter, Member States have a wide margin of discretion regarding the nature of services that could be classified as being services of general economic interest. Thus, the Commission's task is to ensure that this margin of discretion is applied without manifest error as regards the definition of services of general economic interest.

10. It transpires from Article 86(2) that undertakings<sup>(1)</sup> entrusted with the operation of services of general economic interest are undertakings entrusted with 'a particular task'. When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, the Member States are encouraged to consult widely, with a particular emphasis on users.

#### 2.3. Need for an instrument specifying the public service obligations and the methods of calculating compensation

11. The concept of service of general economic interest within the meaning of Article 86 of the EC Treaty means that the undertakings in question have been entrusted with a special task by the State<sup>(2)</sup>. Public authorities remain responsible — with the exception of the sectors in which there are Community rules governing the matter — for setting the framework of criteria and conditions for the provision of services, regardless of the legal status of the provider and of whether the service is provided on the

basis of free competition. Accordingly, a public service assignment is necessary in order to define the obligations of the undertakings in question and of the State. The term 'State' covers the central, regional and local authorities.

12. Responsibility for operation of the service of general economic interest must be entrusted to the undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State. The act or acts must specify, in particular:

(a) the precise nature and the duration of the public service obligations;

(b) the undertakings and territory concerned;

(c) the nature of any exclusive or special rights assigned to the undertaking;

(d) the parameters for calculating, controlling and reviewing the compensation;

(e) the arrangements for avoiding and repaying any over-compensation.

13. When defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, Member States are invited to consult widely, with particular emphasis on users.

#### 2.4. Amount of compensation

14. The **amount of compensation** may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. The amount of compensation includes all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.

15. In any event, compensation must be actually used for the operation of the service of general economic interest concerned. Public service compensation granted for the operation of a service of general economic interest, but actually used to operate on other markets is not justified, and consequently constitutes incompatible State aid. The undertaking receiving public service compensation may, however, enjoy a reasonable profit.

<sup>(1)</sup> 'Undertaking' is to be understood as any entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. 'Public undertaking' is to be understood as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it, as defined in Article 2(1)(b) of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 195, 29.7.1980, p. 35. Directive as last amended by Directive 2000/52/EC, OJ L 193, 29.7.2000, p. 75).

<sup>(2)</sup> See, in particular, the judgment in Case C-127/73 *BRT v SABAM* [1974] ECR-313.



16. The **costs to be taken into consideration** include all the costs incurred in the operation of the service of general economic interest. Where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration. Where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with the service of general economic interest may be taken into consideration. The costs allocated to the service of general economic interest may cover all the variable costs incurred in providing the service of general economic interest, an appropriate contribution to fixed costs common to both the service of general economic interest and other activities and an adequate return on the own capital assigned to the service of general economic interest<sup>(1)</sup>. The costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the functioning of the service of general economic interest. The costs linked to any activities outside the scope of the service of general economic interest must cover all the variable costs, an appropriate contribution to fixed common costs and an adequate return on capital. These costs may, under no circumstances, be imputed to the service of general economic interest. The calculation of costs must follow criteria which have previously been defined and be based on generally accepted cost accounting principles which must be brought to the knowledge of the Commission in the context of the notification pursuant to Article 88(3) of the EC Treaty.

17. The **revenue to be taken into account** must include at least the entire revenue earned from the service of general economic interest. If the undertaking in question holds special or exclusive rights linked to a service of general economic interest that generates profit in excess of the reasonable profit, or benefits from other advantages granted by the State, these must be taken into consideration, irrespective of their classification for the purposes of Article 87 of the EC Treaty, and are added to its revenue. The Member State may also decide that the profits accruing from other activities outside the scope of the service of general economic interest must be allocated in whole or in part to the financing of the service of general economic interest.

18. '**Reasonable profit**' should be taken to mean a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate must normally not exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector

are taken into account. In determining what amounts to a reasonable profit, the Member State may introduce incentive criteria relating, among other things, to the quality of service provided and gains in productive efficiency.

19. When a company carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts must show separately the costs and receipts associated with the service of general economic interest and those associated with other services, as well as the parameters for allocating costs and revenues. Where an undertaking is entrusted with the operation of several services of general economic interest either because the authority assigning the service of general economic interest is different or because the nature of the service of general economic interest is different, the undertaking's internal accounts must make it possible to ensure that there is no over-compensation at the level of each service of general economic interest. These principles are without prejudice to the provisions of Directive 80/723/EEC in cases where that Directive applies.

### 3. OVER-COMPENSATION

20. Member States must check regularly, or arrange for checks to be made, to ensure that there has been no over-compensation. Since over-compensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State, and for the future, the parameters for the calculation of the compensation must be updated.

21. Where the amount of over-compensation does not exceed 10 % of the amount of annual compensation, such over-compensation may be carried forward to the next year. Some services of general economic interest may have costs that vary significantly each year, notably as regards specific investments. In such cases, exceptionally, over-compensation in excess of 10 % in certain years may prove necessary for the operation of the service of general economic interest. The specific situation which may justify over-compensation in excess of 10 % should be explained in the notification to the Commission. However, the situation should be reviewed at intervals determined on the basis of the situation in each sector which, in any event, should not exceed four years. All over-compensation discovered at the end of that period should be repaid.

22. Any over-compensation may be used to finance another service of general economic interest operated by the same undertaking, but such a transfer must be shown in the undertaking's accounts and be carried out in accordance with the rules and principles set out in this framework, notably as regards prior notification. The Member States must ensure that such transfers are subjected to proper control. The transparency rules laid down in Directive 80/723/EEC apply.

<sup>(1)</sup> See Joined Cases C-83/01P, C-93/01P and C-94/01P *Chronopost SA* [2003] ECR I - 6993.

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23. The amount of over-compensation cannot remain available to an undertaking on the ground that it would rank as aid compatible with the Treaty (for example, environmental aid, employment aid and aid for small and medium-sized enterprises). If a Member State wishes to grant such aid, the prior notification procedure laid down in Article 88(3) of the EC Treaty should be complied with. Aid may be disbursed only if it has been authorised by the Commission. If such aid is compatible with a block exemption Regulation, the conditions of the relevant block exemption Regulation must be fulfilled.

#### 4. CONDITIONS AND OBLIGATIONS ATTACHED TO COMMISSION DECISIONS

24. According to Article 7(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(1)</sup>, the Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market, and lay down obligations to enable compliance with the decision to be monitored. In the field of services of general economic interest, conditions and obligations may be necessary notably to ensure that aid granted to the undertakings concerned does not actually lead to over-compensations. In this context, periodical reports or other obligations may be necessary, in the light of the specific situation of each service of general economic interest.

#### 5. APPLICATION OF THE FRAMEWORK

25. This framework will apply for a period of six years from the date of its publication in the *Official Journal of the European Union*. The Commission may, after consulting the Member States, amend the framework before it expires, for important reasons linked to the development of the

common market. Four years after the date of publication of this framework, the Commission will undertake an impact assessment based on factual information and the results of wide consultations conducted by the Commission on the basis, notably, of data provided by the Member States. The results of the impact assessment will be made available to the European Parliament, the Committee of Regions and the Economic and Social Committee and to the Member States.

26. The Commission will apply the provisions of this framework to all aid projects notified to it and will take a decision on those projects after the framework is published in the Official Journal, even if the projects were notified prior to such publication. In the case of non-notified aid, the Commission will apply:

- (a) the provisions of this framework, if the aid was granted after publication of the framework in the Official Journal;
- (b) the provisions in force at the time the aid was granted, in all other cases.

#### 6. APPROPRIATE MEASURES

27. The Commission proposes as appropriate measures for the purposes of Article 88(1) of the EC Treaty that Member States bring their existing schemes regarding public service compensation into line with this framework, within 18 months following its publication in the Official Journal. Member States should confirm to the Commission within one month of publication of the framework in the Official Journal that they agree to the appropriate measures proposed. In the absence of any reply, the Commission will take it that the Member State concerned does not agree.

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.



19. Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2012 L 7/3

**Note:**

State of the Law: 1 September 2012. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



## DECISIONS

### COMMISSION DECISION

of 20 December 2011

**on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest**

(notified under document C(2011) 9380)

(Text with EEA relevance)

(2012/21/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 106(3) thereof,

Whereas:

(1) Article 14 of the Treaty requires the Union, without prejudice to Articles 93, 106 and 107 of the Treaty, to use its powers in such a way as to make sure that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions.

(2) For certain services of general economic interest to operate on the basis of principles and under conditions which enable them to fulfil their missions, financial support from the State may prove necessary to cover some or all of the specific costs resulting from the public service obligations. In accordance with Article 345 of the Treaty, as interpreted by the Court of Justice of the European Union, it is irrelevant whether such services of general economic interest are operated by public or private undertakings.

(3) Article 106(2) of the Treaty states in this respect that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of these rules does not obstruct, in law or in fact, the performance of the tasks entrusted. This should however not affect the development of trade to such an extent as would be contrary to the interests of the Union.

(4) In its judgment in *Altmark* <sup>(1)</sup>, the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107 of the Treaty provided that four cumulative criteria are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

(5) Where those criteria are not fulfilled and the general conditions for the applicability of Article 107(1) of the Treaty are met, public service compensation constitutes State aid and is subject to Articles 93, 106, 107 and 108 of the Treaty.

(6) In addition to this Decision, three instruments are relevant for the application of the State aid rules to compensation granted for the provision of services of general economic interest:

(a) a new Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general

<sup>(1)</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark* [2003] ECR I-7747.

economic interest<sup>(1)</sup> clarifies the application of Article 107 of the Treaty and the criteria set by the *Altmark* ruling to such compensation;

trade and competition to such an extent as would be contrary to the interests of the Union. An individual State aid notification should therefore not be required for compensation below a specified annual amount of compensation provided the requirements of this Decision are met.

- (b) a new Regulation, which the Commission intends to adopt, on the application of Articles 107 and 108 of the Treaty to *de minimis* aid for the provision of SGEI lays down certain conditions – including the amount of the compensation – under which public service compensations shall be deemed not to meet all the criteria of Article 107(1);
- (c) a revised framework for State aid in the form of public service compensation<sup>(2)</sup> specifies how the Commission will analyse cases that are not covered by this Decision and therefore have to be notified to the Commission.
- (7) Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest<sup>(3)</sup> specifies the meaning and extent of the exception pursuant to Article 106(2) of the Treaty and sets out rules intended to enable effective monitoring of the fulfilment of the criteria set out in that provision. This Decision replaces Decision 2005/842/EC and lays down the conditions under which State aid in the form of compensation for a service of general economic interest is not subject to the prior notification requirement of Article 108(3) of the Treaty as it can be deemed compatible with Article 106(2) of the Treaty.
- (8) Such aid may be deemed compatible only if it is granted in order to ensure the provision of services of general economic interest as referred to in Article 106(2) of the Treaty. It is clear from the case-law that, in the absence of sectoral Union rules governing the matter, Member States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. Thus the Commission's task is to ensure that there is no manifest error as regards the definition of services of general economic interest.
- (9) Provided a number of conditions are met, limited amounts of compensation granted to undertakings entrusted with the provision of services of general economic interest do not affect the development of
- (10) Given the development of intra-Union trade in the provision of services of general economic interest, demonstrated for instance by the strong development of multi-national providers in a number of sectors which are of great importance for the development of the internal market, it is appropriate to set a lower limit for the amount of compensation which can be exempted from the notification requirement in accordance with this Decision than what was set by Decision 2005/842/EC, while allowing for that amount to be computed as an annual average over the entrustment period.
- (11) Hospitals and undertakings in charge of social services, which are entrusted with tasks of general economic interest, have specific characteristics that need to be taken into consideration. In particular, account should be taken of the fact that, in the present economic conditions and at the current stage of development of the internal market, social services may require an amount of aid beyond the threshold in this Decision to compensate for the public service costs. A larger amount of compensation for social services does thus not necessarily produce a greater risk of distortions of competition. Accordingly, undertakings in charge of social services, including the provision of social housing for disadvantaged citizens or socially less advantaged groups, who due to solvency constraints are unable to obtain housing at market conditions, should also benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision. The same should apply to hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to their main activities, in particular in the field of research. In order to benefit from the exemption from notification, social services should be clearly identified services, meeting social needs as regards health and long-term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups.
- (12) The extent to which a particular compensation measure affects trade and competition depends not only on the average amount of compensation received per year and the sector concerned, but also on the overall duration of the period of entrustment. Unless a longer period is justified due to the need for a significant investment, for example in the area of social housing, the application of this Decision should therefore be limited to periods of entrustment not exceeding 10 years.

<sup>(1)</sup> OJ C 8, 11.1.2012, p. 4.

<sup>(2)</sup> OJ C 8, 11.1.2012, p. 15.

<sup>(3)</sup> OJ L 312, 29.11.2005, p. 67.

- (13) In order for Article 106(2) of the Treaty to apply, the undertaking in question must have been specifically entrusted by the Member State with the operation of a particular service of general economic interest.
- (14) In order to ensure that the criteria set out in Article 106(2) of the Treaty are met, it is necessary to lay down more precise conditions that must be fulfilled in respect of the entrustment of the operation of services of general economic interest. The amount of compensation can be properly calculated and checked only if the public service obligations incumbent on the undertakings and any obligations incumbent on the State are clearly set out in one or more acts of the competent public authorities in the Member State concerned. The form of the instrument may vary from one Member State to another but it should specify, at least, the undertakings concerned, the precise content and duration of and, where appropriate, the territory concerned by the public service obligations imposed, the granting of any exclusive or special rights, and describe the compensation mechanism and the parameters for determining the compensation and avoiding and recovering any possible overcompensation. In order to ensure transparency in relation to the application of this Decision, the act of entrustment should also include a reference to it.
- (15) In order to avoid unjustified distortions of competition, the compensation should not exceed what is necessary to cover the net costs incurred by the undertaking in operating the service, including a reasonable profit.
- (16) Compensation in excess of what is necessary to cover the net costs incurred by the undertaking concerned in operating the service is not necessary for the operation of the service of general economic interest, and consequently constitutes incompatible State aid that should be repaid to the State. Compensation granted for the operation of a service of general economic interest but actually used by the undertaking concerned to operate on another market for purposes other than those specified in the act of entrustment is not necessary for the operation of the service of general economic interest, and may consequently also constitute incompatible State aid that should be repaid.
- (17) The net cost to be taken into account should be calculated as the difference between the cost incurred in operating the service of general economic interest and the revenue earned from the service of general economic interest or, alternatively, as the difference between the net cost of operating with the public service obligation and the net cost or profit operating without the public service obligation. In particular, if the public service obligation leads to a reduction of the revenue, for instance due to regulated tariffs, but does not affect the costs, it should be possible to determine the net cost incurred in discharging the public service obligation on the basis of the foregone revenue. In order to avoid unjustified distortions of competition, all revenues earned from the service of general economic interest, that is to say, any revenues that the provider would not have obtained had it not been entrusted with the obligation should be taken into account for the purposes of calculating the amount of compensation. If the undertaking in question holds special or exclusive rights linked to activities, other than the service of general economic interest for which the aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these should be included in its revenue, irrespective of their classification for the purposes of Article 107 of the Treaty.
- (18) Reasonable profit should be determined as a rate of return on capital that takes into account the degree of risk, or absence of risk, incurred. The rate of return on capital should be defined as the internal rate of return that the undertaking obtains on its invested capital over the duration of the period of entrustment.
- (19) Profit not exceeding the relevant swap rate plus 100 basis points should not be regarded as unreasonable. In this context, the relevant swap rate is viewed as an appropriate rate of return for a risk-free investment. The premium of 100 basis points serves, inter alia, to compensate for liquidity risk related to the provision of capital which is committed for the operation of the service during the period of entrustment.
- (20) In cases where the undertaking entrusted with a service of general economic interest does not bear a substantial degree of commercial risk, for instance because the costs it incurs in the operation of the service are compensated in full, profits exceeding the benchmark of the relevant swap rate plus 100 basis points should not be viewed as reasonable.
- (21) Where, by reason of specific circumstances, it is not appropriate to use the rate of return on capital, Member States should be able to rely on other profit level indicators to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales.
- (22) In determining what constitutes a reasonable profit, the Member States should be able to introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains should not reduce the quality of the service provided. For instance, Member States should be able to define productive efficiency targets in the entrustment act whereby the level of compensation is made



- dependent upon the extent to which the targets have been met. The entrustment act may provide that if the undertaking does not meet the objectives, the compensation is to be reduced by applying a calculation method specified in the entrustment act, whereas if the undertaking exceeds the objectives, the compensation may be increased by applying a method specified in the entrustment act. Any rewards linked to productive efficiency gains should be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.
- (23) Article 93 of the Treaty constitutes a *lex specialis* with regard to Article 106(2) of the Treaty. It lays down the rules applicable to public service compensation in the land transport sector. Article 93 has been interpreted by Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 <sup>(1)</sup>, which lays down the rules applicable to the compensation of public service obligations in public passenger traffic. Its application to inland waterway passenger traffic is at the discretion of the Member States. Regulation (EC) No 1370/2007 exempts from notification pursuant to Article 108(3) of the Treaty all compensation in the land transport sector that fulfils the conditions of that Regulation. In accordance with the judgment in *Altmark*, compensation in the land transport sector that does not comply with the provisions of Article 93 of the Treaty cannot be declared compatible with the Treaty on the basis of Article 106(2) of the Treaty, or on the basis of any other Treaty provision. Consequently, this Decision does not apply to the land transport sector.
- (24) Unlike land transport, the maritime and air transport sectors are subject to Article 106(2) of the Treaty. Certain rules applicable to public service compensation in the air and maritime transport sectors are to be found in Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community <sup>(2)</sup> and in Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) <sup>(3)</sup>. However, unlike Regulation (EC) No 1370/2007, those Regulations do not refer to the compatibility of the possible State aid elements, nor do they provide for an exemption from the obligation to notify pursuant to Article 108(3) of the Treaty. This Decision should therefore apply to public service compensation in the air and maritime transport sectors provided that, in addition to fulfilling the conditions set out in this Decision, such compensation also complies with the sectoral rules contained in Regulations (EC) No 1008/2008 and (EEC) No 3577/92 where applicable.
- (25) In the specific cases of public service compensation for air or maritime links to islands and for airports and ports which constitute services of general economic interest as referred to in Article 106(2) of the Treaty, it is appropriate to provide thresholds based on the average annual number of passengers as this more accurately reflects the economic reality of these activities and their character of services of general economic interest.
- (26) Exemption from the requirement of prior notification for certain services of general economic interest does not rule out the possibility for Member States to notify a specific aid project. In the event of such a notification, or if the Commission assesses the compatibility of a specific aid measure following a complaint or *ex officio*, the Commission will assess whether the conditions of this Decision are met. If that is not the case, the measure will be assessed in accordance with the principles contained in the Commission Communication on a framework for State aid in the form of public service compensation.
- (27) This Decision should apply without prejudice to the provisions of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings <sup>(4)</sup>.
- (28) This Decision should apply without prejudice to the Union provisions in the field of competition, in particular Articles 101 and 102 of the Treaty.
- (29) This Decision should apply without prejudice to the Union provisions in the field of public procurement.
- (30) This Decision should apply without prejudice to stricter provisions relating to public service obligations that are contained in sectoral Union legislation.
- (31) Transitional provisions should be laid down for individual aid that was granted before the entry into force of this Decision. Aid schemes put into effect in accordance with Decision 2005/842/EC before the entry into force of this Decision should continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2 years. Aid put into effect before the entry into force of this Decision that was not awarded in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision should be compatible with the internal market and exempt from the notification requirement.

<sup>(1)</sup> OJ L 315, 3.12.2007, p. 1.

<sup>(2)</sup> OJ L 293, 31.10.2008, p. 3.

<sup>(3)</sup> OJ L 364, 12.12.1992, p. 7.

<sup>(4)</sup> OJ L 318, 17.11.2006, p. 17.



- (32) The Commission intends to carry out a review of this Decision 5 years after its entry into force,

HAS ADOPTED THIS DECISION:

#### Article 1

##### Subject matter

This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is compatible with the internal market and exempt from the requirement of notification laid down in Article 108(3) of the Treaty.

#### Article 2

##### Scope

1. This Decision applies to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) of the Treaty, which falls within one of the following categories:

- (a) compensation not exceeding an annual amount of EUR 15 million for the provision of services of general economic interest in areas other than transport and transport infrastructure;

where the amount of compensation varies over the duration of the entrustment, the annual amount shall be calculated as average of the annual amounts of compensation expected to be made over the entrustment period;

- (b) compensation for the provision of services of general economic interest by hospitals providing medical care, including, where applicable, emergency services; the pursuit of ancillary activities directly related to the main activities, notably in the field of research, does not, however, prevent the application of this paragraph;

- (c) compensation for the provision of services of general economic interest meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups;

- (d) compensation for the provision of services of general economic interest as regards air or maritime links to islands on which the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 300 000 passengers;

- (e) compensation for the provision of services of general economic interest as regards airports and ports for which

the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 200 000 passengers, in the case of airports, and 300 000 passengers, in the case of ports.

2. This Decision only applies where the period for which the undertaking is entrusted with the operation of the service of general economic interest does not exceed 10 years. Where the period of entrustment exceeds 10 years, this Decision only applies to the extent that a significant investment is required from the service provider that needs to be amortised over a longer period in accordance with generally accepted accounting principles.

3. If during the duration of the entrustment the conditions for the application of this Decision cease to be met, the aid shall be notified in accordance with Article 108(3) of the Treaty.

4. In the field of air and maritime transport, this Decision only applies to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) of the Treaty, which complies with Regulation (EC) No 1008/2008 and, respectively, Regulation (EEC) No 3577/92 where applicable.

5. This Decision does not apply to State aid in the form of public service compensation granted to undertakings in the field of land transport.

#### Article 3

##### Compatibility and exemption from notification

State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the internal market and shall be exempt from the prior notification obligation provided for in Article 108(3) of the Treaty provided that it also complies with the requirements flowing from the Treaty or from sectoral Union legislation.

#### Article 4

##### Entrustment

Operation of the service of general economic interest shall be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. The act or acts shall include, in particular:

- (a) the content and duration of the public service obligations;
- (b) the undertaking and, where applicable, the territory concerned;

- (c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority;
- (d) the costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the operation of the service of general economic interest.
- (d) a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation;
- (e) the arrangements for avoiding and recovering any overcompensation; and
- (f) a reference to this Decision.

#### Article 5

#### Compensation

1. The amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.
2. The net cost may be calculated as the difference between costs as defined in paragraph 3 and revenues as defined in paragraph 4. Alternatively, it may be calculated as the difference between the net cost for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking operating without the public service obligation.
3. The costs to be taken into consideration shall comprise all the costs incurred in operating the service of general economic interest. They shall be calculated on the basis of generally accepted cost accounting principles, as follows:
  - (a) where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration;
  - (b) where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs related to the service of general economic interest shall be taken into consideration;
  - (c) the costs allocated to the service of general economic interest may cover all the direct costs incurred in operating the service of general economic interest and an appropriate contribution to costs common to both the service of general economic interest and other activities;
4. The revenue to be taken into consideration shall include at least the entire revenue earned from the service of general economic interest, regardless of whether the revenue is classified as State aid within the meaning of Article 107 of the Treaty. If the undertaking in question holds special or exclusive rights linked to activities, other than the service of general economic interest for which the aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these shall be included in its revenue, irrespective of their classification for the purposes of Article 107 of the Treaty. The Member State concerned may decide that the profits accruing from other activities outside the scope of the service of general economic interest in question are to be assigned in whole or in part to the financing of the service of general economic interest.
5. For the purposes of this Decision, 'reasonable profit' means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk. The 'rate of return on capital' means the internal rate of return that the undertaking makes on its invested capital over the duration of the period of entrustment. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation.
6. In determining what constitutes a reasonable profit, Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains shall not reduce the quality of the service provided. Any rewards linked to productive efficiency gains shall be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.
7. For the purposes of this Decision, a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points shall be regarded as reasonable in any event. The relevant swap rate shall be the swap rate the maturity and currency of which correspond to the duration and currency of the entrustment act. Where the provision of the service of general economic interest is not connected with a substantial commercial or contractual risk, in particular when the net cost incurred in providing the service of general economic interest is essentially compensated *ex post* in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points.

8. Where, by reasons of specific circumstances, it is not appropriate to use the rate of return on capital, Member States may rely on profit level indicators other than the rate of return on capital to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales. The 'return' means the earnings before interests and taxes in that year. The average return is computed using the discount factor over the life of the contract as specified by the Communication from the Commission on the revision of the method for setting the reference and discount rates<sup>(1)</sup>. Whatever indicator is chosen, the Member State shall be able to provide the Commission upon request with evidence that the profit does not exceed what would be required by a typical undertaking considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.

9. Where an undertaking carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts shall show separately the costs and receipts associated with the service of general economic interest and those of other services, as well as the parameters for allocating costs and revenues. The costs linked to any activities outside the scope of the service of general economic interest shall cover all the direct costs, an appropriate contribution to the common costs and an adequate return on capital. No compensation shall be granted in respect of those costs.

10. Member States shall require the undertaking concerned to repay any overcompensation received.

#### Article 6

##### Control of overcompensation

1. Member States shall ensure that the compensation granted for the operation of the service of general economic interest meets the requirements set out in this Decision and in particular that the undertaking does not receive compensation in excess of the amount determined in accordance with Article 5. They shall provide evidence upon request from the Commission. They shall carry out regular checks, or ensure that such checks are carried out, at least every 3 years during the period of entrustment and at the end of that period.

2. Where an undertaking has received compensation in excess of the amount determined in accordance with Article 5, the Member State shall require the undertaking concerned to repay any overcompensation received. The parameters for the calculation of the compensation shall be updated for the future. Where the amount of overcompensation does not exceed 10 % of the amount of the average annual

compensation, such overcompensation may be carried forward to the next period and deducted from the amount of compensation payable in respect of that period.

#### Article 7

##### Transparency

For compensation above EUR 15 million granted to an undertaking which also has activities outside the scope of the service of general economic interest, the Member State concerned shall publish the following information on the Internet or by other appropriate means:

- (a) the entrustment act or a summary which includes the elements listed in Article 4;
- (b) the amounts of aid granted to the undertaking on a yearly basis.

#### Article 8

##### Availability of information

The Member States shall keep available, during the period of entrustment and for at least 10 years from the end of the period of entrustment, all the information necessary to determine whether the compensation granted is compatible with this Decision.

On written request by the Commission, Member States shall provide the Commission with all the information that the latter considers necessary to determine whether the compensation measures in force are compatible with this Decision.

#### Article 9

##### Reports

Each Member State shall submit a report on the implementation of this Decision to the Commission every 2 years. The reports shall provide a detailed overview of the application of this Decision for the different categories of services referred to in Article 2(1), including:

- (a) a description of the application of this Decision to the services falling within its scope, including in-house activities;
- (b) the total amount of aid granted in accordance with this Decision, with a breakdown by the economic sector of the beneficiaries;

<sup>(1)</sup> OJ C 14, 19.1.2008, p. 6.

- (c) an indication of whether, for a particular type of service, the application of this Decision has given rise to difficulties or complaints by third parties;

and

- (d) any other information concerning the application of this Decision required by the Commission and to be specified in due time before the report is to be submitted.

The first report shall be submitted by 30 June 2014.

*Article 10*

**Transitional provisions**

This Decision shall apply to individual aid and aid schemes as follows:

- (a) any aid scheme put into effect before the entry into force of this Decision that was compatible with the internal market and exempted from the notification requirement in accordance with Decision 2005/842/EC shall continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2 years;
- (b) any aid put into effect before the entry into force of this Decision that was not compatible with the internal market

nor exempted from the notification requirement in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempt from the requirement of prior notification.

*Article 11*

**Repeal**

Decision 2005/842/EC is hereby repealed.

*Article 12*

**Entry into force**

This Decision shall enter into force on 31 January 2012.

*Article 13*

**Addressees**

This Decision is addressed to the Member States.

Done at Brussels, 20 December 2011.

*For the Commission*

Joaquín ALMUNIA

*Vice-President*



**d. Regarding Art 107(2) and (3) TFEU, exemptions/derogations**

20. Commission Regulation 800/2008/EC of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ 2008 L 214/3

Note:  
State of the Law: February 2011. While the authors are striving to keep this document updated, there is no guarantee that the texts are accurate or complete. For official texts, refer to the EU's official database <http://www.eur-lex.eu>



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**COMMISSION REGULATION (EC) No 800/2008**

**of 6 August 2008**

**declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation)**

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid <sup>(1)</sup>, and in particular Article 1(1) points (a) and (b) thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

After consulting the Advisory Committee on State Aid,

Whereas:

(1) Regulation (EC) No 994/98 empowers the Commission to declare, in accordance with Article 87 of the Treaty that under certain conditions aid to small and medium-sized enterprises ('SMEs'), aid in favour of research and development, aid in favour of environmental protection, employment and training aid, and aid that complies with the map approved by the Commission for each Member State for the grant of regional aid is compatible with the common market and not subject to the notification requirement of Article 88(3) of the Treaty.

(2) The Commission has applied Articles 87 and 88 of the Treaty in numerous decisions and gained sufficient experience to define general compatibility criteria as

regards aid in favour of SMEs, in the form of investment aid in and outside assisted areas, in the form of risk capital schemes and in the area of research, development and innovation, in particular in the context of the implementation of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises <sup>(3)</sup>, and as regards the extension of the scope of that Regulation to include aid for research and development, the implementation of Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 <sup>(4)</sup>, the implementation of the Commission communication on State aid and risk capital <sup>(5)</sup> and the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises <sup>(6)</sup>, as well as the implementation of the Community framework for State aid for research and development and innovation <sup>(7)</sup>.

(3) The Commission has also gained sufficient experience in the application of Articles 87 and 88 of the Treaty in the fields of training aid, employment aid, environmental aid, research and development and innovation aid and regional aid with respect to both SMEs and large enterprises, in particular in the context of the implementation of Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid <sup>(8)</sup>, Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment <sup>(9)</sup>, Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid <sup>(10)</sup> the Community framework for State aid for research and development <sup>(11)</sup>, the Community Framework for State aid for research and development and innovation, the 2001 Community guidelines on State aid for environmental protection <sup>(12)</sup>, the 2008 Community guidelines on State aid for environmental protection <sup>(13)</sup> and the Guidelines on national regional aid for 2007-2013 <sup>(14)</sup>.

<sup>(3)</sup> OJ L 10, 13.1.2001, p. 33. Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

<sup>(4)</sup> OJ L 63, 28.2.2004, p. 22.

<sup>(5)</sup> OJ C 235, 21.8.2001, p. 3.

<sup>(6)</sup> OJ C 194, 18.8.2006, p. 2.

<sup>(7)</sup> OJ C 323, 30.12.2006, p. 1.

<sup>(8)</sup> OJ L 10, 13.1.2001, p. 20. Regulation as last amended by Regulation (EC) No 1976/2006.

<sup>(9)</sup> OJ L 337, 13.12.2002, p. 3. Regulation as last amended by Regulation (EC) No 1976/2006.

<sup>(10)</sup> OJ L 302, 1.11.2006, p. 29.

<sup>(11)</sup> OJ C 45, 17.2.1996, p. 5.

<sup>(12)</sup> OJ C 37, 3.2.2001, p. 3.

<sup>(13)</sup> OJ C 82, 1.4.2008, p. 1.

<sup>(14)</sup> OJ C 54, 4.3.2006, p. 13.

<sup>(1)</sup> OJ L 142, 14.5.1998, p. 1.

<sup>(2)</sup> OJ C 210, 8.9.2007, p. 14.



- (4) In the light of this experience, it is necessary to adapt some of the conditions laid down in Regulations (EC) Nos 68/2001, 70/2001, 2204/2002 and 1628/2006. For reasons of simplification and to ensure more efficient monitoring of aid by the Commission, those Regulations should be replaced by a single Regulation. Simplification should result from, amongst other things, a set of common harmonised definitions and common horizontal provisions laid down in Chapter I of this Regulation. In order to ensure the coherence of State aid legislation, the definitions of aid and aid scheme should be identical to the definitions provided for these concepts in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(1)</sup>. Such simplification is essential in order to ensure that the Lisbon Strategy for Growth and Jobs yields results, especially for SMEs.
- (5) This Regulation should exempt any aid that fulfils all the relevant conditions of this Regulation, and any aid scheme, provided that any individual aid that could be granted under such scheme fulfils all the relevant conditions of this Regulation. In order to ensure transparency, as well as more efficient monitoring of aid, any individual aid measure granted under this Regulation should contain an express reference to the applicable provision of Chapter II and to the national law on which the individual aid is based.
- (6) In order to monitor the implementation of this Regulation, the Commission should also be in a position to obtain all necessary information from Member States concerning the measures implemented under this Regulation. A failure of the Member State to provide information within a reasonable deadline on these aid measures may therefore be considered to be an indication that the conditions of this Regulation are not being respected. Such failure may therefore lead the Commission to decide that this Regulation, or the relevant part of this Regulation, should be withdrawn, for the future, as regards the Member State concerned and that all subsequent aid measures, including new individual aid measures granted on the basis of aid schemes previously covered by this Regulation, need to be notified to the Commission in accordance with Article 88 of the Treaty. As soon as the Member State has provided correct and complete information, the Commission should allow the Regulation to be fully applicable again.
- (7) State aid within the meaning of Article 87(1) of the Treaty not covered by this Regulation should remain subject to the notification requirement of Article 88(3) of the Treaty. This Regulation should be without prejudice to the possibility for Member States to notify aid the objectives of which correspond to objectives covered by this Regulation. Such aid will be assessed by the Commission in particular on the basis of the conditions set out in this Regulation and in accordance with the criteria laid down in specific guidelines or frameworks adopted by the Commission wherever the aid measure at stake falls within the scope of application of such specific instrument.
- (8) This Regulation should not apply to export aid or aid favouring domestic over imported products. In particular, it should not apply to aid financing the establishment and operation of a distribution network in other countries. Aid towards the cost of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market should not normally constitute export aid.
- (9) This Regulation should apply across virtually all sectors. In the sector of fisheries and aquaculture, this Regulation should exempt only aid in the fields of research and development and innovation, aid in the form of risk capital, training aid and aid for disadvantaged and disabled workers.
- (10) In the agricultural sector, in view of the special rules which apply in the primary production of agricultural products, this Regulation should exempt only aid in the fields of research and development, aid in the form of risk capital, training aid, environmental aid and aid for disadvantaged and disabled workers to the extent that these categories of aid are not covered by Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 <sup>(2)</sup>.
- (11) In view of the similarities between the processing and marketing of agricultural products and of non-agricultural products this Regulation should apply to the processing and marketing of agricultural products, provided that certain conditions are met.

<sup>(1)</sup> OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

<sup>(2)</sup> OJ L 358, 16.12.2006, p. 3.



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- (12) Neither on-farm activities necessary for preparing a product for the first sale, nor the first sale to resellers or processors should be considered processing or marketing for the purposes of this Regulation. The Court of Justice of the European Communities has established that, once the Community has legislated for the establishment of a common organisation of the market in a given sector of agriculture, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. This Regulation should therefore not apply to aid, the amount of which is fixed on the basis of price or quantity of products purchased or put on the market, nor should it apply to aid which is linked to an obligation to share it with primary producers.
- (13) In view of Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry<sup>(1)</sup>, this Regulation should not apply to aid favouring activities in the coal sector with the exception of training aid, research and development and innovation aid and environmental aid.
- (14) Where a regional aid scheme purports to realise regional objectives, but is targeted at particular sectors of the economy, the objective and likely effects of the scheme may be sectorial rather than horizontal. Therefore, regional aid schemes targeted at specific sectors of economic activity, as well as regional aid granted for activities in the steel sector, in the shipbuilding sector, as foreseen in the Commission communication concerning the prolongation of the Framework on State aid to shipbuilding<sup>(2)</sup>, and in the synthetic fibres sector, should not be covered by the exemption from notification. However, the tourism sector plays an important role in national economies and in general has a particularly positive effect on regional development. Regional aid schemes aimed at tourism activities should therefore be exempt from the notification requirement.
- (15) Aid granted to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty<sup>(3)</sup> should be assessed under those Guidelines in order to avoid their circumvention. Aid to such undertakings should therefore be excluded from the scope of this Regulation. In order to reduce the administrative burden for Member States, when granting aid covered by this Regulation to SMEs, the definition of what is to be considered an undertaking in difficulty should be simplified as compared to the definition used in those Guidelines. Moreover, SMEs which have been incorporated for less than three years should not be considered, for the purposes of this Regulation, to be in difficulty with regard to that period, unless they fulfil the criteria under the relevant national law for being the subject of collective insolvency proceedings. That simplification should be without prejudice to the qualification of those SMEs under those Guidelines with regard to aid not covered by this Regulation and without prejudice to the qualification as undertakings in difficulty of large enterprises, under this Regulation, which remain subject to the full definition provided in those Guidelines.
- (16) The Commission has to ensure that authorised aid does not alter trading conditions in a way contrary to the general interest. Therefore, aid in favour of a beneficiary which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market, should be excluded from the scope of this Regulation. As a consequence, any ad hoc aid paid out to such a beneficiary and any aid scheme not containing a provision explicitly excluding such beneficiaries remains subject to the notification requirements of Article 88(3) of the Treaty. That provision should not affect the legitimate expectations of beneficiaries of aid schemes which are not subject to outstanding recovery orders.
- (17) In order to ensure the consistent application of Community State aid rules, as well as for reasons of administrative simplification, the definitions of terms which are relevant to the various categories of aid covered by this Regulation should be harmonised.
- (18) For the purposes of calculating aid intensity, all figures used should be taken before any deduction of tax or other charge. For the purpose of calculating aid intensities, aid payable in several instalments should be discounted to its value at the moment of granting. The interest rate to be used for discounting purposes and for calculating the aid amount in aid not taking the form of a grant, should be the reference rate applicable at the time of grant, as laid down in the Communication from the Commission on the revision of the method for setting the reference and discount rates<sup>(4)</sup>.

<sup>(1)</sup> OJ L 205, 2.8.2002, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

<sup>(2)</sup> OJ C 260, 28.10.2006, p. 7.

<sup>(3)</sup> OJ C 244, 1.10.2004, p. 2.

<sup>(4)</sup> OJ C 14, 19.1.2008, p. 6.

- (19) In cases where aid is awarded by means of tax exemptions or reductions on future taxes due, subject to the respect of a certain aid intensity defined in gross grant equivalent, discounting of aid tranches should take place on the basis of the reference rates applicable at the various times the tax advantages become effective. In the case of tax exemptions or reductions on future taxes, the applicable reference rate and the exact amount of the aid tranches may not be known in advance. In such a case, Member States should set in advance a cap on the discounted value of the aid respecting the applicable aid intensity. Subsequently, when the amount of the aid tranche in a given year becomes known, discounting can take place on the basis of the reference rate applicable at that time. The discounted value of each aid tranche should be deducted from the overall amount of the cap.
- (20) For the purposes of transparency, equal treatment and effective monitoring, this Regulation should apply only to aid which is transparent. Transparent aid is aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without a need to undertake a risk assessment. Aid comprised in loans, in particular, should be considered transparent where the gross grant equivalent has been calculated on the basis of the reference rate as laid down in the Communication from the Commission on the revision of the method for setting the reference and discount rates. Aid comprised in fiscal measures should be considered transparent where the measure provides for a cap ensuring that the applicable threshold is not exceeded. In the case of reductions in environmental taxes, which are not subject to an individual notification threshold under this Regulation, no cap needs to be included for the measure to be considered transparent.
- (21) Aid comprised in guarantee schemes should be considered transparent when the methodology to calculate the gross grant equivalent has been approved following notification of this methodology to the Commission, and, in the case of regional investment aid, also when the Commission has approved such methodology after adoption of Regulation (EC) No 1628/2006. The Commission will examine such notifications on the basis of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees<sup>(1)</sup>. Aid comprised in guarantee schemes should also be considered transparent where the beneficiary is an SME and the gross grant equivalent has been calculated on the basis of the safe-harbour premiums laid down in points 3.3 and 3.5 of that Notice.
- (22) In view of the difficulty in calculating the grant equivalent of aid in the form of repayable advances, such aid should be covered by this Regulation only if the total amount of the repayable advance is inferior to the applicable individual notification threshold and the maximum aid intensities provided under this Regulation.
- (23) Due to the higher risk of distortion of competition, large amounts of aid should continue to be assessed by the Commission on an individual basis. Thresholds should therefore be set for each category of aid within the scope of this Regulation, at a level which takes into account the category of aid concerned and its likely effects on competition. Any aid granted above those thresholds remains subject to the notification requirement of Article 88(3) of the Treaty.
- (24) With a view to ensuring that aid is proportionate and limited to the amount necessary, thresholds should, whenever possible, be expressed in terms of aid intensities in relation to a set of eligible costs. Because it is based on a form of aid for which eligible costs are difficult to identify, the threshold with regard to aid in the form of risk capital should be formulated in terms of maximum aid amounts.
- (25) The thresholds in terms of aid intensity or aid amount should be fixed, in the light of the Commission's experience, at a level that strikes the appropriate balance between minimising distortions of competition in the aided sector and tackling the market failure or cohesion issue concerned. With respect to regional investment aid, this threshold should be set at a level taking into account the allowable aid intensities under the regional aid maps.
- (26) In order to determine whether the individual notification thresholds and the maximum aid intensities laid down in this Regulation are respected, the total amount of public support for the aided activity or project should be taken into account, regardless of whether that support is financed from local, regional, national or Community sources.
- (27) Moreover, this Regulation should specify the circumstances under which different categories of aid covered by this Regulation may be cumulated. As regards cumulation of aid covered by this Regulation with State aid not covered by this Regulation, regard should be had to the Decision of the Commission approving the aid not covered by this Regulation, as well as to the State aid rules on which that decision is based. Special provisions should apply in respect of cumulation of aid for disabled workers with other categories of aid, notably with investment aid, which can be calculated on the basis of the wage costs concerned. This Regulation should also make provision for cumulation of aid measures with identifiable eligible costs and aid measures without identifiable eligible costs.

<sup>(1)</sup> OJ C 155, 20.6.2008, p. 10.

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- (28) In order to ensure that the aid is necessary and acts as an incentive to develop further activities or projects, this Regulation should not apply to aid for activities in which the beneficiary would already engage under market conditions alone. As regards any aid covered by this Regulation granted to an SME, such incentive should be considered present when, before the activities relating to the implementation of the aided project or activities are initiated, the SME has submitted an application to the Member State. As regards aid in the form of risk capital in favour of SMEs, the conditions laid down in this Regulation, notably with respect to the size of the investment tranches per target enterprise, the degree of involvement of private investors, the size of the company and the business stage financed, ensure that the risk capital measure will have an incentive effect.
- (29) As regards any aid covered by this Regulation granted to a beneficiary which is a large enterprise, the Member State should, in addition to the conditions applying to SMEs, also ensure that the beneficiary has analysed, in an internal document, the viability of the aided project or activity with aid and without aid. The Member State should verify that this internal document confirms a material increase in size or scope of the project/activity, a material increase in the total amount spent by the beneficiary on the subsidised project or activity or a material increase in the speed of completion of the project/activity concerned. As regards regional aid, incentive effect may also be established on the basis of the fact that the investment project would not have been carried out as such in the assisted region concerned in the absence of the aid.
- (30) As regards aid for disadvantaged or disabled workers, an incentive effect should be considered to be present by the fact that the aid measure concerned leads to a net increase in the number of disadvantaged or disabled workers hired by the undertaking concerned or leads to additional costs in favour of facilities or equipment devoted to disabled workers. Where the beneficiary of an aid for the employment of disabled workers in the form of wage subsidies was already benefiting from aid for employing disabled workers, which either fulfilled the conditions of Regulation (EC) No 2204/2002 or had been individually approved by the Commission, it is presumed that the condition of a net increase in the number of disabled workers, which was fulfilled for the pre-existing aid measures, continues to be fulfilled for the purpose of this Regulation.
- (31) Fiscal aid measures should be subject to specific conditions of incentive effect, in view of the fact that they are provided on the basis of different procedures than other categories of aid. Reductions in environmental taxes fulfilling the conditions of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity<sup>(1)</sup> and covered by this Regulation should be presumed to have an incentive effect in view of fact that these reduced rates contribute at least indirectly to an improvement of environmental protection by allowing the adoption or the continuation of the overall tax scheme concerned, thereby incentivising the undertakings subject to the environmental tax to reduce their level of pollution.
- (32) Moreover, as the incentive effect of ad hoc aid granted to large enterprises is considered to be difficult to establish, this form of aid should be excluded from the scope of application of this Regulation. The Commission will examine the existence of such incentive effect in the context of the notification of the aid concerned on the basis of the criteria established in the applicable guidelines, frameworks or other Community instruments.
- (33) In order to ensure transparency and effective monitoring in accordance with Article 3 of Regulation (EC) No 994/98, it is appropriate to establish a standard form to be used by Member States to provide the Commission with summary information whenever, in pursuance of this Regulation, an aid scheme or ad hoc aid is implemented. The summary information form should be used for the publication of the measure in the *Official Journal of the European Union* and on the internet. The summary information should be sent to the Commission in electronic format making use of the established IT application. The Member State concerned should publish on the internet the full text of such aid measure. In the case of ad hoc aid measures, business secrets may be deleted. The name of the beneficiary and the amount of aid should however not be considered a business secret. Member States should ensure that such text remains accessible on the internet as long as the aid measure is in force. With the exception of aid taking the form of fiscal measures, the act granting the aid should also contain a reference to the specific provision(s) of Chapter II of this Regulation relevant to such an act.
- (34) In order to ensure transparency and effective monitoring, the Commission should establish specific requirements as regards the form and the content of the annual reports to be submitted to the Commission by Member States. Moreover, it is appropriate to establish rules concerning the records that Member States should keep regarding the aid schemes and individual aid exempted by this Regulation, in view of the provisions of Article 15 of Regulation (EC) No 659/1999.
- <sup>(1)</sup> OJ L 283, 31.10.2003, p. 51. Directive as last amended by Directive 2004/75/EC (OJ L 157, 30.4.2004, p. 100).

- (35) It is necessary to establish further conditions that should be fulfilled by any aid measure exempted by this Regulation. Having regard to Articles 87(3)(a) and 87(3)(c) of the Treaty, such aid should be proportionate to the market failures or handicaps that have to be overcome in order to be in the Community interest. It is therefore appropriate to limit the scope of this Regulation, as far as it concerns investment aid, to aid granted in relation to certain tangible and intangible investments. In the light of Community overcapacity and the specific problems of distortion of competition in the road freight and air transport sectors, so far as undertakings having their main economic activity in those transport sectors are concerned, transport means and equipment should not be regarded as eligible investment costs. Special provisions should apply as regards the definition of tangible assets for the purpose of environmental aid.
- (36) Consistent with the principles governing the aid falling within Article 87(1) of the Treaty, aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime.
- (37) In order not to favour the capital factor of an investment over the labour factor, provision should be made for the possibility of measuring aid to investment in favour of SMEs and regional aid on the basis of either the costs of the investment or the costs of employment directly created by an investment project.
- (38) Environmental aid schemes in the form of tax reductions, aid for disadvantaged workers, regional investment aid, aid for newly created small enterprises, aid for enterprises newly created by female entrepreneurs or aid in the form of risk capital granted to a beneficiary on an ad hoc basis may have a major impact on competition in the relevant market because it favours the beneficiary over other undertakings which have not received such aid. Because it is granted only to a single undertaking, ad hoc aid is likely to have only a limited positive structural effect on the environment, the employment of disabled and disadvantaged workers, regional cohesion or the risk capital market failure. For this reason, aid schemes concerning those categories of aid should be exempted under this Regulation, whilst ad hoc aid should be notified to the Commission. This Regulation should however exempt ad hoc regional aid when this ad hoc aid is used to supplement aid granted on the basis of a regional investment aid scheme, with a maximum limit for the ad hoc component of 50 % of the total aid to be granted for the investment.
- (39) The provisions of this Regulation relating to SME investment and employment aid should not provide, as was the case in Regulation (EC) No 70/2001, any possibility for increasing the maximum aid intensities by means of a regional bonus. However, it should be possible for the maximum aid intensities laid down in the provisions concerning regional investment aid to be granted also to SMEs, as long as the conditions for granting regional investment and employment aid are fulfilled. Similarly, the provisions relating to environmental investment aid should not provide any possibility for increasing the maximum aid intensities by means of a regional bonus. It should also be possible for the maximum aid intensities laid down in the provisions concerning regional investment aid to be applied to projects which have a positive impact on the environment, as long as the conditions for granting regional investment aid are fulfilled.
- (40) By addressing the handicaps of the disadvantaged regions, national regional aid promotes the economic, social and territorial cohesion of Member States and the Community as a whole. National regional aid is designed to assist the development of the most disadvantaged regions by supporting investment and job creation in a sustainable context. It promotes the setting-up of new establishments, the extension of existing establishments, the diversification of the output of an establishment into new additional products or a fundamental change in the overall production process of an existing establishment.
- (41) In order to prevent large regional investment projects from being artificially divided into sub-projects, thereby escaping the notification thresholds provided under this Regulation, a large investment project should be considered to be a single investment project if the investment is undertaken within a period of three years by the same undertaking or undertakings and consists of fixed assets combined in an economically indivisible way. To assess whether an investment is economically indivisible, Member States should take into account the technical, functional and strategic links and the immediate geographical proximity. The economic indivisibility should be assessed independently from ownership. This means that to establish whether a large investment project constitutes a single investment project, the assessment should be the same irrespective of whether the project is carried out by one undertaking, by more than one undertaking sharing the investment costs or by more undertakings bearing the costs of separate investments within the same investment project (for example in the case of a joint venture).

- (42) In contrast to regional aid, which should be confined to assisted areas, SME investment and employment aid should be able to be granted both in assisted and in non-assisted areas. The Member States should thus be able to provide, in assisted areas, investment aid as long as they respect either all conditions applying to regional investment and employment aid or all conditions applying to SME investment and employment aid.
- (43) The economic development of the assisted regions is hindered by relatively low levels of entrepreneurial activity and in particular by even lower than average rates of business start-ups. It is therefore necessary to include in this Regulation a category of aid, which can be granted in addition to regional investment aid, in order to provide incentives to support business start-ups and the early stage development of small enterprises in the assisted areas. In order to ensure that this aid for newly created enterprises in assisted regions is effectively targeted, this category of aid should be graduated in accordance with the difficulties faced by each category of region. Furthermore, in order to avoid an unacceptable risk of distortions of competition, including the risk of crowding-out existing enterprises, the aid should be strictly limited to small enterprises, limited in amount and degressive. Granting aid designed exclusively for newly created small enterprises or enterprises newly created by female entrepreneurs may produce perverse incentives for existing small enterprises to close down and re-open in order to receive this category of aid. Member States should be aware of this risk and should design aid schemes in such a way as to avoid this problem, for example by placing limits on applications from owners of recently closed firms.
- (44) The economic development of the Community may be hindered by low levels of entrepreneurial activity by certain categories of the population who suffer certain disadvantages, such as getting access to finance. The Commission has reviewed the possibility of market failure in this respect as regards a variety of categories of persons, and is at this stage in a position to conclude that women, in particular have lower than average rates of business start-ups as compared to men, as is evidenced, amongst others, by statistical data of Eurostat. It is therefore necessary to include in this Regulation a category of aid providing incentives for the creation of enterprises by female entrepreneurs in order to tackle the specific market failures women encounter most notably with respect to access to finance. Women also face particular difficulties linked to bearing caring costs for family members. Such aid should allow the achievement of substantive rather than formal equality between men and women by reducing *de facto* inequalities existing in the area of entrepreneurship, in line with the requirements of the case-law of the Court of Justice of the European Communities. At the expiry of this Regulation the Commission will have to reconsider whether the scope of this exemption and the categories of beneficiaries concerned remain justified.
- (45) Sustainable development is one of the main pillars in the Lisbon Strategy for Growth and Jobs, together with competitiveness and security of energy supplies. Sustainable development is based, amongst other things, on a high level of protection and improvement of the quality of the environment. Promoting environmental sustainability and combating climate change leads as well to increasing security of supply and ensuring the competitiveness of European economies and the availability of affordable energy. The area of environmental protection is often confronted with market failures in the form of negative externalities. Under normal market conditions, undertakings may not necessarily have an incentive to reduce their pollution since such reduction may increase their costs. When undertakings are not obliged to internalise the costs of pollution, society as a whole bears these costs. This internalisation of environmental costs can be ensured by imposing environmental regulation or taxes. The lack of full harmonisation of environmental standards at Community level creates an uneven playing field. Furthermore, an even higher level of environmental protection can be achieved by the initiatives to go beyond the mandatory Community standards, which may harm the competitive position of the undertakings concerned.
- (46) In view of the sufficient experience gathered in the application of the Community guidelines on State aid for environmental protection, investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards, aid for the acquisition of transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards, aid for early adaptation to future Community standards by SMEs, environmental aid for investment in energy saving, environmental aid for investment in high efficiency cogeneration, environmental aid for investments to promote renewable energy sources including investment aid relating to sustainable biofuels, aid for environmental studies and certain aid in the form of reductions in environmental taxes should be exempt from the notification requirement.



- (47) Aid in the form of tax reductions favouring environmental protection covered by this Regulation, should, in line with the Community guidelines on State aid for environmental protection, be limited to a period of 10 years. After this period, Member States should re-evaluate the appropriateness of the tax reductions concerned. This should be without prejudice to the possibility for Member States of re-adopting these measures or similar measures under this Regulation after having realised such re-evaluation.
- (48) A correct calculation of the extra investment or production costs to achieve environmental protection is essential to determine whether or not aid is compatible with Article 87(3) of the Treaty. As outlined in the Community guidelines on State aid for environmental protection, eligible costs should be limited to the extra investment costs necessary to achieve a higher level of environmental protection.
- (49) In view of the difficulties which may arise, in particular, with respect to the deduction of benefits deriving from extra investment, provision should be made for a simplified method of calculation of the extra investment costs. Therefore these costs should, for the purpose of applying this Regulation, be calculated without taking into account operating benefits, cost savings or additional ancillary production and without taking into account operating costs engendered during the life of the investment. The maximum aid intensities provided under this Regulation for the different categories of environmental investment aid concerned have therefore been reduced systematically as compared to the maximum aid intensities provided for by the Community guidelines on State aid for environmental protection.
- (50) As regards environmental aid for investment in energy saving measures it is appropriate to allow Member States to choose either the simplified method of calculation or the full cost calculation, identical to the one provided for in the Community guidelines on State aid for environmental protection. In view of the particular practical difficulties which may arise when applying the full cost calculation method, those cost calculations should be certified by an external auditor.
- (51) As regards environmental aid for investment in cogeneration and environmental aid for investments to promote renewable energy sources, the extra costs should, for the purpose of the application of this Regulation, be calculated without taking into account other support measures granted for the same eligible costs, with the exception of other environmental investment aid.
- (52) With regard to investments related to hydropower installations it should be noted that their environmental impact can be twofold. In terms of low greenhouse gas emissions they certainly provide potential. On the other hand, such installations might also have a negative impact, for example on water systems and biodiversity.
- (53) In order to eliminate differences that might give rise to distortions of competition and to facilitate coordination between different Community and national initiatives concerning SMEs, as well as for reasons of administrative clarity and legal certainty, the definition of SME used for the purpose of this Regulation should be based on the definition in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium sized enterprises <sup>(1)</sup>.
- (54) SMEs play a decisive role in job creation and, more generally, act as a factor of social stability and economic drive. However, their development may be limited by market failures, leading to these SMEs suffering from typical handicaps. SMEs often have difficulties in obtaining capital, risk capital or loans, given the risk-averse nature of certain financial markets and the limited collateral that they may be able to offer. Their limited resources may also restrict their access to information, notably regarding new technology and potential markets. In order to facilitate the development of the economic activities of SMEs, this Regulation should therefore exempt certain categories of aid when they are granted in favour of SMEs. Consequently, it is justified to exempt such aid from prior notification and to consider that, for the purposes of the application of this Regulation only, when a beneficiary falls within the SME definition provided for in this Regulation, that SME can be presumed, when the aid amount does not exceed the applicable notification threshold, to be limited in its development by the typical SME handicaps prompted by market failures.
- (55) Having regard to the differences between small enterprises and medium-sized enterprises, different basic aid intensities and different bonuses should be set for small enterprises and for medium-sized enterprises. Market failures affecting SMEs in general, including difficulties of access to finance, result in even greater obstacles to the development of small enterprises as compared to medium-sized enterprises.
- <sup>(1)</sup> OJ L 124, 20.5.2003, p. 36.

- (56) On the basis of the experience gained in applying the Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises there appear to be a number of specific risk capital market failures in the Community in respect of certain types of investments at certain stages of undertakings' development. These market failures result from an imperfect matching of supply and demand of risk capital. As a result, the level of risk capital provided in the market may be too restricted, and undertakings do not obtain funding despite having a valuable business model and growth prospects. The main source of market failure relevant to risk capital markets, which particularly affects access to capital by SMEs and which may justify public intervention, relates to imperfect or asymmetric information. Consequently, risk capital schemes taking the form of commercially managed investment funds in which a sufficient proportion of the funds are provided by private investors in the form of private equity promoting profit-driven risk capital measures in favour of target enterprises should be exempt from the notification requirement under certain conditions. The conditions that the investment funds should be commercially managed and that the ensuing risk capital measures be profit driven should not prevent the investment funds from targeting their activities and particular market segments, such as enterprises created by female entrepreneurs. This Regulation should not affect the status of the European Investment Fund and the European Investment Bank, as defined in the Community guidelines on risk capital.
- (57) Aid for research, development and innovation can contribute to economic growth, strengthening competitiveness and boosting employment. On the basis of its experience with the application of Regulation (EC) No 364/2004, the Community framework for State aid for research and development and the Community Framework for State aid for research and development and innovation, it appears that, given the available research and development capabilities of both SMEs and large enterprises, market failures may prevent the market from reaching the optimal output and lead to an inefficient outcome. Such inefficient outcomes generally relate to positive externalities/knowledge spill-overs, public goods/knowledge spill-overs, imperfect and asymmetric information and coordination and network failures.
- (58) Aid for research, development and innovation is of particular importance, especially for SMEs because one of the structural disadvantages of SMEs lies in the difficulty they may experience in gaining access to new technological developments, technology transfers or highly qualified personnel. Therefore, aid for research and development projects, aid for technical feasibility studies and aid to cover industrial property rights costs for SMEs, as well as aid for young innovative small enterprises, aid for innovation advisory services and for innovation support services and aid for the loan of highly qualified personnel should be exempt from the requirement of prior notification, under certain conditions.
- (59) As regards project aid for research and development, the aided part of the research project should completely fall within the categories of fundamental research, industrial research or experimental development. When a project encompasses different tasks, each task should be qualified as falling under the categories of fundamental research, industrial research or experimental development or as not falling under any of those categories at all. That qualification need not necessarily follow a chronological approach, moving sequentially over time from fundamental research to activities closer to the market. Accordingly, a task which is carried out at a late stage of a project may be qualified as industrial research. Similarly, it is not excluded that an activity carried out at an earlier stage of the project may constitute experimental development.
- (60) In the agricultural sector certain aid for research and development should be exempted if conditions similar to those provided in the specific provisions laid down for the agricultural sector in the Community framework for State aid for research and development and innovation are fulfilled. If those specific conditions are not fulfilled, it is appropriate to provide for the aid to be exempted if it fulfils the conditions set out in the general provisions related to research and development in this Regulation.
- (61) The promotion of training and the recruitment of disadvantaged and disabled workers and compensation of additional costs for the employment of disabled workers constitute a central objective of the economic and social policies of the Community and of its Member States.

- (62) Training usually has positive externalities for society as a whole since it increases the pool of skilled workers from which other firms may draw, improves the competitiveness of Community industry and plays an important role in the Community employment strategy. Training, including e-learning, is also essential for the constitution, the acquisition and the diffusion of knowledge, a public good of primary importance. In view of the fact that undertakings in the Community generally under-invest in the training of their workers, especially when this training is general in nature and does not lead to an immediate and concrete advantage for the undertaking concerned, State aid can help to correct this market failure. Therefore such aid should be exempt, under certain conditions, from prior notification. In view of the particular handicaps with which SMEs are confronted and the higher relative costs that they have to bear when they invest in training, the intensities of aid exempted by this Regulation should be increased for SMEs. The characteristics of training in the maritime transport sector justify a specific approach for that sector.
- (63) A distinction can be drawn between general and specific training. The permissible aid intensities should differ in accordance with the type of training provided and the size of the undertaking. General training provides transferable qualifications and substantially improves the employability of the trained worker. Aid for this purpose has less distortive effects on competition, meaning that higher intensities of aid can be exempted from prior notification. Specific training, which mainly benefits the undertaking, involves a greater risk of distortion of competition and the intensity of aid which can be exempted from prior notification should therefore be much lower. Training should be considered to be general in nature also when it relates to environmental management, eco-innovation or corporate social responsibility and thereby increases the capacity of the beneficiary to contribute to general objectives in the environment field.
- (64) Certain categories of disabled or disadvantaged workers still experience particular difficulty in entering the labour market. For this reason there is a justification for public authorities to apply measures providing incentives to undertakings to increase their levels of employment, in particular of workers from these disadvantaged categories. Employment costs form part of the normal operating costs of any undertaking. It is therefore particularly important that aid for the employment of disabled and disadvantaged workers should have a positive effect on employment levels of those categories of workers and should not merely enable undertakings to reduce costs which they would otherwise have to bear. Consequently, such aid should be exempt from prior notification when it is likely to assist those categories of workers in re-entering the job market or, as regards disabled workers, re-entering and staying in the job market.
- (65) Aid for the employment of disabled workers in the form of wage subsidies may be calculated on the basis of the specific degree of disability of the disabled worker concerned or may be provided as a lump sum provided that neither method leads to the aid exceeding the maximum aid intensity for each individual worker concerned.
- (66) It is appropriate to lay down transitional provisions for individual aid which was granted before the entry into force of this Regulation and was not notified in breach of the obligation provided for in Article 88(3) of the Treaty. With the repeal of Regulation (EC) No 1628/2006, the existing regional investment schemes, as exempted, should be allowed to continue being implemented under the conditions foreseen by that Regulation, in line with Article 9(2), second subparagraph, of that Regulation.
- (67) In the light of the Commission's experience in this area, and in particular the frequency with which it is generally necessary to revise State aid policy, it is appropriate to limit the period of application of this Regulation. Should this Regulation expire without being extended, aid schemes already exempted by this Regulation should continue to be exempted for a further period of six months, in order to give Member States time to adapt.
- (68) Regulation (EC) No 70/2001, Regulation (EC) No 68/2001 and Regulation (EC) No 2204/2002 expired on 30 June 2008 and Regulation (EC) No 1628/2006 should be repealed,



HAS ADOPTED THIS REGULATION:

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#### CHAPTER I

#### COMMON PROVISIONS

##### Article 1

##### Scope

1. This Regulation shall apply to the following categories of aid:

(a) regional aid;

(b) SME investment and employment aid;

(c) aid for the creation of enterprises by female entrepreneurs;

(d) aid for environmental protection;

(e) aid for consultancy in favour of SMEs and SME participation in fairs;

(f) aid in the form of risk capital;

(g) aid for research, development and innovation;

(h) training aid;

(i) aid for disadvantaged or disabled workers.

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2. It shall not apply to:

- (a) aid to export-related activities, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current costs linked to the export activity;
- (b) aid contingent upon the use of domestic over imported goods.

3. This Regulation shall apply to aid in all sectors of the economy with the exception of the following:

- (a) aid favouring activities in the fishery and aquaculture sectors, as covered by Council Regulation (EC) No 104/2000<sup>(1)</sup>, except for training aid, aid in the form of risk capital, aid for research and development and innovation and aid for disadvantaged and disabled workers;
- (b) aid favouring activities in the primary production of agricultural products, except for training aid, aid in the form of risk capital, aid for research and development, environmental aid, and aid for disadvantaged and disabled workers to the extent that these categories of aid are not covered by Commission Regulation (EC) No 1857/2006;
- (c) aid favouring activities in the processing and marketing of agricultural products, in the following cases:
  - (i) when the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned; or
  - (ii) when the aid is conditional on being partly or entirely passed on to primary producers;
- (d) aid favouring activities in the coal sector with the exception of training aid, research and development and innovation aid and environmental aid;
- (e) regional aid favouring activities in the steel sector;
- (f) regional aid favouring activities in the shipbuilding sector;
- (g) regional aid favouring activities in the synthetic fibres sector.

<sup>(1)</sup> OJ L 17, 21.1.2000, p. 22.

4. This Regulation shall not apply to regional aid schemes which are targeted at specific sectors of economic activity within manufacturing or services. Schemes aimed at tourism activities are not considered targeted at specific sectors.

5. This Regulation shall not apply to ad hoc aid granted to large enterprises, except as provided for in Article 13(1).

6. This Regulation shall not apply to the following aid:

- (a) aid schemes which do not explicitly exclude the payment of individual aid in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market;
- (b) ad hoc aid in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market;
- (c) aid to undertakings in difficulty.

7. For the purposes of point (c) of paragraph 6, an SME shall be considered to be an undertaking in difficulty if it fulfils the following conditions:

- (a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or
- (b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or
- (c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

An SME which has been incorporated for less than three years shall not be considered, for the purposes of this Regulation, to be in difficulty with regard to that period unless it meets the condition set out in point (c) of the first subparagraph.

Article 2

**Definitions**

For the purposes of this Regulation the following definitions shall apply:

1. 'aid' means any measure fulfilling all the criteria laid down in Article 87(1) of the Treaty;
2. 'aid scheme' means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;
3. 'individual aid' means:
  - (a) ad hoc aid; and
  - (b) notifiable awards of aid on the basis of an aid scheme;
4. 'ad hoc aid' means individual aid not awarded on the basis of an aid scheme;
5. 'aid intensity' means the aid amount expressed as a percentage of the eligible costs;
6. 'transparent aid' means aid in respect of which it is possible to calculate precisely the gross grant equivalent *ex ante* without need to undertake a risk assessment;
7. 'small and medium-sized enterprises' or 'SMEs' means undertakings fulfilling the criteria laid down in Annex I;
8. 'large enterprises' means undertakings not fulfilling the criteria laid down in Annex I;
9. 'assisted areas' means regions eligible for regional aid, as determined in the approved regional aid map for the Member State concerned for the period 2007-2013;
10. 'tangible assets' means, without prejudice to Article 17(12), assets relating to land, buildings and plant, machinery and equipment; in the transport sector transport means and transport equipment are considered eligible assets, except with regard to regional aid and except for road freight and air transport;
11. 'intangible assets' means assets entailed by the transfer of technology through the acquisition of patent rights, licences, know-how or unpatented technical knowledge;
12. 'large investment project' means an investment in capital assets with eligible costs above EUR 50 million, calculated at prices and exchange rates on the date when the aid is granted;
13. 'number of employees' means the number of annual labour units (ALU), namely the number of persons employed full time in one year, part-time and seasonal work being ALU fractions;
14. 'employment directly created by an investment project' means employment concerning the activity to which the investment relates, including employment created following an increase in the utilisation rate of the capacity created by the investment;
15. 'wage cost' means the total amount actually payable by the beneficiary of the aid in respect of the employment concerned, comprising:
  - (a) the gross wage, before tax;
  - (b) the compulsory contributions, such as social security charges; and
  - (c) child care and parent care costs;
16. 'SME investment and employment aid' means aid fulfilling the conditions laid down in Article 15;
17. 'investment aid' means, regional investment and employment aid under Article 13, SME investment and employment aid under Article 15 and investment aid for environmental protection under Articles 18 to 23;
18. 'disadvantaged worker' means any person who:
  - (a) has not been in regular paid employment for the previous 6 months; or
  - (b) has not attained an upper secondary educational or vocational qualification (ISCED 3); or
  - (c) is over the age of 50 years; or
  - (d) lives as a single adult with one or more dependents; or

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- (e) works in a sector or profession in a Member State where the gender imbalance is at least 25 % higher than the average gender imbalance across all economic sectors in that Member State, and belongs to that underrepresented gender group; or
- (f) is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment;
19. 'severely disadvantaged worker' means any person who has been unemployed for 24 months or more;
20. 'disabled worker' means any person:
- (a) recognised as disabled under national law; or
- (b) having a recognised limitation which results from physical, mental or psychological impairment;
21. 'sheltered employment' means employment in an undertaking where at least 50 % of workers are disabled;
22. 'agricultural product' means:
- (a) the products listed in Annex I to the Treaty, except fishery and aquaculture products covered by Regulation (EC) No 104/2000;
- (b) products falling under CN codes 4502, 4503 and 4504 (cork products);
- (c) products intended to imitate or substitute milk and milk products, as referred to in Council Regulation (EC) No 1234/2007 <sup>(1)</sup>;
23. 'processing of agricultural products' means any operation on an agricultural product resulting in a product which is also an agricultural product, except on-farm activities necessary for preparing an animal or plant product for the first sale;
24. 'marketing of agricultural products' means holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale; a sale by a primary producer to final consumers shall be considered to be marketing if it takes place in separate premises reserved for that purpose;
25. 'tourism activities' means the following activities in terms of NACE Rev. 2:
- (a) NACE 55: Accommodation;
- (b) NACE 56: Food and beverage service activities;
- (c) NACE 79: Travel agency, tour operator reservation service and related activities;
- (d) NACE 90: Creative, arts and entertainment activities;
- (e) NACE 91: Libraries, archives, museums and other cultural activities;
- (f) NACE 93: Sports activities and amusement and recreation activities;
26. 'repayable advance' means a loan for a project which is paid in one or more instalments and the conditions for the reimbursement of which depend on the outcome of the research and development and innovation project;
27. 'risk capital' means finance provided through equity and quasi-equity financing to undertakings during their early-growth stages (seed, start-up and expansion phases);
28. 'enterprise newly created by female entrepreneurs' means a small enterprise fulfilling the following conditions:
- (a) one or more women own at least 51 % of the capital of the small enterprise concerned or are the registered owners of the small enterprise concerned; and
- (b) a woman is in charge of the management of the small enterprise;
29. 'steel sector' means all activities related to the production of one or more of the following products:
- (a) pig iron and ferro-alloys:
- pig iron for steelmaking, foundry and other pig iron, spiegeleisen and high-carbon ferro-manganese, not including other ferro-alloys;
- <sup>(1)</sup> OJ L 299, 16.11.2007, p. 1.

- (b) crude and semi finished products of iron, ordinary steel or special steel:

liquid steel cast or not cast into ingots, including ingots for forging semi finished products: blooms, billets and slabs; sheet bars and tinplate bars; hot-rolled wide coils, with the exception of production of liquid steel for castings from small and medium-sized foundries;

- (c) hot finished products of iron, ordinary steel or special steel:

rails, sleepers, fishplates, soleplates, joists, heavy sections 80 mm and over, sheet piling, bars and sections of less than 80 mm and flats of less than 150 mm, wire rod, tube rounds and squares, hot-rolled hoop and strip (including tube strip), hot-rolled sheet (coated or uncoated), plates and sheets of 3 mm thickness and over, universal plates of 150 mm and over, with the exception of wire and wire products, bright bars and iron castings;

- (d) cold finished products:

tinplate, terneplate, blackplate, galvanized sheets, other coated sheets, cold-rolled sheets, electrical sheets and strip for tinplate, cold-rolled plate, in coil and in strip;

- (e) tubes:

all seamless steel tubes, welded steel tubes with a diameter of over 406.4 mm;

30. 'synthetic fibres sector' means:

- (a) extrusion/texturisation of all generic types of fibre and yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of their end-uses; or
- (b) polymerisation (including polycondensation) where it is integrated with extrusion in terms of the machinery used; or
- (c) any ancillary process linked to the contemporaneous installation of extrusion/texturisation capacity by the prospective beneficiary or by another company in the group to which it belongs and which, in the specific business activity concerned, is normally integrated with such capacity in terms of the machinery used.

Article 3

**Conditions for exemption**

1. Aid schemes fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that any individual aid awarded under such scheme fulfils all the conditions of this Regulation, and the scheme contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Union*.

2. Individual aid granted under a scheme referred to in paragraph 1 shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the aid fulfils all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, and that the individual aid measure contains an express reference to the relevant provisions of this Regulation, by citing the relevant provisions, the title of this Regulation and its publication reference in the *Official Journal of the European Union*.

3. Ad hoc aid fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the aid contains an express reference to the relevant provisions of this Regulation, by citing the relevant provisions, the title of this Regulation and its publication reference in the *Official Journal of the European Union*.

Article 4

**Aid intensity and eligible costs**

1. For the purposes of calculating aid intensity, all figures used shall be taken before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount shall be the grant equivalent of the aid. Aid payable in several instalments shall be discounted to its value at the moment of granting. The interest rate to be used for discounting purposes shall be the reference rate applicable at the time of grant.

2. In cases where aid is awarded by means of tax exemptions or reductions on future taxes due, subject to the respect of a certain aid intensity defined in gross grant equivalent, discounting of aid tranches shall take place on the basis of the reference rates applicable at the various times the tax advantages become effective.

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3. The eligible costs shall be supported by documentary evidence which shall be clear and itemised.

#### Article 5

##### Transparency of aid

1. This Regulation shall apply only to transparent aid.

In particular, the following categories of aid shall be considered to be transparent:

- (a) aid comprised in grants and interest rate subsidies;
  - (b) aid comprised in loans, where the gross grant equivalent has been calculated on the basis of the reference rate prevailing at the time of the grant;
  - (c) aid comprised in guarantee schemes:
    - (i) where the methodology to calculate the gross grant equivalent has been accepted following notification of this methodology to the Commission in the context of the application of this Regulation or Regulation (EC) No 1628/2006 and the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake; or
    - (ii) where the beneficiary is a small or medium-sized enterprise and the gross grant equivalent has been calculated on the basis of the safe-harbour premiums laid down in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees;
  - (d) aid comprised in fiscal measures, where the measure provides for a cap ensuring that the applicable threshold is not exceeded.
2. The following categories of aid shall not be considered to be transparent:
- (a) aid comprised in capital injections, without prejudice to the specific provisions concerning risk capital;
  - (b) aid comprised in risk capital measures, with the exception of aid fulfilling the conditions of Article 29.
3. Aid in the form of repayable advances shall be considered to be transparent aid only if the total amount of the repayable

advance does not exceed the applicable thresholds under this Regulation. If the threshold is expressed in terms of aid intensity, the total amount of the repayable advance, expressed as a percentage of the eligible costs, shall not exceed the applicable aid intensity.

#### Article 6

##### Individual notification thresholds

1. This Regulation shall not apply to any individual aid, whether granted ad hoc or on the basis of a scheme, the gross grant equivalent of which exceeds the following thresholds:

- (a) SME investment and employment aid: EUR 7,5 million per undertaking per investment project;
- (b) investment aid for environmental protection: EUR 7,5 million per undertaking per investment project;
- (c) aid for consultancy in favour of SMEs: EUR 2 million per undertaking per project;
- (d) aid for SME participation in fairs: EUR 2 million per undertaking per project;
- (e) research and development project aid and feasibility studies:
  - (i) if the project is predominantly fundamental research EUR 20 million per undertaking, per project/feasibility study;
  - (ii) if the project is predominantly industrial research, EUR 10 million per undertaking, per project/feasibility study;
  - (iii) for all other projects, EUR 7,5 million per undertaking, per project/feasibility study;
  - (iv) if the project is a EUREKA project twice the amounts laid down in points (i), (ii) and (iii) respectively.
- (f) aid for industrial property rights costs for SMEs: EUR 5 million per undertaking per project;
- (g) training aid: EUR 2 million per training project;
- (h) aid for the recruitment of disadvantaged workers: EUR 5 million per undertaking per year;



- (i) aid for the employment of disabled workers in the form of wage costs: EUR 10 million per undertaking per year;
- (j) aid compensating for additional costs of employing disabled workers: EUR 10 million per undertaking per year.

For the purposes of determining the appropriate threshold applicable to research and development project aid and feasibility studies pursuant to point (e), a project shall be considered to consist 'predominantly' of fundamental research or 'predominantly' of industrial research, if more than 50 % of the eligible project costs are incurred through activities which fall within the category of fundamental research or industrial research respectively. In cases where the predominant character of the project cannot be established, the lower threshold shall apply.

2. Regional investment aid awarded in favour of large investment projects shall be notified to the Commission if the total amount of aid from all sources exceeds 75 % of the maximum amount of aid an investment with eligible costs of EUR 100 million could receive, applying the standard aid threshold in force for large enterprises in the approved regional aid map on the date the aid is to be granted.

#### Article 7

##### Cumulation

1. In determining whether the individual notification thresholds laid down in Article 6 and the maximum aid intensities laid down in Chapter II are respected, the total amount of public support measures for the aided activity or project shall be taken into account, regardless of whether that support is financed from local, regional, national or Community sources.

2. Aid exempted by this Regulation may be cumulated with any other aid exempted under this Regulation as long as those aid measures concern different identifiable eligible costs.

3. Aid exempted by this Regulation shall not be cumulated with any other aid exempted under this Regulation or *de minimis* aid fulfilling the conditions laid down in Commission Regulation (EC) No 1998/2006<sup>(1)</sup> or with other Community funding in relation to the same — partly or fully overlapping — eligible costs if such cumulation would result in exceeding the highest aid intensity or aid amount applicable to this aid under this Regulation.

4. By way of derogation from paragraph 3, aid in favour of disabled workers, as provided for in Articles 41 and 42, may be cumulated with aid exempted under this Regulation in relation to the same eligible costs above the highest applicable threshold

under this Regulation, provided that such cumulation does not result in an aid intensity exceeding 100 % of the relevant costs over any period for which the workers concerned are employed.

5. As regards the cumulation of aid measures exempted under this Regulation with identifiable eligible costs and aid measures exempted under this Regulation without identifiable eligible costs, the following conditions shall apply:

- (a) where a target undertaking has received capital under a risk capital measure under Article 29 and subsequently applies, during the first three years after the first risk capital investment, for aid within the scope of this Regulation, the relevant aid thresholds or maximum eligible amounts under this Regulation shall be reduced by 50 % in general and by 20 % for target undertakings located in assisted areas; the reduction shall not exceed the total amount of risk capital received; this reduction shall not apply to aid for research, development and innovation exempted under Articles 31 to 37;
- (b) during the first 3 years after being granted, aid for young innovative enterprises may not be cumulated with other aid exempted under this Regulation, with the only exception of aid exempted under Article 29 and aid exempted under Articles 31 to 37.

#### Article 8

##### Incentive effect

1. This Regulation shall exempt only aid which has an incentive effect.

2. Aid granted to SMEs, covered by this Regulation, shall be considered to have an incentive effect if, before work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned.

3. Aid granted to large enterprises, covered by this Regulation, shall be considered to have an incentive effect if, in addition to fulfilling the condition laid down in paragraph 2, the Member State has verified, before granting the individual aid concerned, that documentation prepared by the beneficiary establishes one or more of the following criteria:

- (a) a material increase in the size of the project/activity due to the aid;
- (b) a material increase in the scope of the project/activity due to the aid;

<sup>(1)</sup> OJ L 379, 28.12.2006, p. 5.



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(c) a material increase in the total amount spent by the beneficiary on the project/activity due to the aid;

(d) a material increase in the speed of completion of the project/activity concerned;

(e) as regards regional investment aid referred to in Article 13, that the project would not have been carried out as such in the assisted region concerned in the absence of the aid.

4. The conditions laid down in paragraphs 2 and 3 shall not apply in relation to fiscal measures if the following conditions are fulfilled:

(a) the fiscal measure establishes a legal right to aid in accordance with objective criteria and without further exercise of discretion by the Member State; and

(b) the fiscal measure has been adopted before work on the aided project or activity has started; this condition shall not apply in the case of fiscal successor schemes.

5. As regards aid compensating for the additional costs of employing disabled workers, as referred to in Article 42, the conditions laid down in paragraphs 2 and 3 of this Article shall be considered to be met if the conditions laid down in Article 42(3) are fulfilled.

As regards aid for the recruitment of disadvantaged workers in the form of wage subsidies and aid for the employment of disabled workers in the form of wage subsidies, as referred to in Articles 40 and 41, the conditions laid down in paragraphs 2 and 3 of this Article shall be considered to be met if the aid leads to a net increase in the number of disadvantaged/disabled workers employed.

As regards aid in the form of reductions in environmental taxes, as referred to in Article 25, the conditions laid down in paragraphs 2, 3 and 4 of this Article shall be considered to be met.

As regards aid in the form of risk capital, as referred to in Article 29, the conditions laid down in paragraph 2 of this Article shall be considered to be met.

6. If the conditions of paragraphs 2 and 3 are not fulfilled, the entire aid measure shall not be exempted under this Regulation.

been exempted pursuant to this Regulation, the Member State concerned shall forward to the Commission a summary of the information regarding such aid measure. That summary shall be provided in electronic form, via the established Commission IT application and in the form laid down in Annex III.

The Commission shall acknowledge receipt of the summary without delay.

The summaries shall be published by the Commission in the *Official Journal of the European Union* and on the Commission's website.

2. Upon the entry into force of an aid scheme or the awarding of an ad hoc aid, which has been exempted pursuant to this Regulation, the Member State concerned shall publish on the internet the full text of such aid measure. In the case of an aid scheme, this text shall set out the conditions laid down in national law which ensure that the relevant provisions of this Regulation are complied with. The Member State concerned shall ensure that the full text of the aid measure is accessible on the internet as long as the aid measure concerned is in force. The summary information provided by the Member State concerned pursuant to paragraph 1 shall specify an internet address leading directly to the full text of the aid measure.

3. When granting individual aid exempted pursuant to this Regulation, with the exception of aid taking the form of fiscal measures, the act granting the aid shall contain an explicit reference to the specific provisions of Chapter II concerned by that act, to the national law which ensures that the relevant provisions of this Regulation are complied with and to the internet address leading directly to the full text of the aid measure.

4. Without prejudice to the obligations contained in paragraphs 1, 2 and 3, whenever individual aid is granted under an existing aid scheme for research and development projects covered by Article 31 and the individual aid exceeds EUR 3 million and whenever individual regional investment aid is granted, on the basis of an existing aid scheme for large investment projects, which is not individually notifiable pursuant to Article 6, the Member States shall, within 20 working days from the day on which the aid is granted by the competent authority, provide the Commission with the summary information requested in the standard form laid down in Annex II, via the established Commission IT application.

#### Article 9

##### Transparency

1. Within 20 working days following the entry into force of an aid scheme or the awarding of an ad hoc aid, which has

#### Article 10

##### Monitoring

1. The Commission shall regularly monitor aid measures of which it has been informed pursuant to Article 9.

2. Member States shall maintain detailed records regarding any individual aid or aid scheme exempted under this Regulation. Such records shall contain all information necessary to establish that the conditions laid down in this Regulation are fulfilled, including information on the status of any undertaking whose entitlement to aid or a bonus depends on its status as an SME, information on the incentive effect of the aid and information making it possible to establish the precise amount of eligible costs for the purpose of applying this Regulation.

Records regarding individual aid shall be maintained for 10 years from the date on which the aid was granted. Records regarding an aid scheme shall be maintained for 10 years from the date on which the last aid was granted under such scheme.

3. On written request, the Member State concerned shall provide the Commission within a period of 20 working days or such longer period as may be fixed in the request, with all the information which the Commission considers necessary to monitor the application of this Regulation.

Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or within a commonly agreed period, or where the Member State provides incomplete information, the Commission shall send a reminder setting a new deadline for the submission of the information. If, despite such reminder, the Member State concerned does not provide the information requested, the Commission may, after having provided the Member State concerned with the possibility to make its views known, adopt a decision stating that all or part of the future aid measures to which this Regulation applies are to be notified to the Commission in accordance with Article 88(3) of the Treaty.

#### Article 11

##### Annual reporting

In accordance with Chapter III of Commission Regulation (EC) No 794/2004 <sup>(1)</sup>, Member States shall compile a report in electronic form on the application of this Regulation in respect of each whole year or each part of the year during which this Regulation applies. The internet address leading directly to the full text of the aid measures shall also be included in such annual report.

#### Article 12

##### Specific conditions applicable to investment aid

1. In order to be considered an eligible cost for the purposes of this Regulation, an investment shall consist of the following:

- (a) an investment in tangible and/or intangible assets relating to the setting-up of a new establishment, the extension of an

existing establishment, diversification of the output of an establishment into new additional products or a fundamental change in the overall production process of an existing establishment; or

- (b) the acquisition of the capital assets directly linked to an establishment, where the establishment has closed or would have closed had it not been purchased, and the assets are bought by an independent investor; in the case of business succession of a small enterprise in favour of family of the original owner(s) or in favour of former employees, the condition that the assets shall be bought by an independent investor shall be waived.

The sole acquisition of the shares of an undertaking shall not constitute investment.

2. In order to be considered eligible costs for the purposes of this Regulation, intangible assets shall fulfil all the following conditions:

- (a) they must be used exclusively in the undertaking receiving the aid; as regards regional investment aid, they must be used exclusively in the establishment receiving the aid;
- (b) they must be regarded as amortizable assets;
- (c) they must be purchased from third parties under market conditions, without the acquirer being in a position to exercise control, within the meaning of Article 3 of Council Regulation (EC) No 139/2004 <sup>(2)</sup>, on the seller, vice versa; or
- (d) in the case of SME investment aid, they must be included in the assets of the undertaking for at least three years; in the case of regional investment aid, they must be included in the assets of the undertaking and remain in the establishment receiving the aid for at least five years or, in the case of SMEs, at least three years.

3. In order to be considered an eligible cost for the purposes of this Regulation, employment directly created by an investment project shall fulfil all the following conditions:

- (a) employment shall be created within three years of completion of the investment;

<sup>(1)</sup> OJ L 140, 30.4.2004, p. 1.

<sup>(2)</sup> OJ L 24, 29.1.2004, p. 1.

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(b) the investment project shall lead to a net increase in the number of employees in the establishment concerned, compared with the average over the previous 12 months;

(c) the employment created shall be maintained during a minimum period of five years in the case of large enterprise and a minimum period of three years in case of SMEs.

## CHAPTER II

### SPECIFIC PROVISIONS FOR THE DIFFERENT CATEGORIES OF AID

#### SECTION 1

#### *Regional aid*

##### *Article 13*

#### **Regional investment and employment aid**

1. Regional investment and employment aid schemes shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in this Article are fulfilled.

Ad hoc aid which is only used to supplement aid granted on the basis of regional investment and employment aid schemes and which does not exceed 50 % of the total aid to be granted for the investment, shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the ad hoc aid awarded fulfils all the conditions of this Regulation.

2. The aid shall be granted in regions eligible for regional aid, as determined in the approved regional aid map for the Member State concerned for the period 2007-2013. The investment must be maintained in the recipient region for at least five years, or three years in the case of SMEs, after the whole investment has been completed. This shall not prevent the replacement of plant or equipment which has become outdated due to rapid technological change, provided that the economic activity is retained in the region concerned for the minimum period.

3. The aid intensity in present gross grant equivalent shall not exceed the regional aid threshold which is in force at the time the aid is granted in the assisted region concerned.

4. With the exception of aid granted in favour of large investment projects and regional aid for the transport sector,

the thresholds fixed in paragraph 3 may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

5. The thresholds fixed in paragraph 3 shall apply to the intensity of the aid calculated either as a percentage of the investment's eligible tangible and intangible costs or as a percentage of the estimated wage costs of the person hired, calculated over a period of two years, for employment directly created by the investment project or a combination thereof, provided that the aid does not exceed the most favourable amount resulting from the application of either calculation.

6. Where the aid is calculated on the basis of tangible or intangible investment costs, or of acquisition costs in case of takeovers, the beneficiary must provide a financial contribution of at least 25 % of the eligible costs, either through its own resources or by external financing, in a form which is free of any public support. However, where the maximum aid intensity approved under the national regional aid map for the Member State concerned, increased in accordance with paragraph 4, exceeds 75 %, the financial contribution of the beneficiary is reduced accordingly. If the aid is calculated on the basis of tangible or intangible investment costs, the conditions set out in paragraph 7 shall also apply.

7. In the case of acquisition of an establishment, only the costs of buying assets from third parties shall be taken into consideration, provided that the transaction has taken place under market conditions. Where the acquisition is accompanied by other investment, the costs relating to the latter shall be added to the cost of the purchase.

Costs related to the acquisition of assets under lease, other than land and buildings, shall be taken into consideration only if the lease takes the form of financial leasing and contains an obligation to purchase the asset at the expiry of the term of the lease. For the lease of land and buildings, the lease must continue for at least five years after the anticipated date of the completion of the investment project or three years in the case of SMEs.

Except in the case of SMEs and takeovers, the assets acquired shall be new. In the case of takeovers, assets for the acquisition of which aid has already been granted prior to the purchase shall be deducted. For SMEs, the full costs of investments in intangible assets may also be taken into consideration. For large enterprises, such costs are eligible only up to a limit of 50 % of the total eligible investment costs for the project.

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8. Where the aid is calculated on the basis of wage costs, the employment shall be directly created by the investment project.

(b) EUR 1 million for small enterprises with their economic activity in regions eligible for the derogation provided for in Article 87(3)(c) of the Treaty.

9. By way of derogation from paragraphs 3 and 4, the maximum aid intensities for investments in the processing and marketing of agricultural products may be set at:

Annual amounts of aid per undertaking shall not exceed 33 % of the amounts of aid laid down in points (a) and (b).

(a) 50 % of eligible investments in regions eligible under Article 87(3)(a) of the Treaty and 40 % of eligible investments in other regions eligible for regional aid, as determined in the regional aid map approved for the Member States concerned for the period 2007-2013, if the beneficiary is an SME;

4. The aid intensity shall not exceed:

(a) in regions covered by Article 87(3)(a) of the Treaty, 35 % of eligible costs incurred in the first three years after the creation of the undertaking, and 25 % in the two years thereafter;

(b) 25 % of eligible investments in regions eligible under Article 87(3)(a) of the Treaty and 20 % of eligible investments in other regions eligible for regional aid, as determined in the regional aid map approved for the Member States concerned for the period 2007-2013, if the beneficiary has less than 750 employees and/or less than EUR 200 million turnover, calculated in accordance with Annex I to this Regulation.

(b) in regions covered by Article 87(3)(c) of the Treaty, 25 % of eligible costs incurred in the first three years after the creation of the undertaking, and 15 % in the two years thereafter.

10. In order to prevent a large investment being artificially divided into sub-projects, a large investment project shall be considered to be a single investment project when the investment is undertaken within a period of three years by the same undertaking or undertakings and consists of fixed assets combined in an economically indivisible way.

These intensities may be increased by 5 % in regions covered by Article 87(3)(a) of the Treaty with a gross domestic product (GDP) per capita of less than 60 % of the EU-25 average, in regions with a population density of less than 12.5 inhabitants/km<sup>2</sup> and in small islands with a population of less than 5 000 inhabitants, and other communities of the same size suffering from similar isolation.

#### Article 14

##### Aid for newly created small enterprises

1. Aid schemes in favour of newly created small enterprises shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

5. The eligible costs shall be legal, advisory, consultancy and administrative costs directly related to the creation of the small enterprise, as well as the following costs, insofar as they are actually incurred within the first five years after the creation of the undertaking:

2. The beneficiary shall be a small enterprise.

(a) interest on external finance and a dividend on own capital employed not exceeding the reference rate;

3. The aid amount shall not exceed:

(b) fees for renting production facilities/equipment;

(a) EUR 2 million for small enterprises with their economic activity in regions eligible for the derogation provided for in Article 87(3)(a) of the Treaty;

(c) energy, water, heating, taxes (other than VAT and corporate taxes on business income) and administrative charges;

(d) depreciation, fees for leasing production facilities/equipment as well as wage costs, provided that the underlying investments or job creation and recruitment measures have not benefited from other aid.

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6. Small enterprises controlled by shareholders of undertakings that have closed down in the previous 12 months cannot benefit from aid under this Article if the enterprises concerned are active in the same relevant market or in adjacent markets.

#### SECTION 2

##### **SME investment and employment aid**

###### *Article 15*

##### **SME investment and employment aid**

1. SME investment and employment aid shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aid intensity shall not exceed:

(a) 20 % of the eligible costs in the case of small enterprises;

(b) 10 % of the eligible costs in the case of medium-sized enterprises.

3. The eligible costs shall be the following:

(a) the costs of investment in tangible and intangible assets; or

(b) the estimated wage costs of employment directly created by the investment project, calculated over a period of two years.

4. Where the investment concerns the processing and marketing of agricultural products, the aid intensity shall not exceed:

(a) 75 % of eligible investments in the outermost regions;

(b) 65 % of eligible investments in the smaller Aegean Islands within the meaning of Council Regulation (EC) No 1405/2006 <sup>(1)</sup>;

(c) 50 % of eligible investments in regions eligible under Article 87(3)(a) of the Treaty;

(d) 40 % of eligible investments in all other regions.

<sup>(1)</sup> OJ L 265, 26.9.2006, p. 1.

#### SECTION 3

##### **Aid for female entrepreneurship**

###### *Article 16*

##### **Aid for small enterprises newly created by female entrepreneurs**

1. Aid schemes in favour of small enterprises newly created by female entrepreneurs shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The beneficiaries shall be small enterprises newly created by female entrepreneurs.

3. The aid amount shall not exceed EUR 1 million per undertaking.

Annual amounts of aid per undertaking shall not exceed 33 % of the amounts of aid laid down in the first subparagraph.

4. The aid intensity shall not exceed 15 % of eligible costs incurred in the first five years after the creation of the undertaking.

5. The eligible costs shall be legal, advisory, consultancy and administrative costs directly related to the creation of the small enterprise, as well as the following costs, insofar as they are actually incurred within the first five years of the creation of the undertaking:

(a) interest on external finance and a dividend on own capital employed not exceeding the reference rate;

(b) fees for renting production facilities/equipment;

(c) energy, water, heating, taxes (other than VAT and corporate taxes on business income) and administrative charges;

(d) depreciation, fees for leasing production facilities/equipment as well as wage costs, provided that the underlying investments or job creation and recruitment measures have not benefited from other aid;

(e) child care and parent care costs including, where applicable, costs relating to parental leave.

6. Small enterprises controlled by shareholders of undertakings that have closed down in the previous 12 months cannot benefit from aid under this Article if the enterprises concerned are active in the same relevant market or in adjacent markets.

SECTION 4

**Aid for environmental protection**

Article 17

**Definitions**

For the purposes of this Section, the following definitions shall apply:

1. 'environmental protection' means any action designed to remedy or prevent damage to physical surroundings or natural resources by the beneficiary's own activities, to reduce risk of such damage or to lead to a more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy;
2. 'energy-saving measures' mean action which enables undertakings to reduce the amount of energy used notably in their production cycle;
3. 'Community standard' means:
  - (a) a mandatory Community standard setting the levels to be attained in environmental terms by individual undertakings; or
  - (b) the obligation under Directive 2008/1/EC of the European Parliament and of the Council <sup>(1)</sup> to use the best available techniques as set out in the most recent relevant information published by the Commission pursuant to Article 17(2) of that Directive;
4. 'renewable energy sources' means the following renewable non-fossil energy sources: wind, solar, geothermal, wave, tidal, hydropower installations, biomass, landfill gas, sewage treatment plant gas and biogases;
5. 'biofuels' means liquid or gaseous fuel for transport produced from biomass;
6. 'sustainable biofuels' means biofuels fulfilling the sustainability criteria set out in Article 15 of the proposal for a Directive of the European Parliament and the Council on the promotion of the use of energy from renewable sources <sup>(2)</sup>; once the Directive has been adopted by the European Parliament and the Council and published in the *Official Journal of the European Union*, the sustainability criteria laid down in the Directive shall apply;

7. 'energy from renewable energy sources' means energy produced by plants using only renewable energy sources, as well as the share in terms of calorific value of energy produced from renewable energy sources in hybrid plants — which also use conventional energy sources; it includes renewable electricity used for filling storage systems, but excludes electricity produced as a result of storage systems;

8. 'cogeneration' means the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy;

9. 'high efficiency cogeneration' means cogeneration meeting the criteria of Annex III to Directive 2004/8/EC of the European Parliament and of the Council <sup>(3)</sup> and satisfying the harmonised efficiency reference values established by Commission Decision 2007/74/EC <sup>(4)</sup>;

10. 'environmental tax' means a tax whose specific tax base has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment;

11. 'Community minimum tax level' means the minimum level of taxation provided for in Community legislation; for energy products and electricity, the Community minimum tax level means the minimum level of taxation laid down in Annex I to Directive 2003/96/EC;

12. 'tangible assets' means investments in land which are strictly necessary in order to meet environmental objectives, investments in buildings, plant and equipment intended to reduce or eliminate pollution and nuisances, and investments to adapt production methods with a view to protecting the environment.

Article 18

**Investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards**

1. Investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 8 of this Article are fulfilled.

<sup>(1)</sup> OJ L 24, 29.1.2008, p. 8.

<sup>(2)</sup> COM(2008) 19 final.

<sup>(3)</sup> OJ L 52, 21.2.2004, p. 50.

<sup>(4)</sup> OJ L 32, 6.2.2007, p. 183.



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2. The aided investment shall fulfil one of the following conditions:

- (a) the investment shall enable the beneficiary to increase the level of environmental protection resulting from its activities by going beyond the applicable Community standards, irrespective of the presence of mandatory national standards that are more stringent than the Community standards;
- (b) the investment shall enable the beneficiary to increase the level of environmental protection resulting from its activities in the absence of Community standards.

3. Aid may not be granted where improvements are to ensure that companies comply with Community standards already adopted and not yet in force.

4. The aid intensity shall not exceed 35 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

5. The eligible costs shall be the extra investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards concerned, without taking account of operating benefits and operating costs.

6. For the purposes of paragraph 5, the cost of the investment directly related to environmental protection shall be established by reference to the counterfactual situation:

- (a) where the cost of investing in environmental protection can be easily identified in the total investment cost, this precise environmental protection-related cost shall constitute the eligible costs;
- (b) in all other cases, the extra investment costs shall be established by comparing the investment with the counterfactual situation in the absence of State aid; the correct counterfactual shall be the cost of a technically comparable investment that provides a lower degree of environmental protection (corresponding to mandatory Community standards, if they exist) and that would credibly be realised without aid ('reference investment'); technically comparable investment means an investment with the same production capacity and all other technical characteristics (except those directly related to the extra investment for environmental protection); in addition, such a reference investment must, from a business point of view, be a credible alternative to the investment under assessment.

7. The eligible investment shall take the form of investment in tangible assets and/or in intangible assets.

8. In the case of investments aiming at obtaining a level of environmental protection higher than Community standards, the counterfactual shall be chosen as follows:

- (a) where the undertaking is adapting to national standards adopted in the absence of Community standards, the eligible costs shall consist of the additional investment costs necessary to achieve the level of environmental protection required by the national standards;
- (b) where the undertaking adapts to or goes beyond national standards which are more stringent than the relevant Community standards or goes beyond Community standards, the eligible costs shall consist of the additional investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards. The cost of investments needed to reach the level of protection required by the Community standards shall not be eligible;
- (c) where no standards exist, the eligible costs shall consist of the investment costs necessary to achieve a higher level of environmental protection than that which the undertaking or undertakings in question would achieve in the absence of any environmental aid.

9. Aid for investments relating to the management of waste of other undertakings shall not be exempted under this Article.

#### Article 19

#### **Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards**

1. Investment aid for the acquisition of new transport vehicles enabling undertakings active in the transport sector to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aided investment shall fulfil the condition laid down in Article 18(2).

3. Aid for the acquisition of new transport vehicles for road, railway, inland waterway and maritime transport complying with adopted Community standards shall be exempted, when such acquisition occurs before these Community standards enter into force and where, once mandatory, they do not apply retroactively to vehicles already purchased.

4. Aid for retrofitting operations of existing transport vehicles with an environmental protection objective shall be exempted if the existing means of transport are upgraded to environmental standards that were not yet in force at the date of entry into operation of those means of transport or if the means of transport are not subject to any environmental standards.

5. The aid intensity shall not exceed 35 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

6. The eligible costs shall be the extra investment costs necessary to achieve a level of environmental protection higher than the level required by the Community standards.

The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

#### Article 20

##### **Aid for early adaptation to future Community standards for SMEs**

1. Aid allowing SMEs to comply with new Community standards which increase the level of environmental protection and are not yet in force shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The Community standards shall have been adopted and the investment shall be implemented and finalised at least one year before the date of entry into force of the standard concerned.

3. The aid intensity shall not exceed 15 % of the eligible costs for small enterprises and 10 % of the eligible costs for medium-sized enterprises if the implementation and finalisation take place more than three years before the date of entry into force of the standard and 10 % for small enterprises if the implementation and finalisation take place between one and three years before the date of entry into force of the standard.

4. The eligible costs shall be the extra investment costs necessary to achieve the level of environmental protection required by the Community standard compared to the existing level of environmental protection required prior to the entry into force of this standard.

The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

#### Article 21

##### **Environmental investment aid for energy saving measures**

1. Environmental investment aid enabling undertakings to achieve energy savings shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that it meets:

(a) the conditions laid down in paragraphs 2 and 3 of this Article; or

(b) the conditions laid down in paragraphs 4 and 5 thereof.

2. The aid intensity shall not exceed 60 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

3. The eligible costs shall be the extra investment costs necessary to achieve energy savings beyond the level required by the Community standards.

The eligible costs shall be calculated as set out in Article 18(6) and (7).

The eligible costs shall be calculated net of any operating benefits and costs related to the extra investment for energy saving and arising during the first three years of the life of this investment in the case of SMEs, the first four years in the case of large undertakings that are not part of the EU CO<sub>2</sub> Emission Trading System and the first five years in the case of large undertakings that are part of the EU CO<sub>2</sub> Emission Trading System. For large undertakings this period may be reduced to the first three years of the life of this investment where the depreciation time of the investment can be demonstrated not to exceed three years.

The eligible cost calculations shall be certified by an external auditor.

4. The aid intensity shall not exceed 20 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.



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5. The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

#### Article 22

##### **Environmental investment aid for high-efficiency cogeneration**

1. Environmental investment aid for high-efficiency cogeneration shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aid intensity shall not exceed 45 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

3. The eligible costs shall be the extra investment costs necessary to realise a high efficiency cogeneration plant as compared to the reference investment. The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

4. A new cogeneration unit shall overall make primary energy savings compared to separate production as provided for by Directive 2004/8/EC and Decision 2007/74/EC. The improvement of an existing cogeneration unit or conversion of an existing power generation unit into a cogeneration unit shall result in primary energy savings compared to the original situation.

#### Article 23

##### **Environmental investment aid for the promotion of energy from renewable energy sources**

1. Environmental investment aid for the promotion of energy from renewable energy sources shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aid intensity shall not exceed 45 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for aid awarded to small enterprises and by 10 percentage points for aid awarded to medium-sized enterprises.

3. The eligible costs shall be the extra costs borne by the beneficiary compared with a conventional power plant or with a conventional heating system with the same capacity in terms of the effective production of energy.

The eligible costs shall be calculated as set out in Article 18(6) and (7) and without taking account of operating benefits and operating costs.

4. Environmental investment aid for the production of biofuels shall be exempted only to the extent the aided investments are used exclusively for the production of sustainable biofuels.

#### Article 24

##### **Aid for environmental studies**

1. Aid for studies directly linked to investments referred to in Article 18, investments in energy saving measures under the conditions set out in Article 21 and investments for the promotion of energy from renewable energy sources under the conditions set out in Article 23 shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The aid intensity shall not exceed 50 % of the eligible costs.

However, the aid intensity may be increased by 20 percentage points for studies undertaken on behalf of small enterprises and by 10 percentage points for studies undertaken on behalf of medium-sized enterprises.

3. The eligible costs shall be the costs of the study.

#### Article 25

##### **Aid in the form of reductions in environmental taxes**

1. Environmental aid schemes in the form of reductions in environmental taxes fulfilling the conditions of Directive 2003/96/EC shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The beneficiaries of the tax reduction shall pay at least the Community minimum tax level set by Directive 2003/96/EC.

3. Tax reductions shall be granted for maximum periods of ten years. After such 10 year period, Member States shall re-evaluate the appropriateness of the aid measures concerned.

#### SECTION 5

### ***Aid for consultancy in favour of SMEs and SME participation in fairs***

#### *Article 26*

#### **Aid for consultancy in favour of SMEs**

1. Aid for consultancy in favour of SMEs shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The aid intensity shall not exceed 50 % of the eligible costs.

3. The eligible costs shall be the consultancy costs of services provided by outside consultants.

The services concerned shall not be a continuous or periodic activity nor relate to the undertaking's usual operating costs, such as routine tax consultancy services, regular legal services or advertising.

#### *Article 27*

#### **Aid for SME participation in fairs**

1. Aid to SMEs for participation in fairs shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

2. The aid intensity shall not exceed 50 % of the eligible costs.

3. The eligible costs shall be the costs incurred for renting, setting up and running the stand for the first participation of an undertaking in any particular fair or exhibition.

#### SECTION 6

### ***Aid in the form of risk capital***

#### *Article 28*

#### **Definitions**

For the purposes of this Section, the following definitions shall apply:

1. 'equity' means ownership interest in an undertaking, represented by the shares issued to investors;

2. 'quasi-equity' means financial instruments whose return for the holder is predominantly based on the profits or losses of the underlying target undertaking and which are unsecured in the event of default;

3. 'private equity' means private — as opposed to public — equity or quasi-equity investment in undertakings not listed on a stock-market, including venture capital;

4. 'seed capital' means financing provided to study, assess and develop an initial concept, preceding the start-up phase;

5. 'start-up capital' means financing provided to undertakings, which have not sold their product or service commercially and are not yet generating a profit for product development and initial marketing;

6. 'expansion capital' means financing provided for the growth and expansion of an undertaking, which may or may not break even or trade profitably, for the purposes of increasing production capacity, market or product development or the provision of additional working capital;

7. 'exit strategy' means a strategy for the liquidation of holdings by a venture capital or private equity fund in accordance with a plan to achieve maximum return, including trade sale, write-offs, repayment of preference shares/loans, sale to another venture capitalist, sale to a financial institution and sale by public offering, including Initial Public Offerings;

8. 'target undertaking' means an undertaking in which an investor or investment fund is considering investing.

#### *Article 29*

#### **Aid in the form of risk capital**

1. Risk capital aid schemes in favour of SMEs shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 to 8 of this Article are fulfilled.

2. The risk capital measure shall take the form of participation into a profit driven private equity investment fund, managed on a commercial basis.

3. The tranches of investment to be made by the investment fund shall not exceed EUR 1,5 million per target undertaking over any period of twelve months.

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4. For SMEs located in assisted areas, as well as for small enterprises located in non-assisted areas, the risk capital measure shall be restricted to providing seed capital, start-up capital and/or expansion capital. For medium-sized enterprises located in non-assisted areas, the risk capital measure shall be restricted to providing seed capital and/or start-up capital, to the exclusion of expansion capital.

5. The investment fund shall provide at least 70 % of its total budget invested into target SMEs in the form of equity or quasi-equity.

6. At least 50 % of the funding of the investment funds shall be provided by private investors. In the case of investment funds targeting exclusively SMEs located in assisted areas, at least 30 % of the funding shall be provided by private investors.

7. To ensure that the risk capital measure is profit-driven, the following conditions shall be fulfilled:

(a) a business plan shall exist for each investment, containing details of product, sales and profitability development and establishing the *ex ante* viability of the project; and

(b) a clear and realistic exit strategy shall exist for each investment.

8. To ensure that the investment fund is managed on a commercial basis, the following conditions shall be fulfilled:

(a) there shall be an agreement between a professional fund manager and participants in the fund, providing that the manager's remuneration is linked to performance and setting out the objectives of the fund and proposed timing of investments; and

(b) private investors shall be represented in decision-making, such as through an investors' or advisory committee; and

(c) best practices and regulatory supervision shall apply to the management of funds.

#### SECTION 7

#### ***Aid for research and development and innovation***

#### *Article 30*

#### **Definitions**

For the purposes of this Section, the following definitions shall apply:

1. 'research organisation' means an entity, such as a university or research institute, irrespective of its legal status (organised under public or private law) or way of financing, whose

primary goal is to conduct fundamental research, industrial research or experimental development and to disseminate their results by way of teaching, publication or technology transfer; all profits must be reinvested in these activities, the dissemination of their results or teaching; undertakings that can exert influence upon such an organisation, for instance in their capacity as shareholders or members of the organisation, shall enjoy no preferential access to the research capacities of such an organisation or to the research results generated by it;

2. 'fundamental research' means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct practical application or use in view;

3. 'industrial research' means the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts to complex systems, which is necessary for the industrial research, notably for generic technology validation, to the exclusion of prototypes;

4. 'experimental development' means the acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills for the purpose of producing plans and arrangements or designs for new, altered or improved products, processes or services. These may also include, for instance, other activities aiming at the conceptual definition, planning and documentation of new products, processes or services. Those activities may comprise producing drafts, drawings, plans and other documentation, provided that they are not intended for commercial use;

The development of commercially usable prototypes and pilot projects is also included where the prototype is necessarily the final commercial product and where it is too expensive to produce for it to be used only for demonstration and validation purposes. In case of a subsequent commercial use of demonstration or pilot projects, any revenue generated from such use must be deducted from the eligible costs.

The experimental production and testing of products, processes and services shall also be eligible, provided that these cannot be used or transformed to be used in industrial applications or commercially.

Experimental development shall not include routine or periodic changes made to products, production lines, manufacturing processes, existing services and other operations in progress, even if such changes may represent improvements;

5. 'highly qualified personnel' means researchers, engineers, designers and marketing managers with tertiary education degree and at least 5 years of relevant professional experience; doctoral training may count as relevant professional experience;
6. 'secondment' means temporary employment of personnel by a beneficiary during a period of time, after which the personnel has the right to return to its previous employer.

#### Article 31

##### Aid for research and development projects

1. Aid for research and development projects shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty provided that the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The aided part of the research and development project shall completely fall within one or more of the following research categories:

- (a) fundamental research;
- (b) industrial research;
- (c) experimental development.

When a project encompasses different tasks, each task shall be qualified as falling under one of the categories listed in the first subparagraph or as not falling under any of those categories.

3. The aid intensity shall not exceed:
- (a) 100 % of the eligible costs for fundamental research;
- (b) 50 % of the eligible costs for industrial research;
- (c) 25 % of the eligible costs for experimental development.

The aid intensity shall be established for each beneficiary of aid, including in a collaboration project, as provided in paragraph 4(b)(i).

In the case of aid for a research and development project being carried out in collaboration between research organisations and undertakings, the combined aid deriving from direct government support for a specific project and, where they constitute aid, contributions from research organisations to that project may not exceed the applicable aid intensities for each beneficiary undertaking.

4. The aid intensities set for industrial research and experimental development in paragraph 3 may be increased as follows:

- (a) where the aid is granted to SMEs, the aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises; and
- (b) a bonus of 15 percentage points may be added, up to a maximum aid intensity of 80 % of the eligible costs, if:
- (i) the project involves effective collaboration between at least two undertakings which are independent of each other and the following conditions are fulfilled:
- no single undertaking bears more than 70 % of the eligible costs of the collaboration project,
  - the project involves collaboration with at least one SME or is carried out in at least two different Member States, or
- (ii) the project involves effective collaboration between an undertaking and a research organisation and the following conditions are fulfilled:
- the research organisation bears at least 10 % of the eligible project costs, and
  - the research organisation has the right to publish the results of the research projects insofar as they stem from research carried out by that organisation, or
- (iii) in the case of industrial research, the results of the project are widely disseminated through technical and scientific conferences or through publication in scientific or technical journals or in open access repositories (databases where raw research data can be accessed by anyone), or through free or open source software.

For the purposes of point (b)(i) and (ii) of the first subparagraph, subcontracting shall not be considered to be effective collaboration.

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5. The eligible costs shall be the following:
- (a) personnel costs (researchers, technicians and other supporting staff to the extent employed on the research project);
  - (b) costs of instruments and equipment to the extent and for the period used for the research project; if such instruments and equipment are not used for their full life for the research project, only the depreciation costs corresponding to the life of the research project, as calculated on the basis of good accounting practice, shall be considered eligible;
  - (c) costs for buildings and land, to the extent and for the duration used for the research project; with regard to buildings, only the depreciation costs corresponding to the life of the research project, as calculated on the basis of good accounting practice shall be considered eligible; for land, costs of commercial transfer or actually incurred capital costs shall be eligible;
  - (d) cost of contractual research, technical knowledge and patents bought or licensed from outside sources at market prices, where the transaction has been carried out at arm's length and there is no element of collusion involved, as well as costs of consultancy and equivalent services used exclusively for the research activity;
  - (e) additional overheads incurred directly as a result of the research project;
  - (f) other operating costs, including costs of materials, supplies and similar products incurred directly as a result of the research activity.
6. All eligible costs shall be allocated to a specific category of research and development.

#### Article 32

##### **Aid for technical feasibility studies**

1. Aid for technical feasibility studies preparatory to industrial research or experimental development activities shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.
2. The aid intensity shall not exceed:
- (a) for SMEs, 75 % of the eligible costs for studies preparatory to industrial research activities and 50 % of the eligible costs for studies preparatory to experimental development activities;

- (b) for large enterprises, 65 % of the eligible costs for studies preparatory to industrial research activities and 40 % of the eligible costs for studies preparatory to experimental development activities.

3. The eligible costs shall be the costs of the study.

#### Article 33

##### **Aid for industrial property rights costs for SMEs**

1. Aid to SMEs for the costs associated with obtaining and validating patents and other industrial property rights shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.
2. The aid intensity shall not exceed the intensity for research and development project aid laid down in Article 31(3) and (4), in respect of the research activities which first led to the industrial property rights concerned.
3. The eligible costs shall be the following:
- (a) all costs preceding the grant of the right in the first jurisdiction, including costs relating to the preparation, filing and prosecution of the application as well as costs incurred in renewing the application before the right has been granted;
  - (b) translation and other costs incurred in order to obtain the granting or validation of the right in other legal jurisdictions;
  - (c) costs incurred in defending the validity of the right during the official prosecution of the application and possible opposition proceedings, even if such costs occur after the right is granted.

#### Article 34

##### **Aid for research and development in the agricultural and fisheries sectors**

1. Aid for research and development concerning products listed in Annex I to the Treaty shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 7 of this Article are fulfilled.
2. The aid shall be of interest to all operators in the particular sector or sub-sector concerned.

3. Information that research will be carried out, and with which goal, shall be published on the internet, prior to the commencement of the research. An approximate date of expected results and their place of publication on the internet, as well as a mention that the result will be available at no cost, must be included.

The results of the research shall be made available on internet, for a period of at least 5 years. They shall be published no later than any information which may be given to members of any particular organisation.

4. Aid shall be granted directly to the research organisation and must not involve the direct granting of non-research related aid to a company producing, processing or marketing agricultural products, nor provide price support to producers of such products.

5. The aid intensity shall not exceed 100 % of the eligible costs.

6. The eligible costs shall be those provided in Article 31(5).

7. Aid for research and development concerning products listed in Annex I to the Treaty and not fulfilling the conditions laid down in this Article shall be compatible with the common market within the meaning of Article 87(3)(c) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in Articles 30, 31 and 32 of this Regulation are fulfilled.

#### Article 35

##### **Aid to young innovative enterprises**

1. Aid to young innovative enterprises shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.

2. The beneficiary shall be a small enterprise that has been in existence for less than 6 years at the time when the aid is granted.

3. The research and development costs of the beneficiary shall represent at least 15 % of its total operating costs in at least one of the three years preceding the granting of the aid or, in the case of a start-up enterprise without any financial history, in the audit of its current fiscal period, as certified by an external auditor.

4. The aid amount shall not exceed EUR 1 million.

However, the aid amount shall not exceed EUR 1,5 million in regions eligible for the derogation provided for in

Article 87(3)(a) of the Treaty, and EUR 1,25 million in regions eligible for the derogation provided for in Article 87(3)(c) of the Treaty.

5. The beneficiary may receive the aid only once during the period in which it qualifies as a young innovative enterprise.

#### Article 36

##### **Aid for innovation advisory services and for innovation support services**

1. Aid for innovation advisory services and for innovation support services shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 6 of this Article are fulfilled.

2. The beneficiary shall be an SME.

3. The aid amount shall not exceed a maximum of EUR 200 000 per beneficiary within any three year period.

4. The service provider shall benefit from a national or European certification. If the service provider does not benefit from a national or European certification, the aid intensity shall not exceed 75 % of the eligible costs.

5. The beneficiary must use the aid to buy the services at market price, or if the service provider is a non-for-profit entity, at a price which reflects its full costs plus a reasonable margin.

6. The eligible costs shall be the following:

(a) as regards innovation advisory services, the costs relating to: management consulting, technological assistance, technology transfer services, training, consultancy for acquisition, protection and trade in Intellectual Property Rights and for licensing agreements, consultancy on the use of standards;

(b) as regards innovation support services, the costs relating to: office space, data banks, technical libraries, market research, use of laboratory, quality labelling, testing and certification.

#### Article 37

##### **Aid for the loan of highly qualified personnel**

1. Aid for the loan of highly qualified personnel seconded from a research organisation or a large enterprise to an SME shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.



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2. The seconded personnel must not be replacing other personnel, but must be employed in a newly created function within the beneficiary undertaking and must have been employed for at least two years in the research organisation or the large enterprise, which is sending the personnel on secondment.

The seconded personnel must work on research and development and innovation activities within the SME receiving the aid.

3. The aid intensity shall not exceed 50 % of the eligible costs, for a maximum of 3 years per undertaking and per person borrowed.

4. The eligible costs shall be all personnel costs for borrowing and employing highly qualified personnel, including the costs of using a recruitment agency and of paying a mobility allowance for the seconded personnel.

5. This Article shall not apply to consultancy costs as referred to in Article 26.

#### SECTION 8

#### **Training aid**

##### *Article 38*

#### **Definitions**

For the purposes of this Section, the following definitions shall apply:

1. 'specific training' means training involving tuition directly and principally applicable to the employee's present or future position in the undertaking and providing qualifications which are not or only to a limited extent transferable to other undertakings or fields of work;

2. 'general training' means training involving tuition which is not applicable only or principally to the employee's present or future position in the undertaking, but which provides qualifications that are largely transferable to other undertakings or fields of work. Training shall be considered 'general' if, for example:

(a) it is jointly organised by different independent undertakings or where employees of different undertakings may avail themselves of the training;

(b) it is recognised, certified or validated by public authorities or bodies or by other bodies or institutions on which a Member State or the Community has conferred the necessary powers.

#### *Article 39*

#### **Training aid**

1. Training aid shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided that the conditions laid down in paragraphs 2, 3 and 4 of this Article are fulfilled.

2. The aid intensity shall not exceed:

(a) 25 % of the eligible costs for specific training; and

(b) 60 % of the eligible costs for general training.

However, the aid intensity may be increased, up to a maximum aid intensity of 80 % of the eligible costs, as follows:

(a) by 10 percentage points if the training is given to disabled or disadvantaged workers;

(b) by 10 percentage points if the aid is awarded to medium-sized enterprises and by 20 percentage points if the aid is awarded to small enterprises.

Where the aid is granted in the maritime transport sector, it may reach an intensity of 100 % of the eligible costs, whether the training project concerns specific or general training, provided that the following conditions are met:

(a) the trainee shall not be an active member of the crew but shall be supernumerary on board; and

(b) the training shall be carried out on board ships entered on Community registers.

3. In cases where the aid project involves both specific and general training components which cannot be separated for the calculation of the aid intensity, and in cases where the specific or general character of the training aid project cannot be established, the aid intensities applicable to specific training shall apply.

4. The eligible costs of a training aid project shall be:

(a) trainers' personnel costs;

(b) trainers' and trainees' travel expenses, including accommodation;

(c) other current expenses such as materials and supplies directly related to the project;

(d) depreciation of tools and equipment, to the extent that they are used exclusively for the training project;

- (e) cost of guidance and counselling services with regard to the training project;
- (f) trainees' personnel costs and general indirect costs (administrative costs, rent, overheads) up to the amount of the total of the other eligible costs referred to in points (a) to (e). As regards the trainees' personnel costs, only the hours during which the trainees actually participate in the training, after deduction of any productive hours, may be taken into account.

SECTION 9

**Aid for disadvantaged and disabled workers**

**Article 40**

**Aid for the recruitment of disadvantaged workers in the form of wage subsidies**

1. Aid schemes for the recruitment of disadvantaged workers in the form of wage subsidies shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.
2. The aid intensity shall not exceed 50 % of the eligible costs.
3. Eligible costs shall be the wage costs over a maximum period of 12 months following recruitment.

However, where the worker concerned is a severely disadvantaged worker, eligible costs shall be the wage costs over a maximum period of 24 months following recruitment.

4. Where the recruitment does not represent a net increase, compared with the average over the previous twelve months, in the number of employees in the undertaking concerned, the post or posts shall have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy.
5. Except in the case of lawful dismissal for misconduct, the disadvantaged worker shall be entitled to continuous employment for a minimum period consistent with the national legislation concerned or any collective agreements governing employment contracts.

If the period of employment is shorter than 12 months or, as the case may be 24 months, the aid shall be reduced pro rata accordingly.

**Article 41**

**Aid for the employment of disabled workers in the form of wage subsidies**

1. Aid for the employment of disabled workers in the form of wage subsidies shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 to 5 of this Article are fulfilled.
2. The aid intensity shall not exceed 75 % of the eligible costs.
3. Eligible costs shall be the wage costs over any given period during which the disabled worker is being employed.
4. Where the recruitment does not represent a net increase, compared with the average over the previous twelve months, in the number of employees in the undertaking concerned, the post or posts shall have fallen vacant following voluntary departure, disability, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct and not as a result of redundancy.
5. Except in the case of lawful dismissal for misconduct the workers shall be entitled to continuous employment for a minimum period consistent with the national legislation concerned or any collective agreements governing employment contracts.

If the period of employment is shorter than 12 months, the aid shall be reduced pro rata accordingly.

**Article 42**

**Aid for compensating the additional costs of employing disabled workers**

1. Aid for compensating the additional costs of employing disabled workers shall be compatible with the common market within the meaning of Article 87(3) of the Treaty and shall be exempt from the notification requirement of Article 88(3) of the Treaty, provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.
2. The aid intensity shall not exceed 100 % of the eligible costs.
3. Eligible costs shall be costs other than wage costs covered by Article 41, which are additional to those which the undertaking would have incurred if employing workers who are not disabled, over the period during which the worker concerned is being employed.



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The eligible costs shall be the following:

- (a) costs of adapting premises;
- (b) costs of employing staff for time spent solely on the assistance of the disabled workers;
- (c) costs of adapting or acquiring equipment, or acquiring and validating software for use by disabled workers, including adapted or assistive technology facilities, which are additional to those which the beneficiary would have incurred if employing workers who are not disabled;
- (d) where the beneficiary provides sheltered employment, the costs of constructing, installing or expanding the establishment concerned, and any costs of administration and transport which result directly from the employment of disabled workers.

#### CHAPTER III

#### FINAL PROVISIONS

##### Article 43

##### Repeal

Regulation (EC) No 1628/2006 shall be repealed.

Any references to the repealed Regulation and to Regulation (EC) No 68/2001, Regulation (EC) No 70/2001 and Regulation (EC) No 2204/2002 shall be construed as references to this Regulation.

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

Done at Brussels, 6 August 2008.

For the Commission  
Neelie KROES  
Member of the Commission

##### Article 44

##### Transitional provisions

1. This Regulation shall apply to individual aid granted before its entry into force, if the aid fulfils all the conditions laid down in this Regulation, with the exception of Article 9.

2. Any aid granted before 31 December 2008, which does not fulfil the conditions laid down in this Regulation but fulfils the conditions laid down in Regulation (EC) No 68/2001, Regulation (EC) No 70/2001, Regulation (EC) No 2204/2002 or Regulation (EC) No 1628/2006 shall be compatible with the common market and exempt from the notification requirement of Article 88(3) of the Treaty.

Any other aid granted before the entry into force of this Regulation, which fulfils neither the conditions laid down in this Regulation nor the conditions laid down in one of the Regulations referred to in the first subparagraph, shall be assessed by the Commission in accordance with the relevant frameworks, guidelines, communications and notices.

3. At the end of the period of validity of this Regulation, any aid schemes exempted under this Regulation shall remain exempted during an adjustment period of six months, with the exception of regional aid schemes. The exemption of regional aid schemes shall expire at the date of expiry of the approved regional aid maps.

##### Article 45

##### Entry into force and applicability

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

It shall apply until 31 December 2013.

ANNEX I

**Definition of SME**

*Article 1*

**Enterprise**

An enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.

*Article 2*

**Staff headcount and financial thresholds determining enterprise categories**

1. The category of micro, small and medium-sized enterprises ('SMEs') is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.
2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.
3. Within the SME category, a micro-enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

*Article 3*

**Types of enterprise taken into consideration in calculating staff numbers and financial amounts**

1. An 'autonomous enterprise' is any enterprise which is not classified as a partner enterprise within the meaning of paragraph 2 or as a linked enterprise within the meaning of paragraph 3.
2. 'Partner enterprises' are all enterprises which are not classified as linked enterprises within the meaning of paragraph 3 and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraph 3, 25 % or more of the capital or voting rights of another enterprise (downstream enterprise).

However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25 % threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the meaning of paragraph 3, either individually or jointly to the enterprise in question:

- (a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses (business angels), provided the total investment of those business angels in the same enterprise is less than EUR 1 250 000;
  - (b) universities or non-profit research centres;
  - (c) institutional investors, including regional development funds;
  - (d) autonomous local authorities with an annual budget of less than EUR 10 million and less than 5 000 inhabitants.
3. 'Linked enterprises' are enterprises which have any of the following relationships with each other:
    - (a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;
    - (b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
    - (c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
    - (d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

There is a presumption that no dominant influence exists if the investors listed in the second subparagraph of paragraph 2 are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as shareholders.

Enterprises having any of the relationships described in the first subparagraph through one or more other enterprises, or any one of the investors mentioned in paragraph 2, are also considered to be linked.

Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.

An 'adjacent market' is considered to be the market for a product or service situated directly upstream or downstream of the relevant market.

4. Except in the cases set out in paragraph 2, second subparagraph, an enterprise cannot be considered an SME if 25 % or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.

5. Enterprises may make a declaration of status as an autonomous enterprise, partner enterprise or linked enterprise, including the data regarding the thresholds set out in Article 2. The declaration may be made even if the capital is spread in such a way that it is not possible to determine exactly by whom it is held, in which case the enterprise may declare in good faith that it can legitimately presume that it is not owned as to 25 % or more by one enterprise or jointly by enterprises linked to one another. Such declarations are made without prejudice to the checks and investigations provided for by national or Community rules.

#### Article 4

##### **Data used for the staff headcount and the financial amounts and reference period**

1. The data to apply to the headcount of staff and the financial amounts are those relating to the latest approved accounting period and calculated on an annual basis. They are taken into account from the date of closure of the accounts. The amount selected for the turnover is calculated excluding value added tax (VAT) and other indirect taxes.

2. Where, at the date of closure of the accounts, an enterprise finds that, on an annual basis, it has exceeded or fallen below the headcount or financial thresholds stated in Article 2, this will not result in the loss or acquisition of the status of medium-sized, small or micro-enterprise unless those thresholds are exceeded over two consecutive accounting periods.

3. In the case of newly-established enterprises whose accounts have not yet been approved, the data to apply is to be derived from a bona fide estimate made in the course of the financial year.

#### Article 5

##### **Staff headcount**

The headcount corresponds to the number of annual work units (AWU), i.e. the number of persons who worked full-time within the enterprise in question or on its behalf during the entire reference year under consideration. The work of persons who have not worked the full year, the work of those who have worked part-time, regardless of duration, and the work of seasonal workers are counted as fractions of AWU. The staff consists of:

- (a) employees;
- (b) persons working for the enterprise being subordinated to it and deemed to be employees under national law;
- (c) owner-managers;
- (d) partners engaging in a regular activity in the enterprise and benefiting from financial advantages from the enterprise.

Apprentices or students engaged in vocational training with an apprenticeship or vocational training contract are not included as staff. The duration of maternity or parental leaves is not counted.

*Article 6*

**Establishing the data of an enterprise**

1. In the case of an autonomous enterprise, the data, including the number of staff, are determined exclusively on the basis of the accounts of that enterprise.

2. The data, including the headcount, of an enterprise having partner enterprises or linked enterprises are determined on the basis of the accounts and other data of the enterprise or, where they exist, the consolidated accounts of the enterprise, or the consolidated accounts in which the enterprise is included through consolidation.

To the data referred to in the first subparagraph are added the data of any partner enterprise of the enterprise in question situated immediately upstream or downstream from it. Aggregation is proportional to the percentage interest in the capital or voting rights (whichever is greater). In the case of cross-holdings, the greater percentage applies.

To the data referred to in the first and second subparagraph are added 100 % of the data of any enterprise, which is linked directly or indirectly to the enterprise in question, where the data were not already included through consolidation in the accounts.

3. For the application of paragraph 2, the data of the partner enterprises of the enterprise in question are derived from their accounts and their other data, consolidated if they exist. To these are added 100 % of the data of enterprises which are linked to these partner enterprises, unless their accounts data are already included through consolidation.

For the application of the same paragraph 2, the data of the enterprises which are linked to the enterprise in question are to be derived from their accounts and their other data, consolidated if they exist. To these are added, pro rata, the data of any possible partner enterprise of that linked enterprise, situated immediately upstream or downstream from it, unless it has already been included in the consolidated accounts with a percentage at least proportional to the percentage identified under the second subparagraph of paragraph 2.

4. Where in the consolidated accounts no staff data appear for a given enterprise, staff figures are calculated by aggregating proportionally the data from its partner enterprises and by adding the data from the enterprises to which the enterprise in question is linked.

ANNEX II

**Form for the provision of summary information for research and development aid under the extended reporting obligation laid down in Article 9(4)**

1. Aid in favour of (name of the undertaking(s) receiving the aid, SME or not):
2. Aid scheme reference (Commission reference of the existing scheme or schemes under which the aid is awarded):
3. Public entity/entities providing the assistance (name and co-ordinates of the granting authority or authorities):
4. Member State where the aided project or measure is carried out:
5. Type of project or measure:
6. Short description of project or measure:
7. Where applicable, eligible costs (in EUR):
8. Discounted aid amount (gross) in EUR:
9. Aid intensity (% in gross grant equivalent):
10. Conditions attached to the payment of the proposed aid (if any):
11. Planned start and end date of the project or measure:
12. Date of award of the aid:

**Form for the provision of summary information for aid for large investment projects under the extended reporting obligation laid down in Article 9(4)**

1. Aid in favour of (name of the undertaking(s) receiving the aid).
2. Aid scheme reference (Commission reference of the existing scheme or schemes under which the aid is awarded).
3. Public entity/entities providing the assistance (name and co-ordinates of the granting authority or authorities).
4. Member State where the investment takes place.
5. Region (NUTS 3 level) where the investment takes place.
6. Municipality (previously NUTS 5 level, now LAU 2) where the investment takes place.
7. Type of project (setting-up of a new establishment, extension of existing establishment, diversification of the output of an establishment into new additional products or a fundamental change in the overall production process of an existing establishment).
8. Products manufactured or services provided on the basis of the investment project (with PRODCOM/NACE nomenclature or CPA nomenclature for projects in the service sectors).

- 
9. Short description of investment project.
  10. Discounted eligible cost of investment project (in EUR).
  11. Discounted aid amount (gross) in EUR.
  12. Aid intensity (% in GGE).
  13. Conditions attached to the payment of the proposed assistance (if any).
  14. Planned start and end date of the project.
  15. Date of award of the aid.
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ANNEX III

**Form for the provision of summary information under the reporting obligation laid down in Article 9(1)**

Please fill in the information required below:

PART I

Aid reference	(to be completed by the Commission)	
Member State		
Member State reference number		
Region	Name of the Region (NUTS) <sup>(1)</sup>	Regional aid status <sup>(2)</sup>
Granting authority	Name	
	Address	
	Webpage	
Title of the aid measure		
National legal basis (Reference to the relevant national official publication)		
Web link to the full text of the aid measure		
Type of measure	Scheme	
	Ad hoc aid	Name of the Beneficiary
Amendment of an existing aid measure		Commission aid number
	Prolongation	
	Modification	
Duration <sup>(3)</sup>	Scheme	dd/mm/yy to dd/mm/yy
Date of granting <sup>(4)</sup>	Ad hoc aid	dd/mm/yy
Economic sector(s) concerned	All economic sectors eligible to receive aid	
	Limited to specific sectors — Please specify in accordance with NACE Rev. 2. <sup>(5)</sup>	
Type of beneficiary	SME	
	Large enterprises	

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Budget	Annual overall amount of the budget planned under the scheme <sup>(6)</sup>	National currency ... (in millions)	
	Overall amount of the ad hoc aid awarded to the undertaking <sup>(7)</sup>	National currency ... (in millions)	
	For guarantees <sup>(8)</sup>	National currency ... (in millions)	
Aid instrument (Art. 5)	Grant		
	Interest rate subsidy		
	Loan		
	Guarantee/Reference to the Commission decision <sup>(9)</sup>		
	Fiscal measure		
	Risk capital		
	Repayable advances		
	Other (please specify)		
If co-financed by Community funds	Reference(s):	Amount of Community funding	National currency ... (in millions)

<sup>(1)</sup> NUTS — Nomenclature of Territorial Units for Statistics.

<sup>(2)</sup> Article 87(3)(a) of the Treaty, Article 87(3)(c) of the Treaty, mixed areas, areas not eligible for regional aid.

<sup>(3)</sup> Period during which the granting authority can commit itself to grant the aid.

<sup>(4)</sup> Aid is to be considered to be granted at the moment the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime.

<sup>(5)</sup> NACE Rev.2 — Statistical classification of Economic Activities in the European Community.

<sup>(6)</sup> In case of an aid scheme: Indicate the annual overall amount of the budget planned under the scheme or the estimated tax loss per year for all aid instruments contained in the scheme.

<sup>(7)</sup> In case of an ad hoc aid award: Indicate the overall aid amount/tax loss.

<sup>(8)</sup> For guarantees, indicate the (maximum) amount of loans guaranteed.

<sup>(9)</sup> Where appropriate, reference to the Commission decision approving the methodology to calculate the gross grant equivalent, in line with Article 5(1)(c) of the Regulation.



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PART II

Please indicate under which provision of the GBER the aid measure is implemented.

General Objectives (list)	Objectives (list)	Maximum aid intensity in % or Maximum aid amount in national currency	SME — bonuses in %
Regional investment and employment aid <sup>(1)</sup> (Art. 13)	Scheme	... %	
	Ad hoc aid (Art. 13(1))	... %	
Aid for newly created small enterprises (Art. 14)		... %	
SME investment and employment aid (Art. 15)		... %	
Aid for small enterprises newly created by female entrepreneurs (Art. 16)		... %	
Aid for Environmental protection (Art. 17–25)	Investment aid enabling undertakings to go beyond Community standards for environmental protection or increase the level of environmental protection in the absence of Community standards (Art. 18)  Please provide a specific reference to the relevant standard	... %	
	Aid for the acquisition of new transport vehicles which go beyond Community standards or which increase the level of environmental protection in the absence of Community standards (Art. 19)	... %	
	Aid for early adaptation to future Community standards for SMEs (Art. 20)	... %	
	Environmental investment aid for energy saving measures (Art. 21)	... %	
	Environmental investment aid for high efficiency cogeneration (Art. 22)	... %	
	Environmental investment aid for the promotion of energy from renewable energy sources (Art. 23)	... %	
	Aid for environmental studies (Art. 24)	... %	
	Aid in the form of reductions in en- vironmental taxes (Art. 25)	... national currency	

General Objectives (list)	Objectives (list)		Maximum aid intensity in % or Maximum aid amount in national currency	SME — bonuses in %
Aid for consultancy in favour of SMEs and SME participation in fairs (Art. 26–27)	Aid for consultancy in favour of SMEs (Art. 26)		... %	
	Aid for SME participation in fairs (Art. 27)		... %	
Aid in the form of risk capital (Art. 28–29)			... national currency	
Aid for research, deve- lopment and innovation (Art. 30–37)	Aid for research and deve- lopment projects (Art. 31)	Fundamental research (Art. 31(2)(a))	... %	
		Industrial research (Art. 31(2)(b))	... %	
		Experimental develop- ment (Art. 31(2)(c))	... %	
	Aid for technical feasibility studies (Art. 32)		... %	
	Aid for industrial property rights costs for SMEs (Art. 33)		... %	
	Aid for research and development in the agricultural and fisheries sectors (Art. 34)		... %	
	Aid to young innovative enterprises (Art. 35)		... national currency	
	Aid for innovation advisory services and for innovation support services (Art. 36)		... national currency	
	Aid for the loan of highly qualified personnel (Art. 37)		... national currency	
Training aid (Art. 38–39)	Specific training (Art. 38(1))		... %	
	General training (Art. 38(2))		... %	

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General Objectives (list)	Objectives (list)	Maximum aid intensity in % or Maximum aid amount in national currency	SME — bonuses in %
Aid for disadvantaged and disabled workers (Art. 40–42)	Aid for the recruitment of disadvan- taged workers in the form of wage subsidies (Art. 40)	... %	
	Aid for the employment of disabled workers in the form of wage subsidies (Art. 41)	... %	
	Aid for compensating the additional costs of employing disabled workers (Art. 42)	... %	

(<sup>1</sup>) In the case of ad hoc regional aid supplementing aid awarded under aid scheme(s), please indicate both the aid intensity granted under the scheme and the intensity of the ad hoc aid.