

DIRECTIVE 2003/55/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 June 2003

concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF
THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2), Article 55 and Article 95 thereof,

Having regard to the proposals from the Commission ⁽¹⁾,

Having regard to the Opinion of the European Economic and Social Committee ⁽²⁾,

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

(1) Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas ⁽⁴⁾ has made significant contributions towards the creation of an internal market for gas.

(2) Experience in implementing this Directive shows the benefits that may result from the internal market in gas, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness. However, significant shortcomings and possibilities for improving the functioning of the market remain, notably concrete provisions are needed to ensure a level playing field and to reduce the risks of market dominance and predatory behaviour, ensuring non-discriminatory transmission and distribution tariffs, through access to the network on the basis of tariffs published prior to their entry into force, and ensuring that the rights of small and vulnerable customers are protected.

(3) At its meeting in Lisbon on 23 and 24 March 2000, the European Council called for rapid work to be undertaken to complete the internal market in both electricity and gas sectors and to speed up liberalisation in these sectors with a view to achieving a fully operational internal market. The European Parliament, in its Resolution of 6 July 2000 on the Commission's second report on the state of liberalisation of energy markets, requested the Commission to adopt a detailed timetable for the achievement of accurately defined objectives with a view to gradually but completely liberalising the energy market.

(4) The freedoms which the Treaty guarantees European citizens — free movement of goods, freedom to provide services and freedom of establishment — are only possible in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

(5) In view of the anticipated increase in dependency as regards natural gas consumption, consideration should be given to initiatives and measures to encourage reciprocal arrangements for access to third-country networks and market integration.

(6) The main obstacles in arriving at a fully operational and competitive internal market relate to, amongst other things, issues of access to the network, access to storage, tariffication issues, interoperability between systems and different degrees of market opening between Member States.

(7) For competition to function, network access must be non-discriminatory, transparent and fairly priced.

(8) In order to complete the internal gas market, non-discriminatory access to the network of the transmission and distribution system operators is of paramount importance. A transmission or distribution system operator may consist of one or more undertakings.

(9) In case of a gas undertaking performing transmission, distribution, storage or liquefied natural gas (LNG) activities and which is separate in its legal form from those undertakings performing production and/or

⁽¹⁾ OJ C 240 E, 28.8.2001, p. 60 and OJ C 227 E, 24.9.2002, p. 393.

⁽²⁾ OJ C 36, 8.2.2002, p. 10.

⁽³⁾ Opinion of the European Parliament of 13 March 2002 (OJ C 47 E, 27.2.2003, p. 367), Council Common Position of 3 February 2003 (OJ C 50 E, 4.3.2003, p. 36) and Decision of the European Parliament of 4 June 2003 (not yet published in the Official Journal).

⁽⁴⁾ OJ L 204, 21.7.1998, p. 1.

supply activities, the designated system operators may be the same undertaking owning the infrastructure.

- (10) In order to ensure efficient and non-discriminatory network access it is appropriate that the transmission and distribution systems are operated through legally separate entities where vertically integrated undertakings exist. The Commission should assess measures of equivalent effect, developed by Member States to achieve the aim of this requirement, and, where appropriate, submit proposals to amend this Directive.

It is also appropriate that the transmission and distribution system operators have effective decision making rights with respect to assets necessary to maintain and operate and develop networks when the assets in question are owned and operated by vertically integrated undertakings.

It is important however to distinguish between such legal separation and ownership unbundling. Legal separation implies neither a change of ownership of assets and nothing prevents similar or identical employment conditions applying throughout the whole of the vertically integrated undertakings. However, a non-discriminatory decision-making process should be ensured through organisational measures regarding the independence of the decision-makers responsible.

- (11) To avoid imposing a disproportionate financial and administrative burden on small distribution companies, Member States should be able, where necessary, to exempt such companies from the legal distribution unbundling requirements.
- (12) In order to facilitate the conclusion of contracts by a gas undertaking established in a Member State for the supply of gas to eligible customers in another Member State, Member States and, where appropriate, national regulatory authorities should work towards more homogenous conditions and the same degree of eligibility for the whole of the internal market.

- (13) The existence of effective regulation, carried out by one or more national regulatory authorities, is an important factor in guaranteeing non-discriminatory access to the network. Member States specify the functions, competences and administrative powers of the regulatory authorities. It is important that the regulatory authorities in all Member States share the same minimum set of competences. Those authorities should have the competence to fix or approve the tariffs, or at least, the methodologies underlying the calculation of

transmission and distribution tariffs and tariffs for access to liquefied natural gas (LNG) facilities. In order to avoid uncertainty and costly and time consuming disputes, these tariffs should be published prior to their entry into force.

- (14) The Commission has indicated its intention to set up a European Regulators Group for Electricity and Gas which would constitute a suitable advisory mechanism for encouraging cooperation and coordination of national regulatory authorities, in order to promote the development of the internal market for electricity and gas, and to contribute to the consistent application, in all Member States, of the provisions set out in this Directive and Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity ⁽¹⁾ and in Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity ⁽²⁾.

- (15) In order to ensure effective market access for all market players including new entrants, non discriminatory and cost-reflective balancing mechanisms are necessary. As soon as the gas market is sufficiently liquid, this should be achieved through the setting up of transparent market-based mechanisms for the supply and purchase of gas needed in the framework of balancing requirements. In the absence of such a liquid market, national regulatory authorities should play an active role to ensure that balancing tariffs are non-discriminatory and cost-reflective. At the same time, appropriate incentives should be provided to balance in-put and off-take of gas and not to endanger the system.

- (16) National regulatory authorities should be able to fix or approve tariffs, or the methodologies underlying the calculation of the tariffs, on the basis of a proposal by the transmission system operator or distribution system operator(s) or LNG system operator, or on the basis of a proposal agreed between these operator(s) and the users of the network. In carrying out these tasks, national regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal, avoided network costs from demand-side management measures.

- (17) The benefits resulting from the internal market should be available to all Community industry and commerce, including small and medium-sized enterprises, and to all Community citizens as quickly as possible, for reasons of fairness, competitiveness, and indirectly, to create employment as a result of the efficiency gains that will be enjoyed by enterprises.

⁽¹⁾ See p. 37 of this Official Journal.

⁽²⁾ See p. 1 of this Official Journal.

- (18) Gas customers should be able to choose their supplier freely. Nonetheless a phased approach should be taken to completing the internal market for gas, coupled with a specific deadline, to enable industry to adjust and ensure that adequate measures and systems are in place to protect the interests of customers and ensure they have a real and effective right to choose their supplier.
- (19) Progressive opening of markets towards full competition should as soon as possible remove differences between Member States. Transparency and certainty in the implementation of this Directive should be ensured.
- (20) Directive 98/30/EC contributes to access to storage as part of the gas system. In the light of the experience gained in implementing the internal market, additional measures should be taken to clarify the provisions for access to storage and ancillary services.
- (21) Storage facilities are essential means, amongst other things of implementing public service obligations such as security of supply. This should not lead to distortion of competition or discrimination in the access to storage.
- (22) Further measures should be taken in order to ensure transparent and non discriminatory tariffs for access to transportation. Those tariffs should be applicable to all users on a non discriminatory basis. Where a storage facility, linepack or ancillary service operates in a sufficiently competitive market, access could be allowed on the basis of transparent and non-discriminatory market-based mechanisms.
- (23) In the interest of security of supply, the supply/demand balance in individual Member States should be monitored, and monitoring should be followed by a report on the situation at Community level, taking account of interconnection capacity between areas. Such monitoring should be carried out sufficiently early to enable appropriate measures to be taken if security of supply is compromised. The construction and maintenance of the necessary network infrastructure, including interconnection capacity, should contribute to ensuring a stable gas supply.
- (24) Member States should ensure that, taking into account the necessary quality requirements, biogas and gas from biomass or other types of gas are granted non-discriminatory access to the gas system, provided such access is permanently compatible with the relevant technical rules and safety standards. These rules and standards should ensure, that these gases can technically and safely be injected into, and transported through the natural gas system and should also address the chemical characteristics of these gases.
- (25) Long-term contracts will continue to be an important part of the gas supply of Member States and should be maintained as an option for gas supply undertakings in so far as they do not undermine the objectives of this Directive and are compatible with the Treaty, including competition rules. It is therefore necessary to take them into account in the planning of supply and transportation capacity of gas undertakings.
- (26) In order to ensure the maintenance of high standards of public service in the Community, all measures taken by Member States to achieve the objectives of this Directive should be regularly notified to the Commission. The Commission should regularly publish a report analysing measures taken at national level to achieve public service objectives and comparing their effectiveness, with a view to making recommendations as regards measures to be taken at national level to achieve high public service standards.
- Member States should ensure that when they are connected to the gas system customers are informed about their rights to be supplied with natural gas of a specified quality at reasonable prices. Measures taken by Member States to protect final customers may differ according to households and small and medium sized enterprises.
- (27) The respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the observance of Community law.
- (28) Measures implemented by Member States to achieve the objectives of social and economic cohesion may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools. These tools may include liability mechanisms to guarantee the necessary investment.
- (29) To the extent to which measures taken by Member States to fulfil public service obligations constitute State aid under Article 87(1) of the Treaty, there is an obligation according to Article 88(3) of the Treaty to notify them to the Commission

- (30) Since the objective of the proposed action, namely the creation of a fully operational internal gas market, in which fair competition prevails, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity and proportionality as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (31) In the light of the experience gained with the operation of Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids ⁽¹⁾, measures should be taken to ensure homogeneous and non-discriminatory access regimes for transmission, including cross-border flows of gas between Member States. To ensure homogeneity in the treatment of access to the gas networks, also in the case of transit, that Directive should be repealed, without prejudice to the continuity of contracts concluded under the said Directive. The repeal of Directive 91/296/EEC should not prevent long-term contracts being concluded in the future.
- (32) Given the scope of the amendments that are being made to Directive 98/30/EC, it is desirable, for reasons of clarity and rationalisation, that the provisions in question should be recast.
- (33) This Directive respects the fundamental rights, and observes the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.
- (34) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽²⁾,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Directive establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and

functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems.

2. The rules established by this Directive for natural gas, including liquefied natural gas (LNG), shall also apply to biogas and gas from biomass or other types of gas in so far as such gases can technically and safely be injected into, and transported through, the natural gas system.

Article 2

Definitions

For the purposes of this Directive:

1. 'natural gas undertaking' means any natural or legal person carrying out at least one of the following functions: production, transmission, distribution, supply, purchase or storage of natural gas, including LNG, which is responsible for the commercial, technical and/or maintenance tasks related to those functions, but shall not include final customers;
2. 'upstream pipeline network' means any pipeline or network of pipelines operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal;
3. 'transmission' means the transport of natural gas through a high pressure pipeline network other than an upstream pipeline network with a view to its delivery to customers, but not including supply;
4. 'transmission system operator' means a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transportation of gas;
5. 'distribution' means the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers, but not including supply;
6. 'distribution system operator' means a natural or legal person who carries out the function of distribution and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of gas;

⁽¹⁾ OJ L 147, 12.6.1991, p. 37. Directive as last amended by Commission Directive 95/49/EC (OJ L 233, 30.9.1995, p. 86).

⁽²⁾ OJ L 184, 17.7.1999, p. 23.

7. 'supply' means the sale, including resale, of natural gas, including LNG, to customers;
8. 'supply undertaking' means any natural or legal person who carries out the function of supply;
9. 'storage facility' means a facility used for the stocking of natural gas and owned and/or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions;
10. 'storage system operator' means a natural or legal person who carries out the function of storage and is responsible for operating a storage facility;
11. 'LNG facility' means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gaseification of LNG, and shall include ancillary services and temporary storage necessary for the re-gaseification process and subsequent delivery to the transmission system, but shall not include any part of LNG terminals used for storage;
12. 'LNG system operator' means a natural or legal person who carries out the function of liquefaction of natural gas, or the importation, offloading, and re-gaseification of LNG and is responsible for operating a LNG facility;
13. 'system' means any transmission networks, distribution networks, LNG facilities and/or storage facilities owned and/or operated by a natural gas undertaking, including linepack and its facilities supplying ancillary services and those of related undertakings necessary for providing access to transmission, distribution and LNG;
14. 'ancillary services' means all services necessary for access to and the operation of transmission and/or distribution networks and/or LNG facilities and/or storage facilities including load balancing and blending, but excluding facilities reserved exclusively for transmission system operators carrying out their functions;
15. 'linepack' means the storage of gas by compression in gas transmission and distribution systems, but excluding facilities reserved for transmission system operators carrying out their functions;
16. 'interconnected system' means a number of systems which are linked with each other;
17. 'interconnector' means a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of these Member States;
18. 'direct line' means a natural gas pipeline complementary to the interconnected system;
19. 'integrated natural gas undertaking' means a vertically or horizontally integrated undertaking;
20. 'vertically integrated undertaking' means a natural gas undertaking or a group of undertakings whose mutual relationships are defined in Article 3(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings⁽¹⁾ and where the undertaking/group concerned is performing at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas;
21. 'horizontally integrated undertaking' means an undertaking performing at least one of the functions of production, transmission, distribution, supply or storage of natural gas, and a non-gas activity;
22. 'related undertakings' means affiliated undertakings, within the meaning of Article 41 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 44(2)(g)^(*) of the Treaty on consolidated accounts⁽²⁾, and/or associated undertakings, within the meaning of Article 33(1) thereof, and/or undertakings which belong to the same shareholders;
23. 'system users' means any natural or legal persons supplying to, or being supplied by, the system;
24. 'customers' means wholesale and final customers of natural gas and natural gas undertakings which purchase natural gas;
25. 'household customers' means customers purchasing natural gas for their own household consumption;
26. 'non-household customers' means customers purchasing natural gas which is not for their own household use;
27. 'final customers' means customers purchasing natural gas for their own use;
28. 'eligible customers' means customers who are free to purchase gas from the supplier of their choice, within the meaning of Article 23 of this Directive;

(*) The title of Directive 83/349/EEC has been adjusted to take account of the renumbering of the Articles of the Treaty establishing the European Community in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g).

⁽¹⁾ OJ L 395, 30.12.1989, p. 1. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

⁽²⁾ OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

29. 'wholesale customers' means any natural or legal persons other than transmission system operators and distribution system operators who purchase natural gas for the purpose of resale inside or outside the system where they are established;
30. 'long-term planning' means the planning of supply and transportation capacity of natural gas undertakings on a long-term basis with a view to meeting the demand for natural gas of the system, diversification of sources and securing supplies to customers;
31. 'emergent market' means a Member State in which the first commercial supply of its first long-term natural gas supply contract was made not more than 10 years earlier;
32. 'security' means both security of supply of natural gas and technical safety;
33. 'new infrastructure' means an infrastructure not completed by the entry into force of this Directive.

CHAPTER II

GENERAL RULES FOR THE ORGANISATION OF THE SECTOR

Article 3

Public service obligations and customer protection

1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and shall not discriminate between these undertakings as regards either rights or obligations.
2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency and climate protection. Such obligations shall be clearly defined, transparent, non discriminatory, verifiable and shall guarantee equality of access for EU gas companies to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals, as referred to in this paragraph, Member States may introduce the implementation of long term planning, taking into account the possibility of third parties seeking access to the system.

3. Member States shall take appropriate measures to protect final customers and to ensure high levels of consumer protection, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers, including appropriate measures to help them avoid disconnection. In this context, they may take appropriate measures to protect customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customers connected to the gas network. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding general contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is effectively able to switch to a new supplier. As regards at least household customers these measures shall include those set out in Annex A.

4. Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection, which may include means to combat climate change, and security of supply. Such measures may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools, for the maintenance and construction of necessary network infrastructure, including interconnection capacity.

5. Member States may decide not to apply the provisions of Article 4 with respect to distribution insofar as their application would obstruct, in law or in fact, the performance of the obligations imposed on natural gas undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.

6. Member States shall, upon implementation of this Directive, inform the Commission of all measures adopted to fulfil public service obligations, including consumer and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from the provisions of this Directive. They shall notify the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.

Article 4

Authorisation procedure

1. In circumstances where an authorisation (e.g. licence, permission, concession, consent or approval) is required for the construction or operation of natural gas facilities, the Member States or any competent authority they designate shall grant authorisations to build and/or operate such facilities,

pipelines and associated equipment on their territory, in accordance with paragraphs 2 to 4. Member States or any competent authority they designate may also grant authorisations on the same basis for the supply of natural gas and for wholesale customers.

2. Where Member States have a system of authorisation, they shall lay down objective and non discriminatory criteria which shall be met by an undertaking applying for an authorisation to build and/or operate natural gas facilities or applying for an authorisation to supply natural gas. The non discriminatory criteria and procedures for the granting of authorisations shall be made public.

3. Member States shall ensure that the reasons for any refusal to grant an authorisation are objective and non discriminatory and are given to the applicant. Reasons for such refusals shall be forwarded to the Commission for information. Member States shall establish a procedure enabling the applicant to appeal against such refusals.

4. For the development of newly supplied areas and efficient operation generally, and without prejudice to Article 24, Member States may decline to grant a further authorisation to build and operate distribution pipeline systems in any particular area once such pipeline systems have been or are proposed to be built in that area and if existing or proposed capacity is not saturated.

Article 5

Monitoring of security of supply

Member States shall ensure the monitoring of security of supply issues. Where Member States consider it appropriate, they may delegate this task to the regulatory authorities referred to in Article 25(1). This monitoring shall, in particular, cover the supply/demand balance on the national market, the level of expected future demand and available supplies, envisaged additional capacity being planned or under construction, and the quality and level of maintenance of the networks, as well as measures to cover peak demand and to deal with shortfalls of one or more suppliers. The competent authorities shall publish, by 31 July each year at the latest a report outlining the findings resulting from the monitoring of these issues, as well as any measures taken or envisaged to address them and shall forward this report to the Commission forthwith.

Article 6

Technical rules

Member States shall ensure that technical safety criteria are defined and that technical rules establishing the minimum technical design and operational requirements for the connection to the system of LNG facilities, storage facilities,

other transmission or distribution systems, and direct lines, are developed and made public. These technical rules shall ensure the interoperability of systems and shall be objective and non-discriminatory. They shall be notified to the Commission in accordance with Article 8 of 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 of rules on Information Society Services ⁽¹⁾.

CHAPTER III

TRANSMISSION, STORAGE AND LNG

Article 7

Designation of system operators

Member States shall designate or shall require natural gas undertakings which own transmission, storage or LNG facilities to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more system operators. Member States shall take the measures necessary to ensure that transmission, storage and LNG system operators act in accordance with Articles 8 to 10.

Article 8

Tasks of system operators

1. Each transmission, storage and/or LNG system operator shall:
 - (a) operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities, with due regard to the environment;
 - (b) refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;
 - (c) provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system;
 - (d) provide system users with the information they need for efficient access to the system.
2. Rules adopted by transmission system operators for balancing the gas transmission system shall be objective, transparent and non-discriminatory, including rules for the

⁽¹⁾ OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 25(2) in a non-discriminatory and cost-reflective way and shall be published.

3. Member States may require transmission system operators to comply with minimum requirements for the maintenance and development of the transmission system, including interconnection capacity.

4. Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures.

Article 9

Unbundling of transmission system operators

1. Where the transmission system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission. These rules shall not create an obligation to separate the ownership of assets of the transmission system from the vertically integrated undertaking.

2. In order to ensure the independence of the transmission system operator referred to in paragraph 1, the following minimum criteria shall apply:

- (a) those persons responsible for the management of the transmission system operator may not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production, distribution and supply of natural gas;
- (b) appropriate measures must be taken to ensure that the professional interests of persons responsible for the management of the transmission system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the transmission system operator shall have effective decision-making rights, independent from the integrated gas undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets regulated indirectly in accordance with Article 25(2) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the transmission system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not

permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of transmission lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument;

- (d) the transmission system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 25(1) and shall be published.

Article 10

Confidentiality for transmission system operators

1. Without prejudice to Article 16 or any other legal duty to disclose information, each transmission, storage and/or LNG system operator shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner.

2. Transmission system operators shall not, in the context of sales or purchases of natural gas by related undertakings, abuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.

CHAPTER IV

DISTRIBUTION AND SUPPLY

Article 11

Designation of distribution system operators

Member States shall designate, or shall require undertakings which own or are responsible for distribution systems to designate, for a period of time to be determined by Member States, having regard to considerations of efficiency and economic balance, one or more distribution system operators and shall ensure that those operators act in accordance with Articles 12 to 14.

Article 12

Tasks of distribution system operators

1. Each distribution system operator shall operate, maintain and develop under economic conditions a secure, reliable and efficient system, with due regard for the environment.
2. In any event, the distribution system operator shall not discriminate between system users or classes of system users, particularly in favour of its related undertakings.
3. Each distribution system operator shall provide any other distribution system operator, and/or any transmission, and/or LNG system operator, and/or storage system operator with sufficient information to ensure that the transport and storage of natural gas takes place in a manner compatible with the secure and efficient operation of the interconnected system.
4. Each distribution system operator shall provide system users with the information they need for efficient access to the system.
5. Where distribution system operators are responsible for balancing the gas distribution system, rules adopted by them for that purpose shall be objective, transparent and non-discriminatory, including rules for the charging of system users for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by system operators shall be established pursuant to a methodology compatible with Article 25(2) in a non-discriminatory and cost-reflective way and shall be published.

Article 13

Unbundling of distribution system operators

1. Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. These rules shall not create an obligation to separate the ownership of assets of the distribution system from the vertically integrated undertaking.
2. In addition to the requirements of paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:
 - (a) those persons responsible for the management of the distribution system operator may not participate in

company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production, transmission and supply of natural gas;

- (b) appropriate measures must be taken to ensure that the professional interests of persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the distribution system operator shall have effective decision-making rights, independent from the integrated gas undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets, regulated indirectly in accordance with Article 25(2), in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the distribution system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of distribution lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument;
- (d) the distribution system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 25(1) and shall be published.

Member States may decide not to apply paragraphs 1 and 2 to integrated natural gas undertakings serving less than 100 000 connected customers.

Article 14

Confidentiality for distribution system operators

1. Without prejudice to Article 16 or any other legal duty to disclose information, each distribution system operator shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner.

2. Distribution system operators shall not, in the context of sales or purchases of natural gas by related undertakings, abuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.

Article 15

Combined operator

The rules in Articles 9(1) and Article 13(1) shall not prevent the operation of a combined transmission, LNG, storage and distribution system operator, which is independent in terms of its legal form, organisation and decision making from other activities not relating to transmission LNG, storage and distribution system operations and which meets the requirements set out in points (a) to (d). These rules shall not create an obligation to separate the ownership of assets of the combined system from the vertically integrated undertaking:

- (a) those persons responsible for the management of the combined system operator may not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;
- (b) appropriate measures must be taken to ensure that the professional interests of persons responsible for the management of the combined system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the combined system operator shall have effective decision-making rights, independent from the integrated gas undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets, regulated indirectly in accordance with Article 25(2) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the combined system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of transmission and distribution lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument;
- (d) the combined system operator shall establish a compliance programme, which sets out measures taken to ensure that

discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 25(1) and shall be published.

CHAPTER V

UNBUNDLING AND TRANSPARENCY OF ACCOUNTS

Article 16

Right of access to accounts

1. Member States or any competent authority they designate, including the regulatory authorities referred to in Article 25(1) and the dispute settlement authorities referred to in Article 20(3), shall, insofar as necessary to carry out their functions, have right of access to the accounts of natural gas undertakings as set out in Article 17.
2. Member States and any designated competent authority, including the regulatory authorities referred to in Article 25(1) and the dispute settlement authorities, shall preserve the confidentiality of commercially sensitive information. Member States may provide for the disclosure of such information where this is necessary in order for the competent authorities to carry out their functions.

Article 17

Unbundling of accounts

1. Member States shall take the necessary steps to ensure that the accounts of natural gas undertakings are kept in accordance with paragraphs 2 to 5. Where undertakings benefit from a derogation from this provision on the basis of Article 28(2) and (4), they shall at least keep their internal accounts in accordance with this Article.
2. Natural gas undertakings, whatever their system of ownership or legal form, shall draw up, submit to audit and publish their annual accounts in accordance with the rules of national law concerning the annual accounts of limited liability companies adopted pursuant to the Fourth Council Directive

78/660/EEC of 25 July 1978 based on Article 44(2)(g) (*) of the Treaty on the annual accounts of certain types of companies ⁽¹⁾. Undertakings which are not legally obliged to publish their annual accounts shall keep a copy of these at the disposal of the public at their head office.

3. Natural gas undertakings shall, in their internal accounting, keep separate accounts for each of their transmission, distribution, LNG and storage activities as they would be required to do if the activities in question were carried out by separate undertakings, with a view to avoiding discrimination, cross-subsidisation and distortion of competition. They shall also keep accounts, which may be consolidated, for other gas activities not relating to transmission, distribution, LNG and storage. Until 1 July 2007, they shall keep separate accounts for supply activities for eligible customers and supply activities for non-eligible customers. Revenue from ownership of the transmission/distribution network shall be specified in the accounts. Where appropriate, they shall keep consolidated accounts for other, non-gas activities. The internal accounts shall include a balance sheet and a profit and loss account for each activity.

4. The audit, referred to in paragraph 2, shall, in particular, verify that the obligation to avoid discrimination and cross-subsidies referred to in paragraph 3, is respected.

5. Undertakings shall specify in their internal accounting the rules for the allocation of assets and liabilities, expenditure and income as well as for depreciation, without prejudice to nationally applicable accounting rules, which they follow in drawing up the separate accounts referred to in paragraph 3. These internal rules may be amended only in exceptional cases. Such amendments shall be mentioned and duly substantiated.

6. The annual accounts shall indicate in notes any transaction of a certain size conducted with related undertakings.

CHAPTER VI

ORGANISATION OF ACCESS TO THE SYSTEM

Article 18

Third party access

1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published

(*) The title of Directive 78/660/EEC has been adjusted to take account of the renumbering of the Articles of the Treaty establishing the European Community in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g).

⁽¹⁾ OJ L 222, 14.8.1978, p. 11. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that these tariffs, or the methodologies underlying their calculation shall be approved prior to their entry into force by a regulatory authority referred to in Article 25(1) and that these tariffs — and the methodologies, where only methodologies are approved — are published prior to their entry into force.

2. Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.

3. The provisions of this Directive shall not prevent the conclusion of long-term contracts in so far as they comply with Community competition rules

Article 19

Access to storage

1. For the organisation of access to storage facilities and linepack when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services, Member States may choose either or both of the procedures referred to in paragraphs 3 and 4. These procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.

2. The provisions of paragraph 1 shall not apply to ancillary services and temporary storage that are related to LNG facilities and are necessary for the re-gaseification process and subsequent delivery to the transmission system.

3. In the case of negotiated access, Member States shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. The parties shall be obliged to negotiate access to storage, linepack and other ancillary services in good faith.

Contracts for access to storage, linepack and other ancillary services shall be negotiated with the relevant storage system operator or natural gas undertakings. Member States shall require storage system operators and natural gas undertakings to publish their main commercial conditions for the use of storage, linepack and other ancillary services within the first six months following implementation of this Directive and on an annual basis every year thereafter.

4. In the case of regulated access Member States shall take the necessary measures to give natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system a right to access to storage, linepack and other ancillary services, on the basis of published tariffs and/or other terms and obligations for use of that storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. This right of access for eligible customers may be given by enabling them to enter into supply contracts with competing natural gas undertakings other than the owner and/or operator of the system or a related undertaking.

Article 20

Access to upstream pipeline networks

1. Member States shall take the necessary measures to ensure that natural gas undertakings and eligible customers, wherever they are located, are able to obtain access to upstream pipeline networks, including facilities supplying technical services incidental to such access, in accordance with this Article, except for the parts of such networks and facilities which are used for local production operations at the site of a field where the gas is produced. The measures shall be notified to the Commission in accordance with the provisions of Article 33.

2. The access referred to in paragraph 1 shall be provided in a manner determined by the Member State in accordance with the relevant legal instruments. Member States shall apply the objectives of fair and open access, achieving a competitive market in natural gas and avoiding any abuse of a dominant position, taking into account security and regularity of supplies, capacity which is or can reasonably be made available, and environmental protection. The following may be taken into account:

- (a) the need to refuse access where there is an incompatibility of technical specifications which cannot be reasonably overcome;
- (b) the need to avoid difficulties which cannot be reasonably overcome and could prejudice the efficient, current and planned future production of hydrocarbons, including that from fields of marginal economic viability;
- (c) the need to respect the duly substantiated reasonable needs of the owner or operator of the upstream pipeline network for the transport and processing of gas and the interests of all other users of the upstream pipeline network or relevant processing or handling facilities who may be affected; and
- (d) the need to apply their laws and administrative procedures, in conformity with Community law, for the grant of authorisation for production or upstream development.

3. Member States shall ensure that they have in place dispute settlement arrangements, including an authority independent of the parties with access to all relevant information, to enable disputes relating to access to upstream pipeline networks to be settled expeditiously, taking into account the criteria in paragraph 2 and the number of parties which may be involved in negotiating access to such networks.

4. In the event of cross border disputes, the dispute settlement arrangements for the Member State having jurisdiction over the upstream pipeline network which refuses access shall be applied. Where, in cross border disputes, more than one Member State covers the network concerned, the Member States concerned shall consult with a view to ensuring that the provisions of this Directive are applied consistently.

Article 21

Refusal of access

1. Natural gas undertakings may refuse access to the system on the basis of lack of capacity or where the access to the system would prevent them from carrying out the public service obligations referred to in Article 3(2) which are assigned to them or on the basis of serious economic and financial difficulties with take-or-pay contracts having regard to the criteria and procedures set out in Article 27 and the alternative chosen by the Member State in accordance with paragraph 1 of that Article. Duly substantiated reasons shall be given for such a refusal.

2. Member States may take the measures necessary to ensure that the natural gas undertaking refusing access to the system on the basis of lack of capacity or a lack of connection makes the necessary enhancements as far as it is economic to do so or when a potential customer is willing to pay for them. In circumstances where Member States apply Article 4(4), Member States shall take such measures.

Article 22

New infrastructure

1. Major new gas infrastructures, i.e. interconnectors between Member States, LNG and storage facilities, may, upon request, be exempted from the provisions of Articles 18, 19, 20, and 25(2), (3) and (4) under the following conditions:

- (a) the investment must enhance competition in gas supply and enhance security of supply;

- (b) the level of risk attached to the investment is such that the investment would not take place unless an exemption was granted;
- (c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;
- (d) charges are levied on users of that infrastructure;
- (e) the exemption is not detrimental to competition or the effective functioning of the internal gas market, or the efficient functioning of the regulated system to which the infrastructure is connected.

2. Paragraph 1 shall apply also to significant increases of capacity in existing infrastructures and to modifications of such infrastructures which enable the development of new sources of gas supply.

3. (a) The regulatory authority referred to in Article 25 may, on a case by case basis, decide on the exemption referred to in paragraphs 1 and 2. However, Member States may provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State its opinion on the request for an exemption. This opinion shall be published together with the decision.

(b) (i) The exemption may cover all or parts of, respectively, the new infrastructure, the existing infrastructure with significantly increased capacity or the modification of the existing infrastructure.

(ii) In deciding to grant an exemption consideration shall be given, on a case by case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the interconnector.

(iii) When deciding on the conditions in this subparagraph account shall, in particular, be taken of the duration of contracts, additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

(c) When granting an exemption the relevant authority may decide upon the rules and mechanisms for management and allocation of capacity insofar as this does not prevent the implementation of long term contracts.

(d) The exemption decision, including any conditions referred to in (b), shall be duly reasoned and published.

(e) In the case of an interconnector any exemption decision shall be taken after consultation with the other Member States or regulatory authorities concerned.

4. The exemption decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. This information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision.

In particular, the information shall contain:

(a) the detailed reasons on the basis of which the regulatory authority, or Member State, granted the exemption, including the financial information justifying the need for the exemption;

(b) the analysis undertaken of the effect on competition and the effective functioning of the internal gas market resulting from the grant of the exemption;

(c) the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;

(d) in case the exemption relates to an interconnector, the result of the consultation with the Member States concerned or regulatory authorities;

(e) the contribution of the infrastructure to the diversification of gas supply.

Within two months after receiving a notification, the Commission may request that the regulatory authority or the Member State concerned amend or withdraw the decision to grant an exemption. The two month period may be extended by one additional month where additional information is sought by the Commission.

If the regulatory authority or Member State concerned does not comply with the request within a period of four weeks, a final decision shall be taken in accordance with the procedure referred to in Article 30(2).

The Commission shall preserve the confidentiality of commercially sensitive information.

Article 23

Market opening and reciprocity

1. Member States shall ensure that the eligible customers are:

(a) until 1 July 2004, the eligible customers as specified in Article 18 of Directive 98/30/EC. Member States shall publish by 31 January each year the criteria for the definition of these eligible customers;

(b) from 1 July 2004, at the latest, all non-household customers;

(c) from 1 July 2007, all customers.

2. To avoid imbalance in the opening of gas markets:
- (a) contracts for the supply with an eligible customer in the system of another Member State shall not be prohibited if the customer is eligible in both systems involved;
 - (b) in cases where transactions as described in point (a) are refused because the customer is eligible in only one of the two systems, the Commission may, taking into account the situation in the market and the common interest, oblige the refusing party to execute the requested supply, at the request of one of the Member States of the two systems.
- (a) the rules on the management and allocation of interconnection capacity, in conjunction with the regulatory authority or authorities of those Member States with which interconnection exists;
 - (b) any mechanisms to deal with congested capacity within the national gas system;
 - (c) the time taken by transmission and distribution system operators to make connections and repairs;
 - (d) the publication of appropriate information by transmission and distribution system operators concerning interconnectors, grid usage and capacity allocation to interested parties, taking into account the need to treat non-aggregated information as commercially confidential;

Article 24

Direct lines

1. Member States shall take the necessary measures to enable:

- (a) natural gas undertakings established within their territory to supply the eligible customers through a direct line;
- (b) any such eligible customer within their territory to be supplied through a direct line by natural gas undertakings.

2. In circumstances where an authorisation (e.g. licence, permission, concession, consent or approval) is required for the construction or operation of direct lines, the Member States or any competent authority they designate shall lay down the criteria for the grant of authorisations for the construction or operation of such lines in their territory. These criteria shall be objective, transparent and non-discriminatory.

3. Member States may make authorisations to construct a direct line subject either to the refusal of system access on the basis of Article 21 or to the opening of a dispute settlement procedure under Article 25.

Article 25

Regulatory authorities

1. Member States shall designate one or more competent bodies with the function of regulatory authorities. These authorities shall be wholly independent of the interests of the gas industry. They shall, through the application of this Article, at least be responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market, monitoring in particular:

- (e) the effective unbundling of accounts as referred to in Article 17, to ensure there are no cross subsidies between transmission, distribution, storage, LNG and supply activities;
- (f) the access conditions to storage, linepack and to other ancillary services as provided for in Article 19;
- (g) the extent to which transmission and distribution system operators fulfil their tasks in accordance with Articles 8 and 12;
- (h) the level of transparency and competition.

The authorities established pursuant to this Article shall publish an annual report on the outcome of their monitoring activities referred to in points (a) to (h).

2. The regulatory authorities shall be responsible for fixing or approving prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for :

- (a) connection and access to national networks, including transmission and distribution tariffs. These tariffs, or methodologies, shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks;
- (b) the provision of balancing services.

3. Notwithstanding paragraph 2, Member States may provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State the tariffs or at least the methodologies referred to in that paragraph as well as the modifications in paragraph 4. The relevant body shall, in such a case, have the power to either approve or reject a draft decision submitted by the regulatory authority.

These tariffs or the methodologies or modifications thereto shall be published together with the decision on formal adoption. Any formal rejection of a draft decision shall also be published, including its justification.

4. Regulatory authorities shall have the authority to require transmission, LNG and distribution system operators, if necessary, to modify the terms and conditions, including tariffs and methodologies referred to in paragraphs 1, 2 and 3, to ensure that they are proportionate and applied in a non-discriminatory manner.

5. Any party having a complaint against a transmission, LNG or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 4 and in Article 19 may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authorities. This period may be extended with the agreement of the complainant. Such a decision shall have binding effect unless and until overruled on appeal.

6. Any party having a complaint against a transmission, LNG or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 4 and in Article 19 may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authorities. This period may be extended with the agreement of the complainant. Such a decision shall have binding effect unless and until overruled on appeal.

7. Member States shall take measures to ensure that regulatory authorities are able to carry out their duties referred to in paragraphs 1 to 5 in an efficient and expeditious manner.

8. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

9. Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.

10. In the event of cross border disputes, the deciding regulatory authority shall be the regulatory authority which has jurisdiction in respect of the system operator, which refuses use of, or access to, the system.

11. Complaints referred to in paragraphs 5 and 6 shall be without prejudice to the exercise of rights of appeal under Community and national law.

12. National regulatory authorities shall contribute to the development of the internal market and of a level playing field by cooperating with each other and with the Commission in a transparent manner.

CHAPTER VII

FINAL PROVISIONS

Article 26

Safeguard measures

1. In the event of a sudden crisis in the energy market or where the physical safety or security of persons, apparatus or installations or system integrity is threatened, a Member State may temporarily take the necessary safeguard measures.

2. Such measures shall cause the least possible disturbance to the functioning of the internal market and shall not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

3. The Member State concerned shall without delay notify these measures to the other Member States, and to the Commission, which may decide that the Member State concerned must amend or abolish such measures, insofar as they distort competition and adversely affect trade in a manner which is at variance with the common interest.

Article 27

Derogations in relation to take-or-pay commitments

1. If a natural gas undertaking encounters, or considers it would encounter, serious economic and financial difficulties because of its take-or-pay commitments accepted in one or more gas-purchase contracts, an application for a temporary derogation from Article 18 may be sent to the Member State concerned or the designated competent authority. Applications shall, according to the choice of Member States, be presented on a case-by-case basis either before or after refusal of access to the system. Member States may also give the natural gas undertaking the choice of presenting an application either before or after refusal of access to the system. Where a natural gas undertaking has refused access, the application shall be presented without delay. The applications shall be accompanied by all relevant information on the nature and extent of the problem and on the efforts undertaken by the natural gas undertaking to solve the problem.

If alternative solutions are not reasonably available, and taking into account the provisions of paragraph 3, the Member State or the designated competent authority may decide to grant a derogation.

2. The Member State, or the designated competent authority, shall notify the Commission without delay of its decision to grant a derogation, together with all the relevant information with respect to the derogation. This information may be submitted to the Commission in an aggregated form, enabling the Commission to reach a well-founded decision. Within eight weeks of its receipt of this notification, the Commission may request that the Member State or the designated competent authority concerned amend or withdraw the decision to grant a derogation.

If the Member State or the designated competent authority concerned does not comply with this request within a period of four weeks, a final decision shall be taken expeditiously in accordance with the procedure referred to in Article 30(2).

The Commission shall preserve the confidentiality of commercially sensitive information.

3. When deciding on the derogations referred to in paragraph 1, the Member State, or the designated competent authority, and the Commission shall take into account, in particular, the following criteria:

- (a) the objective of achieving a competitive gas market;
- (b) the need to fulfil public service obligations and to ensure security of supply;
- (c) the position of the natural gas undertaking in the gas market and the actual state of competition in this market;
- (d) the seriousness of the economic and financial difficulties encountered by natural gas undertakings and transmission undertakings or eligible customers;
- (e) the dates of signature and terms of the contract or contracts in question, including the extent to which they allow for market changes;
- (f) the efforts made to find a solution to the problem;
- (g) the extent to which, when accepting the take-or-pay commitments in question, the undertaking could reasonably have foreseen, having regard to the provisions of this Directive, that serious difficulties were likely to arise;
- (h) the level of connection of the system with other systems and the degree of interoperability of these systems; and
- (i) the effects the granting of a derogation would have on the correct application of this Directive as regards the smooth functioning of the internal natural gas market.

A decision on a request for a derogation concerning take or pay contracts concluded before the entry into force of this Directive should not lead to a situation in which it is impossible to find economically viable alternative outlets. Serious difficulties shall in any case be deemed not to exist when the sales of natural gas do not fall below the level of minimum offtake guarantees contained in gas purchase take or pay contracts or in so far as the relevant gas purchase take-or-pay contract can be adapted or the natural gas undertaking is able to find alternative outlets.

4. Natural gas undertakings which have not been granted a derogation as referred to in paragraph 1 shall not refuse, or shall no longer refuse, access to the system because of take-or-pay commitments accepted in a gas purchase contract. Member States shall ensure that the relevant provisions of Chapter VI namely Articles 18 to 25 are complied with.

5. Any derogation granted under the above provisions shall be duly substantiated. The Commission shall publish the decision in the *Official Journal of the European Union*.

6. The Commission shall, within five years of the entry into force of this Directive, submit a review report on the experience gained from the application of this Article, so as to allow the European Parliament and the Council to consider, in due course, the need to adjust it.

Article 28

Emergent and isolated markets

1. Member States not directly connected to the interconnected system of any other Member State and having only one main external supplier may derogate from Articles 4, 9, 23 and/or 24 of this Directive. A supply undertaking having a market share of more than 75 % shall be considered to be a main supplier. This derogation shall automatically expire from the moment when at least one of these conditions no longer applies. Any such derogation shall be notified to the Commission.

2. A Member State, qualifying as an emergent market, which because of the implementation of this Directive would experience substantial problems may derogate from Articles 4, 7, 8(1) and (2), 9, 11, 12(5), 13, 17, 18, 23(1) and/or 24 of this Directive. This derogation shall automatically expire from the moment when the Member State no longer qualifies as an emergent market. Any such derogation shall be notified to the Commission.

3. On the date at which the derogation referred to in paragraph 2 expires, the definition of eligible customers shall result in an opening of the market equal to at least 33 % of the total annual gas consumption of the national gas market. Two years thereafter, Article 23(1)(b) shall apply, and three years thereafter, Article 23(1)(c). Until Article 23(1)(b) applies the Member State referred to in paragraph 2 may decide not to

apply Article 18 as far as ancillary services and temporary storage for the re-gaseification process and its subsequent delivery to the transmission system are concerned.

4. Where implementation of this Directive would cause substantial problems in a geographically limited area of a Member State, in particular concerning the development of the transmission and major distribution infrastructure, and with a view to encouraging investments, the Member State may apply to the Commission for a temporary derogation from Article 4, Article 7, Article 8(1) and (2), Article 9, Article 11, Article 12(5), Article 13, Article 17, Article 18, Article 23(1) and/or Article 24 for developments within this area.

5. The Commission may grant the derogation referred to in paragraph 4, taking into account, in particular, the following criteria:

- the need for infrastructure investments, which would not be economic to operate in a competitive market environment,
 - the level and pay-back prospects of investments required,
 - the size and maturity of the gas system in the area concerned,
 - the prospects for the gas market concerned,
 - the geographical size and characteristics of the area or region concerned, and socioeconomic and demographic factors.
- (a) For gas infrastructure other than distribution infrastructure a derogation may be granted only if no gas infrastructure has been established in this area, or has been so established for less than 10 years. The temporary derogation may not exceed 10 years from the time gas is first supplied in the area.
- (b) For distribution infrastructure a derogation may be granted for a time period which may not exceed 20 years for the distribution infrastructure from the time gas is first supplied through the said system in the area.

6. Luxembourg may benefit from a derogation from Articles 8(3) and 9 for a period of five years from 1 July 2004. Such a derogation shall be reviewed before the end of the five year period and any decision to renew the derogation for another five years shall be taken in accordance with the procedure referred to in Article 30(2). Any such derogation shall be notified to the Commission.

7. The Commission shall inform the Member States of applications made under paragraph 4 prior to taking a decision pursuant to paragraph 5, taking into account respect for confidentiality. This decision, as well as the derogations referred to in paragraphs 1 and 2, shall be published in the *Official Journal of the European Union*.

8. Greece may derogate from Articles 4, 11, 12, 13, 18, 23 and/or 24 of this Directive for the geographical areas and time periods specified in the licences issued by it, prior to 15 March 2002 and in accordance with Directive 98/30/EC, for the development and exclusive exploitation of distribution networks in certain geographical areas.

Article 29

Review Procedure

In the event that the report referred to in Article 31(3) reaches the conclusion whereby, given the effective manner in which network access has been carried out in a Member State — which gives rise to fully effective, non-discriminatory and unhindered network access —, the Commission concludes that certain obligations imposed by this Directive on undertakings (including those with respect to legal unbundling for distribution system operators) are not proportionate to the objective pursued, the Member State in question may submit a request to the Commission for exemption from the requirement in question.

The request shall be notified, without delay, by the Member State to the Commission, together with all the relevant information necessary to demonstrate that the conclusion reached in the report on effective network access being ensured will be maintained.

Within three months of its receipt of a notification, the Commission shall adopt an opinion with respect to the request by the Member State concerned, and where appropriate, submit proposals to the European Parliament and to the Council to amend the relevant provisions of the Directive. The Commission may propose, in the proposals to amend the Directive, to exempt the Member State concerned from specific requirements subject to that Member State implementing equally effective measures as appropriate.

Article 30

Committee

1. The Commission shall be assisted by a Committee.
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
3. The Committee shall adopt its rules of procedure.

Article 31

Reporting

1. The Commission shall monitor and review the application of this Directive and submit an overall progress report to the European Parliament and the Council before the end of the first year following the entry into force of this Directive, and thereafter on an annual basis. The report shall cover at least:

- (a) the experience gained and progress made in creating a complete and fully operational internal market in natural gas and the obstacles that remain in this respect including aspects of market dominance, concentration in the market, predatory or anti-competitive behaviour;
- (b) the derogations granted under this Directive, including implementation of the derogation provided for in Article 13(2) with a view to a possible revision of the threshold;
- (c) the extent to which the unbundling and tariffication requirements contained in this Directive have been successful in ensuring fair and non-discriminatory access to the Community's gas system and equivalent levels of competition, as well as the economic, environmental and social consequences of the opening of the gas market for customers;
- (d) an examination of issues relating to system capacity levels and security of supply of natural gas in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas and the development of storage (including the question of the proportionality of market regulation in this field);
- (e) special attention will be given to the measures taken in Member States to cover peak demand and to deal with shortfalls of one or more suppliers;
- (f) a general assessment of the progress achieved with regard to bilateral relations with third countries which produce and export or transport natural gas, including progress in market integration, trade and access to the networks of such third countries;
- (g) the need for possible harmonisation requirements which are not linked to the provisions of this Directive.

Where appropriate, this report may include recommendations and measures to counteract negative effects of market dominance and market concentration.

2. Every two years, the report referred to in paragraph 1 shall also cover an analysis of the different measures taken in Member States to meet public service obligations, together with an examination of the effectiveness of those measures, and in particular their effects on competition in the gas market. Where appropriate, the report may include recommendations as to the measures to be taken at national level to achieve high public service standards or measures intended to prevent market foreclosure.

3. The Commission shall, no later than 1 January 2006, forward to the European Parliament and Council, a detailed report outlining progress in creating the internal gas market. The report shall, in particular, consider:

- the existence of non-discriminatory network access;
- effective regulation;
- the development of interconnection infrastructure, the conditions of transit, and the security of supply situation in the Community;
- the extent to which the full benefits of the opening of the market are accruing to small enterprises and households, notably with respect to public service standards;
- the extent to which markets are in practice open to effective competition, including aspects of market dominance, market concentration and predatory or anti-competitive behaviour;
- the extent to which customers are actually switching suppliers and renegotiating tariffs;
- price developments, including supply prices, in relation to the degree of the opening of markets;
- whether effective and non-discriminatory third party access to gas storage exists when technically and/or economically necessary for providing efficient access to the system;
- the experience gained in the application of the Directive as far as the effective independence of system operators in vertically integrated undertakings is concerned and whether other measures in addition to functional independence and separation of accounts have been developed which have effects equivalent to legal unbundling.

Where appropriate, the Commission shall submit proposals to the European Parliament and the Council, in particular to guarantee high public service standards.

Where appropriate, the Commission shall submit proposals to the European Parliament and the Council, in particular to ensure full and effective independence of distribution system operators before 1 July 2007. When necessary, these proposals shall, in conformity with competition law, also concern measures to address issues of market dominance, market concentration and predatory or anti-competitive behaviour.

Article 32

Repeals

1. Directive 91/296/EEC shall be repealed with effect from 1 July 2004, without prejudice to contracts concluded pursuant to Article 3(1) of Directive 91/296/EEC, which shall continue to be valid and to be implemented under the terms of the said Directive.

2. Directive 98/30/EC shall be repealed from 1 July 2004, without prejudice to the obligations of Member States concerning the deadlines for transposition and application of the said Directive. References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex B.

Article 33

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 July 2004. They shall forthwith inform the Commission thereof.

2. Member States may postpone the implementation of Article 13(1) until 1 July 2007. This shall be without prejudice to the requirements contained in Article 13(2).

3. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 34

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 35

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 26 June 2003.

For the European Parliament

The President

P. COX

For the Council

The President

A. TSOCHATZOPOULOS

ANNEX A

Measures on consumer protection

Without prejudice to Community rules on consumer protection, in particular Directives 97/7/EC of the European Parliament and of the Council ⁽¹⁾ and Council Directive 93/13/EC ⁽²⁾, the measures referred to in Article 3 are to ensure that customers:

- (a) have a right to a contract with their gas service provider that specifies:
- the identity and address of the supplier;
 - the services provided, the service quality levels offered, as well as the time for the initial connection;
 - if offered, the types of maintenance service offered;
 - the means by which up to date information on all applicable tariffs and maintenance charges may be obtained;
 - the duration of the contract, the conditions for renewal and termination of services and of the contract, the existence of any right of withdrawal;
 - any compensation and the refund arrangements which apply if contracted service quality levels are not met; and
 - the method of initiating procedures for settlement of disputes in accordance with point (f).

Conditions shall be fair and well known in advance. In any case, this information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract:

- (b) are given adequate notice of any intention to modify contractual conditions and are informed about their right of withdrawal when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect. Member States shall ensure that customers are free to withdraw from contracts if they do not accept the new conditions, notified to them by their gas service provider;
- (c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of gas services;
- (d) are offered a wide choice of payment methods. Any difference in terms and conditions shall reflect the costs to the supplier of the different payment systems. General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. Customers shall be protected against unfair or misleading selling methods;
- (e) shall not be charged for changing supplier;
- (f) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. Such procedures shall enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation. They should follow, wherever possible, the principles set out in Commission Recommendation 98/257/EC ⁽³⁾;
- (g) connected to the gas system are informed about their rights to be supplied, under the national legislation applicable, with natural gas of a specified quality at reasonable prices.

⁽¹⁾ OJ L 144, 4.6.1997, p. 19.

⁽²⁾ OJ L 95, 21.4.1993, p. 29.

⁽³⁾ OJ L 115, 17.4.1998, p. 31.

ANNEX B

Correlation table

Directive 98/30/EC	This Directive	
Article 1	Article 1	Scope
Article 2	Article 2	Definitions
Article 3	Article 3	PSOs and Customer protection
Article 4	Article 4	Authorisation procedure
—	Article 5	Monitoring of security of supply
Article 5	Article 6	Technical rules
Article 6	Article 7	Designation of TSOs
Article 7	Article 8	Tasks of TSOs
—	Article 9	Unbundling of TSOs
Article 8	Article 10	Confidentiality for TSOs
Article 9(1)	Article 11	Designation of DSOs
Article 10	Article 12	Tasks of DSOs
—	Article 13	Unbundling of DSOs
Article 11	Article 14	Confidentiality for DSOs
—	Article 15	Combined operator
Article 12	Article 16	Right of access to accounts
Article 13	Article 17	Unbundling of accounts
Article 14-16	Article 18	Third Party Access
—	Article 19	Access to storage
Article 23	Article 20	Access to upstream pipeline networks
Article 17	Article 21	Refusal of access
—	Article 22	New infrastructure
Article 18 and 19	Article 23	Market opening and reciprocity
Article 20	Article 24	Direct lines
Article 21(2)-(3) and 22	Article 25	Regulatory authorities
Article 24	Article 26	Safeguard measures
Article 25	Article 27	Derogations in relation to take-or-pay commitments
Article 26	Article 28	Emergent and Isolated Markets
—	Article 29	Review procedure
—	Article 30	Committee

Directive 98/30/EC	This Directive	
Article 27 and 28	Article 31	Reporting
—	Article 32	Repeals
Article 29	Article 33	Implementation
Article 30	Article 34	Entry into force
Article 31	Article 35	Addressees
	Annex A	Measures on consumer protection



I

(Acts whose publication is obligatory)

**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 ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽³⁾,

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 ⁽⁴⁾, 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.

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 284.

⁽²⁾ OJ C 72 E, 21.3.2002, p. 305.

⁽³⁾ OJ C 155, 29.5.2001, p. 73.

^(*) 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.

⁽⁴⁾ 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).

- (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 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 ⁽¹⁾, (EEC) No 2821/71 ⁽²⁾, (EEC) No 3976/87 ⁽³⁾, (EEC) No 1534/91 ⁽⁴⁾, or (EEC) No 479/92 ⁽⁵⁾ 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 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.

⁽¹⁾ 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).

⁽²⁾ 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.

⁽³⁾ 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.

⁽⁴⁾ 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).

⁽⁵⁾ 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.

- (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. 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.
- (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.

- (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 ⁽¹⁾, 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.
- (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

⁽¹⁾ 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).

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 ⁽¹⁾ should therefore be repealed and Regulations (EEC) No 1017/68 ⁽²⁾, (EEC) No 4056/86 ⁽³⁾ and (EEC) No 3975/87 ⁽⁴⁾ 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,

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.

⁽¹⁾ 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).

⁽²⁾ 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.

⁽³⁾ 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.

⁽⁴⁾ Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EEC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).

*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 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 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 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 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.

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.

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;
- (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 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.

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 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;
 - (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:
 - (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 representatives 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.

*Article 32***Exclusions**

This Regulation shall not apply to:

- (a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;
- (b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;
- (c) air transport between Community airports and third countries.

*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.

Interaksi antara..., Carolyn Sinulingga, FISIP UI, 2008

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 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:

'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.

*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.

(*) 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 (*).

(*) 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.

*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.

Done at Brussels, 16 December 2002.

For the Council
The President
M. FISCHER BOEL



I

(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 ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽³⁾,

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽⁴⁾ 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.

⁽¹⁾ OJ C 20, 28.1.2003, p. 4.

⁽²⁾ Opinion delivered on 9.10.2003 (not yet published in the Official Journal).

⁽³⁾ Opinion delivered on 24.10.2003 (not yet published in the Official Journal).

⁽⁴⁾ 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

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.

- (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⁽¹⁾. 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.

⁽¹⁾ 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:
- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and
 - 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:
- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;
 - in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
 - 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
 - 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:

- the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which 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⁽¹⁾ 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.

⁽¹⁾ 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).

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⁽¹⁾, 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).

⁽¹⁾ 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.

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).

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.

*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.

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);

- (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.

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).

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.

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.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The 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.

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*.

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

Article 21

Application of the Regulation and jurisdiction

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003 ⁽¹⁾, (EEC) No 1017/68 ⁽²⁾, (EEC) No 4056/86 ⁽³⁾ and (EEC) No 3975/87 ⁽⁴⁾ 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.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of 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.

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.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

⁽²⁾ 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).

⁽³⁾ OJ L 378, 31. 12. 1986, p. 4. Regulation as last amended by Regulation (EC) No 1/2003.

⁽⁴⁾ 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.

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.

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

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.

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)

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)

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