

Official Journal

of the European Communities

ISSN 0378-6978

L 354

Volume 37

31 December 1994

English edition

Legislation

Contents

I *Acts whose publication is obligatory*

- ★ Commission Directive 94/68/EC of 16 December 1994 adapting to technical progress Council Directive 78/318/EEC on the approximation of the laws of the Member States relating to the windscreen wiper and washer systems of motor vehicles 1
- ★ Commission Directive 94/78/EC of 21 December 1994 adapting to technical progress Council Directive 78/549/EEC, as regards the wheel guards of motor vehicles 10
- ★ Commission Directive 94/79/EC of 21 December 1994 amending Council Directive 91/414/EEC concerning the placing of plant protection products on the market 16

II *Acts whose publication is not obligatory*

Commission

94/893/EC:

- ★ Commission Decision of 21 June 1994 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (IV/M.430 — Procter & Gamble/VP Schickedanz (II)) ⁽¹⁾ 32

94/894/EC:

- ★ Commission Decision of 13 December 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/32.490 — Eurotunnel) ⁽¹⁾ 66

⁽¹⁾ Text with EEA relevance.

Price: ECU 18

(Continued overleaf)

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.
The titles of all other Acts are printed in bold type and preceded by an asterisk.

94/895/EC:	
★ Commission Decision of 15 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.768 — International Private Satellite Partners) ⁽¹⁾	75
94/896/EC:	
★ Commission Decision of 16 December 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/33.863 — Asahi/Saint-Gobain) ⁽¹⁾	87

⁽¹⁾ Text with EEA relevance.

Note to our Swedish and Finnish readers (see inside back cover)

I

(Acts whose publication is obligatory)

COMMISSION DIRECTIVE 94/68/EC

of 16 December 1994

adapting to technical progress Council Directive 78/318/EEC on the approximation of the laws of the Member States relating to the windscreen wiper and washer systems of motor vehicles

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers⁽¹⁾, at last amended by Commission Directive 93/81/EEC⁽²⁾, and in particular Article 13 (2) thereof,

Having regard to Council Directive 78/318/EEC of 21 December 1977 on the approximation of the laws of the Member States relating to the wiper and washer systems of motor vehicles⁽³⁾, and in particular Article 5 thereof,

Whereas Directive 78/318/EEC is one of the separate directives of EEC type-approval procedure established under Directive 70/156/EEC; whereas, consequently, the provisions laid down in Directive 70/156/EEC relating to vehicle systems, components and separate technical units apply to this Directive;

Whereas, in particular, Articles 3 (4) and 4 (3) of Directive 70/156/EEC require that each separate directive shall have attached to it an information document incorporating the relevant items of Annex I to that Directive and also a type-approval certificate based on Annex VI thereto in order that type-approval may be computerized;

Whereas Council Directive 77/649/EEC of 27 September 1977 on the approximation of the laws of the Member States relating to the field of vision of motor vehicle drivers⁽⁴⁾, as last amended by Commission Directive

90/630/EEC⁽⁵⁾ established the procedure for determining different characteristics of vehicles which are to be maintained;

Whereas in the light of technical progress it is possible to adapt Directive 78/318/EEC in order to bring the test specifications and procedures closer to the actual operating conditions for these systems;

Whereas the provisions of this Directive are in accordance with the opinion of the Committee for Adaptation to Technical Progress established by Directive 70/156/EEC,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 78/318/EEC shall be amended as follows:

1. In Article 1, the term between brackets 'as defined in Annex I to Directive 70/156/EEC' shall be replaced by the term 'as defined in Annex II A to Directive 70/156/EEC'.
2. Article 2 is amended as follows:
 - (a) in the first indent the words 'Annexes I to V' are replaced by 'the relevant Annexes';
 - (b) in the second and third indents the words 'within the meaning of Article 9a of Directive 70/156/EEC' are replaced by 'within the meaning of Article 2 of Directive 70/156/EEC'.
3. Article 3 is amended as follows:
 - (a) paragraph 1 is amended as follows:
 - (i) in the first indent the words 'Annexes I to V' are replaced by 'the relevant Annexes';

⁽¹⁾ OJ No L 42, 23. 2. 1970, p. 1.

⁽²⁾ OJ No L 264, 23. 10. 1993, p. 49.

⁽³⁾ OJ No L 81, 28. 3. 1978, p. 49.

⁽⁴⁾ OJ No L 267, 19. 10. 1977, p. 1.

⁽⁵⁾ OJ No L 341, 6. 12. 1990, p. 20.

- (ii) in the second indent the words 'within the meaning of Article 9a of Directive 70/156/EEC' are replaced by 'within the meaning of Article 2 of Directive 70/156/EEC';
 - (b) in paragraph 2 the words 'within the meaning of Article 9a of Directive 70/156/EEC' are replaced by 'within the meaning of Article 2 of Directive 70/156/EEC'.
4. In Article 4, '2.2' is replaced by '2.1'.
 5. In Article 5, the words 'Annexes I to VII' are replaced by 'the Annexes'.
 6. The list of Annexes and Annexes I, II, VI and VII are amended in accordance with the Annex to this Directive.

Article 2

1. With effect from 1 July 1995 Member States may not, on grounds relating to windscreen wiper and washer systems:

- refuse, in respect of a type of motor vehicle or a type of windscreen wiper and washer system, to grant EEC type-approval or national type-approval; or
- prohibit the registration, sale or entry into service of vehicles, or the sale or entry into service of windscreen wiper and washer systems,

if the windscreen wiper and washer systems comply with the requirements of Directive 78/318/EEC as amended by this Directive.

2. With effect from 1 January 1996 Member States:

- shall no longer grant EEC type-approval, and
- may refuse to grant national type-approval

for a type of vehicle on grounds relating to windscreen wiper and washer systems and for a type of windscreen wiper and washer system if the requirements of Directive 78/318/EEC, as amended by this Directive, are not fulfilled.

3. Notwithstanding paragraph 2 above, for the purposes of replacement parts, Member States shall continue to grant EEC type-approval of windscreen wiper and washer systems in accordance with the original version of Directive 78/318/EEC, provided that such windscreen washer systems:

- are intended to be fitted to vehicles already in use, and
- comply with the requirements of that Directive as they were applicable when the vehicles were first registered.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 July 1995 and shall forthwith inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the texts of the legal provisions subsequently adopted in the field covered by this Directive.

Article 4

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

Done at Brussels, 16 December 1994.

For the Commission
Martin BANGEMANN
Member of the Commission

ANNEX

1. In the list of Annexes:

- the asterisks after the titles of Annexes I to V and the related footnote shall be deleted;
- the title of Annex I shall be amended to read: 'Scope, definitions, applications for EEC type-approval, granting of EEC type-approval, specifications, test procedure, markings, amendments to approvals, conformity of production';
- the title of Annex VI shall be amended to read: 'Information document (vehicle)';
- the title of Annex VII shall be amended to read: 'Information document (separate technical unit)';
and
- at the end of the list, the following shall be added:
 'Annex VIII: Type-approval certificate (Vehicle)
 Annex IX: Type-approval certificate (Separate technical unit)'

2. Annex I shall be amended as follows:

- The title shall read:
 '**SCOPE, DEFINITIONS, APPLICATION FOR THE EEC TYPE-APPROVAL, SPECIFICATIONS, TEST PROCEDURE, MARKINGS, AMENDMENTS TO APPROVALS, CONFORMITY OF PRODUCTION**'
- Item (2.1.) shall be deleted.
- Items 2.2 to 2.4 shall be renumbered 2.1 to 2.3, respectively.
- Item 2.1.2 (former item 2.2.2) shall be amended to read:
 '**2.1.2.** the shape and dimensions of the windscreen and its mountings where these are likely to affect the vision areas covered by Annex IV;'
- Item 2.5 shall be deleted.
- Items 2.6 and 2.7 shall be renumbered 2.4 and 2.5 and the word 'seat-back' shall be replaced by 'torso'.
- Items 2.8 to 2.21 shall be renumbered 2.6 to 2.19, respectively.
- Item 2.18 (former item 2.20) shall be amended to read:
 '**2.18 Nozzle**
 'Nozzle' means a device which serves to direct the windscreen-washer fluid on to the windscreen.'
- Items 3.1.1 shall be amended to read:
 '**3.1.1** The application for EEC type-approval pursuant to Article 3(4) of Directive 70/156/EEC of a vehicle type with regard to its windscreen-wiper and windscreen washer systems shall be submitted by the manufacturer.'
- Item 3.1.2 shall be amended to read:
 '**3.1.2** A model for the information document is given in Annex VI.'
- Items 3.1.2.1 to 3.1.2.3 inclusive shall be deleted. Item 3.1.2.4 shall be renumbered 3.1.3.
- Item 3.2.1 shall be amended to read:
 '**3.2.1** The application for EC type-approval pursuant to Article 3 (4) of Directive 70/156/EEC for a type of windscreen-washer system as a separate technical unit shall be submitted by the manufacturer.'
- Item 3.2.2 shall be amended to read:
 '**3.2.2** A model for the information document is given in Annex VII.'

- Item 3.2.2.1 shall be deleted. Item 3.2.2.2 shall be renumbered 3.2.3 and shall be amended to read:
 - '3.2.3 One specimen of the type of system to be approved shall be submitted to the technical service conducting the type-approval tests. The technical service may, if necessary, request a further specimen. The specimens must bear in a clearly legible and indelible manner the applicant's trade name or mark and an identification of the type.'
- Item 4 shall be amended to read: '4. GRANTING OF EEC TYPE-APPROVAL'
- Item (4.1) shall be amended to read:
 - '4.1 If the relevant requirements are satisfied, EEC type-approval pursuant to Article 4 (3) and 4 (4) of Directive 70/156/EEC shall be granted.'
- Item (4.2) shall be deleted.
- Items 4.3, 4.3.1 and 4.3.2 shall be renumbered 4.2, 4.2.1 and 4.2.2 and shall be amended to read:
 - '4.2 A model of the EEC type-approval certificate is given in:
 - 4.2.1 Annex VIII for applications referred to in 3.1;
 - 4.2.2 Annex IX for applications referred to in 3.2'
- Item (4.4) shall be renumbered 4.3 and shall be amended to read:
 - '4.3 An approval number in accordance with Annex VII to Directive 70/156/EEC shall be assigned to each type of vehicle or windscreen washer system approved. The same Member State shall not assign the same number to another type of vehicle or windscreen washer system.'
- Items (4.4) to (4.8) shall be deleted.
- Item 5.1.4 shall be amended to read:
 - '5.1.4 the frequencies referred to in point 5.1.3 shall be achieved as set out in items 6.1.1 to 6.1.6 and 6.1.8.'
- Item 5.1.7 shall be amended to read:
 - '5.1.7 The system shall be capable of withstanding stalling for 15 seconds. The use of automatic circuit protection devices is allowed, provided that for possible resetting no action is required on controls other than the windscreen-wiper control. The test procedure and conditions are described in item 6.1.7.'
- Item 5.1.9.1 shall be amended to read:
 - '5.1.9.1 When subjected to a relative air speed equal to 80 % of the vehicle's maximum speed, but not exceeding 160 km/h, the windscreen wiper systems, operating at maximum frequency, shall continue to sweep a field as specified in item 5.1.2.1 with the same efficiency and under the same conditions as set out in item 6.1.10.2.'
- The following should be added to point 5.1.10:
 - 'This requirement does not apply to devices which, when parked, are in an area of the windscreen which is hidden from view by parts of the vehicle (such as the bonnet, instrument panel, etc.).'
- Item 5.2.2 shall be amended to read:
 - '5.2.2 The performance of the windscreen washer system shall not be adversely affected by exposure to the temperature cycles laid down in points 6.2.3 and 6.2.4.'
- The following new item 6.1.10.2 is added after item 6.1.10.1:
 - '6.1.10.2 Where the outer face of the windscreen has been prepared as described in items 6.1.8 and 6.1.9 the windscreen washer may be used in all of the tests.'
- The second sentence in item 6.2.3.1 shall be amended to read:
 - 'The system shall then be placed in an ambient temperature of 20 ± 2 C until the ice has completely thawed, but in any case no longer than four hours.'
- The second sentence in item 6.2.5.1 shall be amended to read:
 - 'With the vehicle stationary and no significant wind effect, the washer nozzle or nozzles, if adjustable, shall be pointed towards the target area on the outer face of the windscreen.'

— The items (7), (8) and (9) are amended to read:

7. MARKINGS

7.1. Every windscreen washer system conforming to the type approved under this Directive as a separate technical unit shall bear an EEC type-approval mark.

7.2. This mark shall consist of a rectangle surrounding the letter “e” followed by the distinguishing number or letters of the Member State which has granted type-approval:

1	for Germany,	11	for the United Kingdom,
2	for France,	13	for Luxemburg,
3	for Italy,	18	for Denmark,
4	for the Netherlands,	21	for Portugal,
6	for Belgium,	23	for Greece,
9	for Spain,	IRL	for Ireland.

It must also include in the vicinity of the rectangle the ‘base approval number’ contained in section 4 of the type-approval number referred to in Annex VII of Directive 70/156/EEC, preceded by the two figures indicating the sequence number assigned to the most recent major technical amendment to Directive 78/318/EEC on the date EEC type-approval was granted. In this Directive the sequence number is 00.

7.3. The EEC type-approval mark must be affixed to the container for the windscreen washer fluid in such a way as to be indelible and clearly legible even if the device is fitted to a vehicle.

7.4. An example of the EEC type-approval mark is shown in the Appendix.

8. MODIFICATIONS OF THE TYPE AND AMENDMENTS TO APPROVALS

8.1. In the case of modifications of the type approved pursuant to this Directive, the provisions of Article 5 of Directive 70/156/EEC shall apply.

9. CONFORMITY OF PRODUCTION

9.1. Measures to ensure the conformity of production shall be taken in accordance with the provisions laid down in Article 10 of Directive 70/156/EEC.

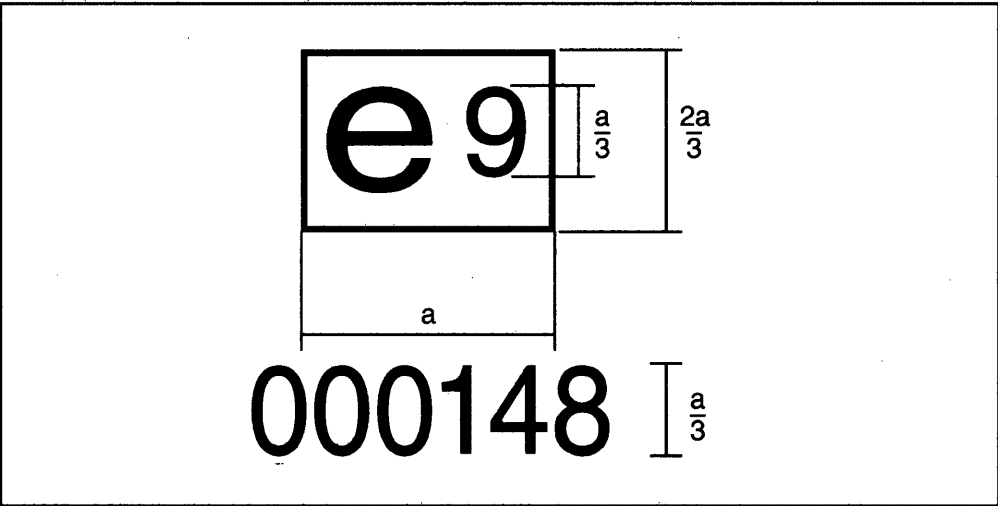
— Items (10) to (12) shall be deleted.

— The following new Appendix shall be added:

Appendix

Model for the EEC type-approval mark

a ≥ 12 mm



The windscreen washer system bearing the above EEC type-approval mark is a device which has been approved in Spain (e 9) under the base approval number 0148 on the basis of this Directive. The figures used are only indicative.

3. Annex II shall be amended to read:

- 'Annex III to Council Directive 77/649/EEC shall be applicable.'
- Footnote (1) shall be deleted.

4. Annexes VI and VII shall be deleted and shall be replaced by the following Annexes VI and VII:

'ANNEX VI

Information Document No

pursuant to Annex I of Council Directive 70/156/EEC relating to EEC type-approval of a vehicle with respect to the wiper and washer system (Council Directive 78/318/EEC as last amended by Directive 94/68/EC)

The following information, if applicable, must be supplied in triplicate and include a list of contents. Any drawings must be supplied in appropriate scale and in sufficient detail on size A4 or on a folder of A4 format. Photographs, if any, must show sufficient detail.

If the systems, components of separate technical units have electronic controls, information concerning their performance must be supplied.

0. GENERAL

0.1. Make (trade name of manufacturer):

0.2. Type and general commercial description(s):

0.3. Means of identification of type, if marked on the vehicle (b):

0.3.1. Location of that marking:

0.4. Category of vehicle (c):

0.5. Name and address of manufacturer:

0.8. Address(es) of assembly plant(s):

1. GENERAL CONSTRUCTION CHARACTERISTICS OF THE VEHICLE

1.1 Photographs and/or drawings of a representative vehicle:

2. MASSES AND DIMENSIONS (e) (in kg and mm)

2.6 Mass of the vehicle with bodywork in running order, or mass of the chassis with cab if the manufacturer does not fit the bodywork (including coolant, oils, fuels, tools, spare wheel and driver) (o) (max. and min. for each version):

3. POWER PLANT (q)

3.2.1.8 Maximum net power (t): kW at min⁻¹

3.2.5 Electrical system

3.2.5.1 Rated voltage: V, pos./neg. ground ⁽¹⁾

3.2.5.2 Generator

3.2.5.2.1 Type:

3.2.5.2.2 Nominal output: VA

4. TRANSMISSION (v)

4.7 Maximum vehicle speed and gear in which this is achieved (in km/h) (w):

9. BODYWORK

9.4.1 Particulars of the primary reference marks in sufficient detail to enable them to be readily identified and the position of each in relation to the others and to the R-point to be verified:

9.5.1 Windscreen

The item numbers and footnotes used in this Information Document correspond to those set out in Annex I to Directive 70/156/EEC.

Items not relevant for the purpose of this Directive are omitted.

- 9.5.1.2 Method of mounting:
- 9.5.1.4 Approval number(s):
- 9.6 Windscreen wiper(s)
- 9.6.1 Detailed technical description (including photographs or drawings):
- 9.7 Windscreen washer
- 9.7.1. Detailed technical description (including photographs or drawings) or, if approved as separate technical unit, type-approval number:
- 9.8 Defrosting and demisting
- 9.8.2 Maximum electrical consumption: kW
- 9.10 Interior fittings
- 9.10.3 Seats
- 9.10.3.5 Coordinates or drawing of the R point (x)
- 9.10.3.5.1 Driver's seat:
- 9.10.3.6 Design seat back angle
- 9.10.3.6.1 Driver's seat:
- 9.10.3.7 Range of seat adjustment
- 9.10.3.7.1 Driver's seat:
- 9.10.5 Heating systems for the passenger compartment
- 9.10.5.3 Maximum electrical consumption: kW

ANNEX VII

Information Document No.

relating to EEC type-approval as separate technical unit of the windscreen washer systems (Council Directive 78/318/EEC as last amended by Directive 94/68/EC)

The following information, if applicable, must be supplied in triplicate and include a list of contents. Any drawings must be supplied in appropriate scale and in sufficient detail on size A4 or on a folder of A4 format. Photographs, if any, must show sufficient detail.

If the systems, components of separate technical units have electronic controls, information concerning their performance must be supplied.

0. GENERAL

- 0.1 Make (trade name of manufacturer):
- 0.2 Type and general commercial description(s):
- 0.5 Name and address of manufacturer:
- 0.7 In the case of components and separate technical units, location and method of affixing of the EEC approval mark:
- 0.8 Address(es) of assembly plant(s):

1. DESCRIPTION OF THE DEVICE

- 1.1 Detailed technical description (including photographs or drawings) identifying those components which may be fitted within the engine compartment.
- 1.2 Any restrictions of use and conditions for fitting.

5. The following two new Annexes VIII and IX shall be added:

'ANNEX VIII

MODEL

(maximum format: A4 (210 × 297 mm))

EEC TYPE-APPROVAL CERTIFICATE

Communication concerning the

— type approval ⁽¹⁾

Stamp of Administration

⁽¹⁾ Delete where not applicable.

- extension of type approval ⁽¹⁾
- refusal of type approval ⁽¹⁾
- withdrawal of type approval ⁽¹⁾

of a type of a vehicle/component/separate technical unit ⁽¹⁾ with regard to Directive 78/38/EEC, as last amended by Directive 94/68/EC

Type-approval number:

Reason for extension:

Section I

- 0.1 Make (trade name of manufacturer):
- 0.2 Type and general commercial description(s):
- 0.3 Means of identification of type if marked on the vehicle/component/separate technical unit ⁽¹⁾ ⁽²⁾
 - 0.3.1 Location of that marking:
- 0.4 Category of vehicle ⁽³⁾:
- 0.5 Name and address of manufacturer:
- 0.7 In the case of components and separate technical units, location and method of affixing of the EEC approval mark:
- 0.8 Name(s) and address(es) of assembly plant(s):

Section II

- 1. Additional information (where applicable): See Appendix
- 2. Technical service responsible for carrying out the tests:
- 3. Date of test report:
- 4. Number of test report:
- 5. Remarks (if any): See Appendix
- 6. Place:
- 7. Date:
- 8. Signature:
- 9. The index to the information package lodged with the approval authority, which may be obtained on request, is attached.

Appendix

to EEC type-approval certificate No.
concerning the type approval of a vehicle with regard to Directive 78/318/EEC
as last amended by Directive

- 1. Additional information
 - 1.1 Wiper, — number of blades:
 - 1.2 Washer, — method of operation:
 - type-approval mark (where applicable):
- 5. Remarks:
(e.g. valid for both left-hand drive and right-hand drive vehicles)

⁽¹⁾ Delete where not applicable.

⁽²⁾ If the means of identification of type contains characters not relevant to describe the vehicle, component or separate technical unit types covered by this type-approval certificate such characters shall be represented in the documentation by the symbol: "?" (e.g. ABC??123??).

⁽³⁾ As defined in Annex II A to Directive 70/156/EEC.

ANNEX IX

MODEL

(maximum format: A4 (210 × 297 mm))

EEC TYPE-APPROVAL CERTIFICATE

Stamp of Administration

Communication concerning the

- type approval ⁽¹⁾
- extension of type approval ⁽¹⁾
- refusal of type approval ⁽¹⁾
- withdrawal of type approval ⁽¹⁾

of a type of a vehicle/component/separate technical unit ⁽¹⁾ with regard to Directive 78/318/EEC, as last amended by Directive 94/68/EEC

Type-approval number:

Reason for extension:

Section I

- 0.1 Make (trade name of manufacturer):
- 0.2 Type and general commercial description(s):
- 0.3 Means of identification of type if marked on the vehicle/component/separate technical unit ⁽¹⁾ ⁽²⁾;
- 0.3.1 Location of that marking:
- 0.4 Category of vehicle ⁽³⁾:
- 0.5 Name and address of manufacturer.
- 0.7 In the case of components and separate technical units, location and method of affixing of the EEC approval mark:
- 0.8 Name(s) and address(es) of assembly plant(s):

Section II

1. Additional information (where applicable): See Appendix
2. Technical service responsible for carrying out the tests:
3. Date of test report:
4. Number of test report:
5. Remarks (if any): See Appendix
6. Place:
7. Date:
8. Signature:
9. The index to the information package lodged with the approval authority, which may be obtained on request, is attached.

Appendix

to EEC type-approval certificate No
concerning the separate technical unit type approval of windscreen washer systems with regard to Directive 78/318/EEC as last amended by Directive 94/68/EC

1. Additional information
- 1.1 Any restrictions of use and conditions of fitting:
5. Remarks:.

⁽¹⁾ Delete where not applicable.

⁽²⁾ If the means of identification of type contains characters not relevant to describe the vehicle, component or separate technical unit types covered by this type-approval certificate such characters shall be represented in the documentation by the symbol: "?" (e.g. ABC??123??).

⁽³⁾ As defined in Annex II A to Directive 70/156/EEC.

COMMISSION DIRECTIVE 94/78/EC

of 21 December 1994

adapting to technical progress Council Directive 78/549/EEC, as regards the wheel guards of motor vehicles

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THIS DIRECTIVE:

Having regard to the Treaty establishing the European Community,

Article 1

Having regard to Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers⁽¹⁾ as last amended by Commission Directive 93/81/EEC⁽²⁾, and in particular Article 13 (2) thereof,

Directive 78/549/EEC is amended as follows:

1. In Article 1, the words '(as defined in Annex I to Directive 70/156/EEC)' are replaced by the words '(as defined in Annex II A to Directive 70/156/EEC)'.
2. Annexes I and II are amended in accordance with points 1, 2 and 3 of the Annex hereto.
3. Annex III set out in point 4 of the Annex hereto is added.

Having regard to Council Directive 78/549/EEC of 12 June 1978 on the approximation of the laws of the Member States relating to the wheel guards of motor vehicles⁽³⁾, and in particular Article 4 thereof,

Article 2

Whereas Directive 78/549/EEC is one of the separate directives of the EEC type-approval procedure which has been established by Directive 70/156/EEC; whereas, consequently, the provisions laid down in Directive 70/156/EEC relating to vehicle systems, components and separate technical units apply to this Directive;

1. With effect from 1 July 1995 Member States may not, on grounds relating to wheel guards:

- refuse, in respect of a type of motor vehicle, to grant EEC type-approval or to grant national type-approval, or
- prohibit the registration, sale or entry into service of vehicles

if the wheel guards comply with the requirements of Directive 78/549/EEC, as amended by this Directive.

2. With effect from 1 January 1996 the Member States:

- shall no longer grant EEC type-approval, and
- may refuse to grant national type-approval

for a type of vehicle on grounds relating to the wheel guards if the requirements of Directive 78/549/EEC, as amended by this Directive, are not fulfilled.

Article 3

Whereas, in particular, Articles 3 (4) and 4 (3) of Directive 70/156/EEC necessitate that each separate directive has attached to it an information document incorporating the relevant items of Annex I to that Directive and also a type-approval certificate based on Annex VI thereto in order that type-approval may be computerized;

Whereas the number of four-wheel-drive passenger cars is increasing, whether the four-wheel-drive is engaged permanently, automatically or under the control of the driver; whereas it is necessary, in the case of such passenger cars, and in the light of technical progress, to review certain design and operating parameters and to amend certain provisions of Directive 78/549/EEC in a manner which reflects the current and future market situation and which is consistent with proper design, construction and safe operating practice;

Whereas the provisions of this Directive are in accordance with the opinion of the Committee on the Adaptation to Technical Progress established by Directive 70/156/EEC,

⁽¹⁾ OJ No L 42, 23. 2. 1970, p. 1.

⁽²⁾ OJ No L 264, 23. 10. 1993, p. 49.

⁽³⁾ OJ No L 168, 26. 6. 1978, p. 45.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 July 1995. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

Done at Brussels, 21 December 1994.

For the Commission

Martin BANGEMANN

Member of the Commission

ANNEX

1. The following is inserted immediately prior to the heading 'Annex I':

'List of Annexes

Annex I General requirements, special requirements, use of chains, application for EEC type-approval, granting of EEC type-approval, amendments to approvals, conformity of production

Annex II Information document

Annex III Type-approval certificate'

2. Annex I is amended as follows:

- (a) The following heading to Annex I is inserted:

'GENERAL REQUIREMENTS, SPECIAL REQUIREMENTS, USE OF CHAINS, APPLICATION FOR EEC TYPE-APPROVAL, GRANTING OF EEC TYPE-APPROVAL, AMENDMENTS TO APPROVALS, CONFORMITY OF PRODUCTION'

- (b) Item 2.1 is replaced by the following:

'2.1 The wheel guards shall meet the following requirements when the vehicle is in running order (see item 2.6 of Annex II) and carrying one passenger in the front seat and the wheels are in the straight ahead position:'

- (c) Item 2.1.1 is replaced by the following:

'2.1.1. In the part formed by radial planes at an angle of 30 to the front and 50 to the rear of the centre of the wheels (see Figure 1), the overall width (q) of the wheel guards shall be at least sufficient to cover the total type width (b) taking into account the extremes of tyre/wheel combination as specified by the manufacturer and as indicated in item 1.3 of the Appendix to Annex III. In the case of twin wheels, the total width over the two tyres (t) shall be taken into account.'

- (d) Item 3.1 is replaced by the following:

'3.1. In the case of vehicles where only two wheels are driven, the manufacturer shall certify that the vehicle is so designed that at least one type of snow chain can be used on at least one of the types of wheel and tyre approved for the drive wheels of that type of vehicle. One chain/tyre/wheel combination that is suitable for the vehicle shall be specified by the manufacturer and indicated in item 1.2 of the Appendix to Annex III.'

- (e) The following new items 3.2 and 3.3 shall be added to point 3:

'3.2. In the case of vehicles where four wheels are driven, including vehicles where one drive axle may be disengaged manually or automatically, the manufacturer shall certify that the vehicle is so designed that at least one type of snow chain can be used on at least one of the types of wheel and tyre approved for at least one drive axle, which cannot be disengaged, of that type of vehicle. One chain/tyre/wheel combination that is suitable for the vehicle and the drive wheels to which these chains may be fitted shall be specified by the manufacturer and indicated in item 1.2 of the Appendix to Annex III.

3.3. Instructions regarding the type or types of chains that may be used must accompany each vehicle falling within the series conforming to the EEC type-approval vehicle.'

- (f) Item 4.1 is replaced by the following:

'4.1. The application for EEC type-approval pursuant to Article 3 (4) of Directive 70/156/EEC of a vehicle type with regard to wheel guards shall be submitted by the manufacturer.'

- (g) Item 4.2 is replaced by the following:

'4.2. A model for the information document is given in Annex II.'

- (h) Items 4.2.1 and 4.2.2 are deleted.

(i) The following items 5, 6 and 7 are added:

‘5. GRANTING OF EEC TYPE-APPROVAL

5.1. If the relevant requirements are satisfied, EEC type-approval pursuant to Article 4 (3) of Directive 70/156/EEC shall be granted.

5.2. A model for the EEC type-approval certificate is given in Annex III.

5.3. An approval number in accordance with Annex VII to Directive 70/156/EEC shall be assigned to each type of vehicle approved. The same Member State shall not assign the same number to another type of vehicle.

6. MODIFICATIONS OF THE TYPE AND AMENDMENTS TO APPROVALS

6.1. In the case of modifications of the vehicle type approved pursuant to this Directive, the provisions of Article 5 of Directive 70/156/EEC shall apply.

7. CONFORMITY OF PRODUCTION

7.1. Measures to ensure the conformity of production shall be taken in accordance with the provisions laid down in Article 10 of Directive 70/156/EEC.’

3. Annex II is replaced by the following:

‘ANNEX II

Information document No

pursuant to Annex I of Council Directive 70/156/EEC relating to EEC type-approval of a vehicle with respect to the wheel guards, Directive 78/549/EEC, as last amended by Directive / /EEC.

The following information, if applicable, must be supplied in triplicate and include a list of contents. Any drawings must be supplied in appropriate scale and in sufficient detail on size A4 or on a folder of A4 format. Photographs, if any, must show sufficient detail.

If the systems, components or separate technical units have electronic controls, information concerning their performance must be supplied.

0 GENERAL

0.1. Make (trade name of manufacturer):

0.2. Type and general commercial description(s):

0.3. Means of identification of type, if marked, on the vehicle ^(b):

0.3.1 Location of that marking:

0.4. Category of vehicle ^(c):

0.5. Name and address of manufacturer:

0.8. Address(es) of assembly plant(s):

1. GENERAL CONSTRUCTION CHARACTERISTICS OF THE VEHICLE

1.1. Photographs and/or drawings of a representative vehicle.

1.3. Number of axles and wheels:

1.3.1. Number and position of axles with double wheels.

2. MASSES AND DIMENSIONS ^(c)

(in kg and mm) (refer to drawing where applicable)

2.4. Range of vehicle dimensions (overall)

2.4.1. For chassis without bodywork

The item numbers and footnotes used in this Information document correspond to those set out in Annex I to Directive 70/156/EEC.

Items not relevant for the purpose of this Directive are omitted.

- 2.4.1.3 Height (unladen) ⁽¹⁾ (For suspension adjustable for height, indicate normal running position):
- 2.4.2. For chassis with bodywork
- 2.4.2.3. Height (unladen) ⁽¹⁾ (For suspension adjustable for height, indicate normal running position):
- 2.6. Mass of the vehicle with bodywork in running order, or mass of the chassis with cab if the manufacturer does not fit the bodywork (including coolant, oils, fuel, tools, spare wheel and driver) ^(o) (maximum and minimum for each version):
- 6 SUSPENSION
- 6.6. Tyres and wheels
- 6.6.1. Tyre/wheel combination(s) (For tyres indicate size designation, minimum load capacity index, minimum speed category symbol; for wheels indicate rim size(s) and off-set(s))
- 6.6.1.1. Axles
- 6.6.1.1.1. Axle 1:
- 6.6.1.1.2. Axle 2:
- 6.6.1.1.3. Axle 3:
- 6.6.1.1.4. Axle 4:
- 6.6.4. Chain/tyre/wheel combination on the front and/or rear axle that is suitable for the type of vehicle, as recommended by the manufacturer.
9. BODYWORK
- 9.16. Wheel guards
- 9.16.1. Brief description of the vehicle with regard to its wheel guards:
- 9.16.2. Detailed drawings of the wheel guards and their position on the vehicle showing the dimension specified in Figure 1 of Annex I to Directive 78/549/EEC and taking account of the extremes of tyre/wheel combinations.'

4. The following Annex III is added:

'ANNEX III

MODEL

[maximum format: A4 (210 × 297 mm)]

EEC TYPE-APPROVAL CERTIFICATE

Communication concerning the

- type-approval ⁽¹⁾
- extension of type-approval ⁽¹⁾
- refusal of type-approval ⁽¹⁾
- withdrawal of type-approval ⁽¹⁾

of a type of a vehicle/component/separate technical unit ⁽¹⁾ with regard to Directive/...../EEC, as last amended by Directive/...../EEC.

Type-approval number:

Reason for extension:

Stamp of Administration

⁽¹⁾ Delete where not applicable.

Section I

- 0.2. Make (trade name of manufacturer):
- 0.2. Type and general commercial description(s):
- 0.3. Means of identification of type, if marked on the vehicle/component/separate technical unit ⁽¹⁾ ⁽²⁾
- 0.3.1. Location of that marking:
- 0.4. Category of vehicle. ⁽³⁾
- 0.5. Name and address of manufacturer.
- 0.7. In the case of components and separate technical units, location and method of affixing of the EEC approval mark:
- 0.8. Name(s) and address(es) of assembly plant(s):

Section II

- 1 Additional information (where applicable): see Appendix
- 2 Technical service responsible for carrying out the tests:
- 3 Date of test report:
- 4 Number of test report:
- 5 Remarks (if any): see Appendix
- 6 Place:
- 7 Date:
- 8 Signature:
- 9 The index to the information package lodged with the approval authority, which may be obtained on request, is attached.

Appendix

to EEC approval certificate No.
concerning the type-approval of a vehicle with regard to Directive 78/549/EEC
as last amended by Directive/...../EEC

- 1. Additional information
 - 1.1. Brief description of the vehicle with regard to the wheel guards:
 - 1.2. Chain/tyre/wheel size combination on the front and/or rear axle specified by the manufacturer:
 - 1.3. Tyre/wheel combination(s) including off-sets specified by the manufacturer:
 - 5. Remarks.
-

⁽¹⁾ Delete where not applicable.

⁽²⁾ If the means of identification of type contains characters not relevant to describe the vehicle, component or separate technical unit types covered by this type-approval certificate such characters shall be represented in the documentation by the symbol: '?' (e.g. ABC??123??)

⁽³⁾ As defined in Annex II A to Directive 70/156/EEC.

COMMISSION DIRECTIVE 94/79/EC

of 21 December 1994

amending Council Directive 91/414/EEC concerning the placing of plant protection products on the market

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market ⁽¹⁾, as last amended by Directive 94/43/EC ⁽²⁾, and in particular Article 18 (2) thereof,

Whereas Annexes II and III to Directive 91/414/EEC set out the requirements for the dossier to be submitted by applicants respectively for the inclusion of an active substance in Annex I and for the authorization of a plant protection product;

Whereas it is necessary to indicate, in Annexes II and III, to the applicants, as precisely as possible, any details on the required information, such as the circumstances, conditions and technical protocols under which certain data have to be generated; whereas these provisions should be introduced as soon as available in order to permit applicants to use them in the preparation of their files;

Whereas it is now possible to introduce more precision with regard to the data requirements concerning toxicological and metabolism studies on the active substance provided for in Section 5 of Part A of Annex II;

Whereas it is also now possible to introduce more precision with regard to the data requirements concerning toxicological studies on the plant protection product provided for in Section 7 of Part A of Annex II;

Whereas the measures provided for in this Directive are in accordance with the opinion of the Standing Committee on Plant Health,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 91/414/EEC is amended as follows:

1. in Part A of Annex II the section headed '5. Toxicological and metabolism studies on the active substance' is replaced by Annex I hereto;
2. in Part A of Annex III the section headed '7. Toxicological studies' is replaced by Annex II hereto;

3. Point 1.2 of the introduction to Annexes II and III is replaced by the following: '1.2 where relevant, be generated using test guidelines, according to the latest adopted version, referred to or described in this Annex; in the case of studies initiated before the entry into force of the modification of this Annex, the information shall be generated using suitable internationally or nationally validated test guidelines or, in the absence thereof, test guidelines accepted by the competent authority;'
4. in point 1.3 of the introduction to Annexes II and III, the following words are added at the end: 'in particular, when reference is made in this Annex to an EEC Method which consists in the transposal of a method developed by an international organization (e.g. OECD), Member States may accept that the required information is generated according to the latest version of that method if at the initiation of the studies the EEC Method has not yet been updated;'

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 January 1996. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States

Article 3

This Directive shall enter into force on 1 February 1995.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 21 December 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 230, 19. 8. 1991, p. 1.

⁽²⁾ OJ No L 227, 1. 9. 1994, p. 31.

ANNEX I

5. TOXICOLOGICAL AND METABOLISM STUDIES

Introduction

- (i) The information provided, taken together with that provided for one or more preparations containing the active substance, must be sufficient to permit an evaluation to be made as to the risks for man, associated with the handling and use of plant protection products containing the active substance, and the risk for man arising from residual traces remaining in food and water. In addition, the information provided must be sufficient to:
 - permit a decision to be made as to whether, or not, the active substance can be included in Annex I,
 - specify appropriate conditions or restrictions to be associated with any inclusion in Annex I,
 - classify the active substance as to hazard,
 - establish a relevant acceptable daily intake (ADI) level for man,
 - establish acceptable operator exposure level(s) (AOEL),
 - specify the hazard symbols, the indications of danger, and the risk and safety phrases for the protection of man, animals and the environment to be included in packaging (containers),
 - identify relevant first aid measures as well as appropriate diagnostic and therapeutic measures to be followed in the event of poisoning in man, and
 - permit an evaluation to be made as to the nature and extent of the risks for man, animals (species normally fed and kept or consumed by man) and of the risks for other non-target vertebrate species.
- (ii) There is a need to investigate and report all potentially adverse effects found during routine toxicological investigations (including effects on organs and special systems such as immunotoxicity and neurotoxicity) and to undertake and report such additional studies which may be necessary to investigate the probable mechanism involved, to establish Noaels (no observed adverse effect levels), and to assess the significance of these effects. All available biological data and information which is relevant to the assessment of the toxicological profile of the substance tested, must be reported.
- (iii) In the context of the influence that impurities can have on toxicological behaviour, it is essential that for each study submitted, a detailed description (specification) of the material used, as mentioned under section 1 point 11 be provided. Tests should be conducted using active substance of that specification to be used in the manufacture of preparations to be authorized, except where radiolabelled material is required or permitted.
- (iv) Where studies are conducted using an active substance produced in the laboratory or in a pilot plant production system, the studies must be repeated using the active substance as manufactured, unless it can be justified that the test material used is essentially the same, for the purposes of toxicological testing and assessment. In cases of uncertainty, appropriate bridging studies must be submitted to serve as a basis for a decision as to the possible need for repetition of the studies.
- (v) In the case of studies in which dosing extends over a period, dosing should preferably be done using a single batch of active substance if stability permits.
- (vi) For all studies actual achieved dose in mg/kg body weight, as well as in other convenient units, must be reported. Where dosing via the diet is utilized the test compound must be distributed uniformly in the diet.
- (vii) Where, as a result of metabolism or other processes in or on treated plants, or as a result of processing of treated products, the terminal residue (to which consumers or workers as defined in Annex III, point 7.2.3 will be exposed) contains a substance which is not the active substance itself and is not identified as a metabolite in mammals, it will be necessary to carry out toxicity studies on these components of the terminal residue unless it can be demonstrated that consumer or worker exposure to these substances does not constitute a relevant risk to health. Toxicokinetic and metabolism studies relating to metabolites and degradation products should only be conducted if toxicity findings of the metabolite cannot be evaluated by the available results relating to the active substance.

- (viii) The way of administration of the test substance depends on the main exposure routes. In cases where exposure is mainly by the gas phase, it can be more appropriate to perform inhalation studies instead of oral studies.

5.1. Studies on absorption, distribution, excretion and metabolism in mammals

Quite limited data, as described below and restricted to one test species (normally the rat) may be all that is required in this area. These data can provide information useful in the design and interpretation of subsequent toxicity tests. However, it must be remembered that information on interspecies differences may be crucial in extrapolation of animal data to man and information on percutaneous penetration, absorption, distribution, excretion and metabolism may be useful in operator risk assessments. It is not possible to specify detailed data requirements in all areas, since the exact requirements will be dependant upon the results obtained for each particular test substance.

Aim of the test:

The tests should provide sufficient data to permit:

- an evaluation of the rate and extent of absorption,
- the tissue distribution and the rate and extent of excretion of the test substance and the relevant metabolites,
- the identification of metabolites and the metabolic pathway.

The effect of dose level on these parameters and whether results are different after single versus repeated doses, should also be investigated.

Circumstances in which required

A single dose toxicokinetic study in rats (oral route of administration) in at least two dose levels as well as a repeated dose toxicokinetic study in rats (oral route of administration) at a single dose level, must be conducted and reported. It may be necessary in some cases to perform additional studies on another species (such as goat or chicken).

Test guideline

Commission Directive 87/302/EEC of 18 November 1987 adapting to technical progress for the ninth time Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances ⁽¹⁾, part B, Toxicokinetics.

5.2. Acute toxicity

The studies, data and information to be provided and evaluated must be sufficient to permit the identification of effects following a single exposure to the active substance, and in particular to establish, or indicate:

- the toxicity of the active substance;
- the time course and characteristics of the effects with full details of behavioural changes and possible gross pathological findings at post-mortem;
- where possible mode of toxic action; and
- the relative hazard associated with the different routes of exposure.

While the emphasis must be on estimating the toxicity ranges involved, the information generated must also permit the active substance to be classified in accordance with Council Directive 67/548/EEC. The information generated through acute toxicity testing is of particular value in assessing hazards likely to arise in accident situations.

5.2.1. Oral

Circumstances in which required

The acute oral toxicity of the active substance must always be reported.

Test guideline

The test must be carried out in accordance with the Annex to Commission Directive 92/69/EEC of 31 July 1992 adapting to technical progress for the seventeenth time Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances ⁽²⁾, Method B1 or B1 bis.

⁽¹⁾ OJ No L 133, 30. 5. 1988, p. 1.

⁽²⁾ OJ No L 383A, 29. 12. 1992, p. 1.

5.2.2. *Percutaneous*

Circumstances in which required

The acute percutaneous toxicity of the active substance must always be reported.

Test guideline

Both local and systemic effects must be investigated. The test must be carried out in accordance with Directive 92/69/EEC method B3.

5.2.3. *Inhalation*

Circumstances in which required

The inhalation toxicity of the active substance must be reported where the active substance is:

- a gas or liquified gas,
- is to be used as a fumigant,
- is to be included in a smoke generating, aerosol or vapour releasing preparation,
- is to be used with fogging equipment,
- has a vapour pressure $> 1 \times 10^{-2}$ Pa and is to be included in preparations to be used in enclosed spaces such as warehouses or glasshouses,
- is to be included in preparations which are powders containing a significant proportion of particles of diameter $> 50 \mu\text{m}$ ($> 1\%$ on a weight basis), or
- is to be included in preparations to be applied in a manner which generates a significant proportion of particles or droplets of diameter $< 50 \mu\text{m}$ ($> 1\%$ on a weight basis).

Test guideline

The test must be carried out in accordance with Directive 92/69/EEC Method B2.

5.2.4. *Skin irritation*

Aim of the test

The test will provide the potential of skin irritancy of the active substance including the potential reversibility of the effects observed.

Circumstances in which required

The skin irritancy of the active substance must be determined except where it is likely, as indicated in the test guideline, that severe skin effects may be produced or that effects can be excluded.

Test guideline

The acute skin irritation must be carried out in accordance with Directive 92/69/EEC Method B4.

5.2.5. *Eye irritation*

Aim of test

The test will provide the potential of eye irritancy of the active substance including the potential reversibility of the effects observed.

Circumstances in which required

Eye irritation tests must be conducted except where it is likely, as indicated in the test guideline, that severe effects on the eyes may be produced.

Test guidelines

The acute eye irritation must be determined in accordance with Directive 92/69/EEC Method B5.

5.2.6. *Skin sensitization*

Aim of test

The test will provide sufficient information to assess the potential of the active substance to provoke skin sensitization reactions.

Circumstances in which required

The test must always be carried out except where the substance is a known sensitizer.

Test guideline

The test must be carried out in accordance with Directive 92/69/EEC Method B6.

5.3. Short-term toxicity

Short-term toxicity studies must be designed to provide information as to the amount of the active substance that can be tolerated without toxic effects under the conditions of the study. Such studies provide useful data on the risks for those handling and using preparations containing the active substance. In particular, short-term studies provide an essential insight into possible cumulative actions of the active substance and the risks to workers who may be intensively exposed. In addition short-term studies provide information useful in the design of chronic toxicity studies.

The studies, data and information to be provided and evaluated, must be sufficient to permit the identification of effects following repeated exposure to the active substance, and in particular to further establish, or indicate:

- the relationship between dose and adverse effects,
- toxicity of the active substance including where possible the Noael,
- target organs, where relevant,
- the time course and characteristics of poisoning with full details of behavioural changes and possible pathological findings at post-mortem,
- specific toxic effects and pathological changes produced,
- where relevant the persistence and reversibility of certain toxic effects observed, following discontinuation of dosing,
- where possible, the mode of toxic action, and
- the relative hazard associated with the different routes of exposure.

5.3.1. Oral 28-day study**Circumstances in which required**

Although it is not mandatory to perform 28-day short term studies, they can be useful as range finding tests. Where conducted they must be reported, since the results could be of particular value in the identification of adaptive responses which can be masked in chronic toxicity studies.

Test guideline

The test must be carried out in accordance with Directive 92/69/EEC Method B7.

5.3.2. Oral 90-day study**Circumstances in which required**

The short-term oral toxicity (90 day) of the active substance to both rat and dog, must always be reported. Where there is evidence that the dog is significantly more sensitive and where such data are likely to be of value in extrapolating results obtained to man, a 12-month toxicity study in dogs must be conducted and reported.

Test guidelines

Directive 87/302/EEC, Part B, sub-chronic oral toxicity test.

5.3.3. Other routes**Circumstances in which required**

For the assessment of operator exposure additional percutaneous studies may be useful.

For volatile substances (vapour pressure $>10^{-2}$ Pascal) expert judgment is required to decide whether the short term studies have to be performed by oral or inhalation exposure.

Test guidelines

- 28-day dermal: Directive 92/69/EEC Method B9,
- 90-day dermal: Directive 87/302/EEC, Part B, sub-chronic dermal toxicity study,

- 28-day inhalation: Directive 92/69/EEC Method B8,
- 90-day inhalation: Directive 87/302/EEC, Part B, sub-chronic inhalation toxicity study.

5.4. Genotoxicity testing

Aim of the test

These studies are of value in:

- the prediction of genotoxic potential
- the early identification of genotoxic carcinogens
- the elucidation of the mechanism of action of some carcinogens

To avoid responses that are artifacts of the test system, excessively toxic doses must not be used in either *in vitro* or *in vivo* assays for mutagenicity. This approach should be regarded as general guidance. It is important that a flexible approach is adopted, with selection of further tests being dependant upon interpretation of results at each stage.

5.4.1. *In vitro* studies

Circumstances in which required

In vitro mutagenicity tests (bacterial assay for gene mutation, test for clastogenicity in mammalian cells and test for gene mutation in mammalian cells) must always be performed.

Test guidelines

Acceptable test guidelines are:

Directive 92/69/EEC Method B14 — *Salmonella Typhimurium* reverse mutation assay

Directive 92/69/EEC Method B10 — *in vitro* mammalian cytogenetic test

Directive 87/302/EEC, Part B — *in vitro* mammalian cell gene mutation test

5.4.2. *In vivo* studies in somatic cells

Circumstances in which required

If all the results of the *in vitro* studies are negative further resting must be done with consideration of other relevant information available (including toxicokinetic, toxicodynamic and physico-chemical data and data on analogous substances). The test can be an *in vivo* study or an *in vitro* study using a different metabolizing system from that/those previously used.

If the *in vitro* cytogenetic test is positive, an *in vivo* test using somatic cells (metaphase analysis in rodent bone marrow or micronucleus test in rodents) must be conducted.

If either of the *in vitro* gene mutation tests are positive, an *in vivo* test to investigate unscheduled DNA synthesis or a mouse spot test must be conducted.

Test guidelines

Acceptable test guidelines are:

Directive 92/69/EEC Method B12 — Micronucleus test,

Directive 87/302/EEC Part B — Mouse spot test,

Directive 92/69/EEC Method B11 — *In vivo* Mammalian Bone-Marrow cytogenetic test, Chromosomal analysis.

5.4.3. *In vivo* studies in germ cells

Circumstances in which required

When any result of an *in vivo* study in somatic cells is positive, *in vivo* testing for germ cell effects may be justified. The necessity for conducting these tests will have to be considered on a case by case basis, taking into account information regarding toxicokinetics, use and anticipated exposure. Suitable tests would need to examine interaction with DNA (such as the dominant lethal assay), to look at the potential for inherited effects and possibly make a quantitative assessment of heritable effects. It is recognized that in view of their complexity, the use of quantitative studies would require strong justification.

5.5. Long term toxicity and carcinogenicity

Aim of the test

The long-term studies conducted and reported, taken together with other relevant data and information on the active substance, must be sufficient to permit the identification of effects, following repeated exposure to the active substance, and in particular must be sufficient to:

- identify adverse effects resulting from exposure to the active substance,
- identify target organs, where relevant,
- establish the dose-response relationship,
- identify changes in toxic signs and manifestations observed, and
- establish the Noael.

Similarly, the carcinogenicity studies taken together with other relevant data and information on the active substance, must be sufficient to permit the hazards for humans, following repeated exposure to the active substance, to be assessed, and in particular must be sufficient:

- to identify carcinogenic effects resulting from exposure to the active substance,
- to establish the species and organ specificity of tumours induced,
- to establish the dose-response relationship, and
- for non-genotoxic carcinogens, to identify the maximum dose eliciting no adverse effect (threshold dose).

Circumstances in which required

The long-term toxicity and carcinogenicity of all active substances must be determined. If in exceptional circumstances, it is claimed that such testing is unnecessary, that claim must be fully justified, *viz.* toxicokinetic data demonstrates that absorption of the active substance does not occur from the gut, through the skin or via the pulmonary system.

Test conditions

A long-term oral toxicity and carcinogenicity study (two years) of the active substance must be conducted using the rat as test species; these studies can be combined.

A carcinogenicity study of the active substance must be conducted using the mouse as test species.

Where a non-genotoxic mechanism for carcinogenicity is suggested, a well argued case, supported with relevant experimental data, including that necessary to elucidate the possible mechanism involved, must be provided.

While the standard reference points for treatment responses are concurrent control data, historical control data, may be helpful in the interpretation of particular carcinogenicity studies. Where submitted, historical control data should be from the same species and strain, maintained under similar conditions and should be from contemporaneous studies. The information on historical control data provided must include:

- identification of species and strain, name of the supplier, and specific colony identification, if the supplier has more than one geographical location,
- name of the laboratory and the dates when the study was performed,
- description of the general conditions under which animals were maintained, including the type or brand of diet and, where possible, the amount consumed,
- approximate age, in days, of the control animals at the beginning of the study and at the time of killing or death,
- description of the control group mortality pattern observed during or at the end of the study, and other pertinent observations (e.g. diseases, infections),
- name of the laboratory and the examining scientists responsible for gathering and interpreting the pathological data from the study, and
- a statement of the nature of the tumours that may have been combined to produce any of the incidence data.

The doses tested, including the highest dose tested, must be selected on the basis of the results of short-term testing and where available at the time of planning the studies concerned, on the basis of metabolism and toxicokinetic data. The highest dose level in the carcinogenicity study should elicit signs of minimal toxicity such as slight depression in body-weight gain (less than 10%), without causing tissue necrosis or metabolic saturation and without substantially altering normal lifespan due

to effects other than tumours. If the long-term toxicity study is carried out separately, the highest dose level should elicit definite signs of toxicity without causing excessive lethality. Higher doses, causing excessive toxicity are not considered relevant to evaluations to be made.

In the collection of data and compilation of reports, incidence of benign and malignant tumours must not be combined, unless there is clear evidence of benign tumours becoming malignant with time. Similarly, dissimilar, un-associated tumours, whether benign or malignant, occurring in the same organ, must not be combined, for reporting purposes. In the interests of avoiding confusion, terminology such as that developed by American Society of Toxicologic Pathologists ⁽¹⁾, or the Hannover Tumour Registry (RENI) should be used in the nomenclature and reporting of tumours. The system used must be identified.

It is essential that biological material selected for histopathological examination includes material selected to provide further information on lesions identified during gross pathological examination. Where relevant to the elucidation of mechanism of action and available, special histological (staining) techniques, histochemical techniques and electron microscopic examinations, must be conducted and reported.

Test guideline

The studies must be carried out in accordance with Directive 87/302/EEC, part B, Chronic toxicity test, Carcinogenicity test or combined chronic toxicity/carcinogenicity test.

5.6. Reproductive toxicity

Adverse reproductive effects are of two main types:

- impairment of male or female fertility, and
- impacts on the normal development of progeny (developmental toxicity).

Possible effects on all aspects of reproductive physiology in both males and females, as well as possible effects on pre-natal and post-natal development, must be investigated and reported. If in exceptional circumstances, it is claimed that such testing is unnecessary, that claim must be fully justified.

While the standard reference point for treatment responses are concurrent control data, historical control data may be helpful in the interpretation of particular reproductive studies. Where submitted, historical control data should be from the same species and strain, maintained under similar conditions and should be from contemporaneous studies. The information on historical control data provided must include:

- identification of species and strain, name of the supplier, and specific colony identification, if the supplier has more than one geographical location,
- name of the laboratory and the dates when the study was performed,
- description of the general conditions under which animals were maintained, including the type or brand of diet and, where possible, the amount consumed,
- approximate age, in days, of the control animals at the beginning of the study and at the time of killing or death,
- description of the control group mortality pattern observed during or at the end of the study, and other pertinent observations (e.g. diseases, infections), and
- name of the laboratory and the examining scientist responsible for gathering and interpreting the toxicological data from the study.

5.6.1. Multi-generation studies

Aim of the test

The studies reported, taken together with other relevant data and information on the active substance, must be sufficient to permit the identification of effects for reproduction, following repeated exposure to the active substance, and in particular must be sufficient:

⁽¹⁾ Standardized System of Nomenclature and Diagnostic Criteria — Guides for Toxicologic Pathology

- to identify direct and indirect effects on reproduction resulting from exposure to the active substance,
- to identify any enhancement of general toxic effects (noted during short-term and chronic toxicity testing),
- to establish the dose-response relationship, to identify changes in toxic signs and manifestations observed, and
- to establish the Noael.

Circumstances in which required

A reproduction toxicity study in rats over at least two generations must always be reported.

Test guideline

The tests must be carried out in accordance with Directive 87/302/EEC, Part B, two-generation reproduction toxicity test. In addition organ weight of reproductive organs must be reported.

Supplementary studies

Where necessary for a better interpretation of the effects on reproduction and as far as this information is not yet available it could be necessary to perform supplementary studies in order to provide the following information:

- separate male and female studies,
- three segment designs,
- dominant lethal assay for male fertility,
- cross-matings of treated males with untreated females and vice versa,
- effects on spermatogenesis,
- effects on oogenesis,
- sperm motility, mobility and morphology, and
- investigation of hormonal activity.

5.6.2. *Developmental toxicity studies*

Aim of the test

The studies reported, taken together with other relevant data and information on the active substance, must be sufficient to permit effects on embryonic and foetal development, following repeated exposure to the active substance, to be assessed, and in particular must be sufficient:

- to identify direct and indirect effects on embryonic and foetal development resulting from exposure to the active substance,
- to identify any maternal toxicity,
- to establish the relationship between observed responses and dose in both dam and offspring,
- to identify changes in toxic signs and manifestations observed, and
- to establish the Noael.

Furthermore, the tests will give additional information on any enhancement of general toxic effects of pregnant animals.

Circumstances in which required

The tests must always be carried out.

Test conditions

Developmental toxicity must be determined both to rat and rabbit by the oral route. Malformations and variations should be reported separately. A glossary of terminology and diagnostic principles for malformations and variations must be given in the report.

Test guideline

The tests must be carried out in accordance with Directive 87/302/EEC, Part B, teratogenicity test — rodent and non-rodent.

5.7. Delayed neurotoxicity studies

Aim of the test

The test shall provide sufficient data to evaluate if the active substance could provoke delayed neurotoxicity after acute exposure.

Circumstances in which required

These studies have to be performed for substances of similar or related structures to those capable of inducing delayed neurotoxicity such as organophosphates.

Test guidelines

The test must be carried out in accordance with OECD Guideline 418.

5.8. Other toxicological studies

5.8.1. Toxicity studies of metabolites as referred to in the introduction point (vii)

Supplementary studies, where they relate to substances other than the active substance, are not a routine requirement.

Decisions as to the need for supplementary studies must be made on a case by case basis.

5.8.2. Supplementary studies on the active substance

In certain cases it can be necessary to carry out supplementary studies to further clarify observed effects. These studies could include:

- studies on absorption, distribution, excretion and metabolism,
- studies on the neurotoxic potential,
- studies on the immunotoxicological potential,
- studies on other routes of administration.

Decisions as to the need for supplementary studies must be made on a case by case basis, taking into account the results of the available toxicological and metabolism studies and the most important exposure routes.

Studies required must be designed on an individual basis, in the light of the particular parameters to be investigated and the objectives to be achieved.

5.9. Medical data

Where available, and without prejudice to the provisions of Article 5 of Council Directive 80/1107/EEC of 27 November 1980 on the protection of workers from the risks related to chemical, physical and biological agents at work ⁽¹⁾, practical data and information relevant to the recognition of the symptoms of poisoning, and on the effectiveness of first aid and therapeutic measures have to be submitted. More specific references to the investigation for antidotal pharmacology or safety pharmacology using animals should be provided. Where relevant, the effectiveness of potential antagonists to poisoning, should be investigated and reported.

Data and information relevant to the effects of human exposure, where available and of the necessary quality, are of particular value, in confirming the validity of extrapolations made and conclusions reached with respect to target organs, dose-response relationships, and the reversibility of toxic effects. Such data can be generated following accidental or occupational exposure.

5.9.1. Medicinal surveillance on manufacturing plant personnel

Reports of occupational health surveillance programmes, supported with detailed information on the design of the programme, on exposure to the active substance and exposure to other chemicals, must be submitted. Such reports should, where feasible, include data relevant to the mechanism of action of the active substance. These reports shall, where available, include data from persons exposed in manufacturing plants or after application of the active substance (e.g.: in efficacy trials).

Available information on the sensitization including allergenic response of workers and others exposed to the active substance, must be provided, and include where relevant details of any incidence of hypersensitivity. The information provided should include details of frequency, level and duration of exposure, symptoms observed and other relevant clinical information.

⁽¹⁾ OJ No L 327, 3. 12. 1980, p. 8.

5.9.2. *Direct observation, e.g.: clinical cases and poisoning incidents*

Available reports from the open literature, relating to clinical cases and poisoning incidents, where they are from refereed journals or official reports, must be submitted together with reports of any follow-up studies undertaken. Such reports should contain complete descriptions of the nature, level and duration of exposure, as well as the clinical symptoms observed, first aid and therapeutic measures applied and measurements and observations made. Summary and abstract information is not of value.

Where supported with the necessary level of detail, such documentation can be of particular value in confirming the validity of extrapolations from animal data to man and in identifying unexpected adverse effects which are specific to humans.

5.9.3. *Observations on exposure of the general population and epidemiological studies if appropriate*

Where available, and supported with data on levels and duration of exposure, and conducted in accordance with recognized standards ⁽¹⁾, epidemiological studies are of particular value and must be submitted.

5.9.4. *Diagnosis of poisoning (determination of active substance, metabolites), specific signs of poisoning, clinical tests*

A detailed description of the clinical signs and symptoms of poisoning, including the early signs and symptoms and full details of clinical tests useful for diagnostic purposes, where available, must be provided and include full details of the time courses involved relevant to the ingestion, dermal exposure or inhalation of varying amounts of the active substance.

5.9.5. *Proposed treatment: first aid measures, antidotes, medical treatment*

The first aid measures to be used in the event of poisoning (actual and suspected) and in the event of contamination of eyes must be provided.

Therapeutic regimes for use in the event of poisoning or contamination of eyes, including where available the use of antidotes, must be described in full. Information based on practical experience, where it exists and is available, in other cases on theoretical grounds, as to the effectiveness of alternative treatment regimes, where relevant, must be provided. Contraindications associated with particular regimes, particularly those relating to 'general medical problems' and conditions, must be described.

5.9.6. *Expected effects of poisoning*

Where known, the expected effects and the duration of these effects following poisoning must be described and include the impact of:

- the type, level and duration of exposure, or ingestion, and
- varying time periods between exposure, or ingestion, and commencement of treatment.

5.10. *Summary of mammalian toxicity and overall evaluation*

A summary of all data and information provided under paragraphs 5.1 through 5.10, must be submitted, and include a detailed and critical assessment of those data in the context of relevant evaluative and decision making criteria and guidelines, with particular reference to the risks for man and animals that may or do arise, and the extent, quality and reliability of the data base.

Where relevant, in the light of findings with respect to the analytical profile of batches of the active substance (paragraph 1.11) and any bridging studies conducted (paragraphs 5 (iv)), the relevance of the data as submitted to the assessment of the toxicological profile of the active substance as manufactured, must be argued.

On the basis of an assessment of the data base, and the relevant decision making criteria and guidelines, justifications must be submitted for the Noels proposed for each relevant study.

On the basis of these data scientifically reasoned proposals for the establishment of ADI and AOEL(s) for the active substance must be submitted.

⁽¹⁾ *Guidelines for Good Epidemiology Practices for Occupational and Environmental Research, developed by the Chemical Manufacturers Association's Epidemiology Task Group, as part of the Epidemiology Resource and Information Centre (ERIC), Pilot Project, 1991*

ANNEX II

7. TOXICOLOGICAL STUDIES

For proper evaluation of the toxicity of preparations sufficient information should be available on acute toxicity, irritation and sensitization of the active substance. If possible, additional information on mode of toxic action, toxicological profile and all other known toxicological aspects of the active substance should be submitted.

In the context of the influence that impurities and other components can have on toxicological behaviour, it is essential that for each study submitted, a detailed description (specification) of the material used, be provided. Tests must be conducted using the plant protection product to be authorized.

7.1. Acute toxicity

The studies, data and information to be provided and evaluated, must be sufficient to permit the identification of effects following a single exposure to the plant protection product, to be assessed, and in particular to establish, or indicate:

- the toxicity of the plant protection products,
- toxicity of the plant protection product relative to the active substance,
- the time course and characteristics of the effect with full details of behavioural changes and possible gross pathological findings at post-mortem,
- where possible the mode of toxic action, and
- the relative hazard associated with the different routes of exposure.

While the emphasis must be on estimating the toxicity ranges involved, the information generated must also permit the plant protection product to be classified in accordance with Council Directive 78/631/EEC. The information generated through acute toxicity testing is of particular value in assessing hazards likely to arise in accident situations.

7.1.1. Oral

Circumstances in which required

An acute oral test should always be carried out unless the applicant can justify to the satisfaction of the competent authority that Article 3.2 of Council Directive 78/631/EEC can be invoked.

Test guidelines

The test must be carried out in accordance with Directive 92/69/EEC Method B1 or B1 bis.

7.1.2. Percutaneous

Circumstances in which required

An acute percutaneous test should always be carried out unless the applicant can justify to the satisfaction of the competent authority that Article 3.2 of Council Directive 78/631/EEC can be invoked.

Test guideline

The test must be carried out in accordance with Directive 92/69/EEC Method B3.

7.1.3. Inhalation

Aim of the test

The test will provide the inhalation toxicity to rats of the plant protection product or of the smoke it generates.

Circumstances in which required

The test must be carried out where the plant protection product:

- is a gas or liquified gas,
- is a smoke generating formulation or fumigant,
- is used with fogging equipment,
- is a vapour releasing preparation,

- is an aerosol,
- is a powder containing a significant proportion of particles of diameter $< 50 \mu\text{m}$ ($> 1\%$ on a weight basis),
- is to be applied from aircraft in cases where inhalation exposure is relevant,
- contains an active substance with a vapour pressure $> 1 \times 10^{-2}$ Pa and is to be used in enclosed spaces such as warehouses or glasshouses,
- is to be applied in a manner which generates a significant proportion of particles or droplets of diameter $< 50 \mu\text{m}$ ($> 1\%$ on a weight basis).

Test guideline

The test must be carried out in accordance with Directive 92/69/EEC Method B2.

7.1.4. *Skin irritation*

Aim of the test

The test will provide the potential of skin irritancy of the plant protection product including the potential reversibility of the effects observed.

Circumstances in which required

The skin irritancy of the plant protection product must be determined except where it is likely, as indicated in the test guideline, that severe skin effects may be produced or that effects can be excluded.

Test guideline

The test must be carried out in accordance with Directive 92/69/EEC Method B4.

7.1.5. *Eye irritation*

Aim of the test

The test will provide the potential for eye irritation of the plant protection product, including the potential reversibility of the effects observed.

Circumstances in which required

Eye irritation tests must be conducted except where it is likely, as indicated in the test guideline, that severe effects on the eyes may be produced.

Test guideline

The eye irritation must be determined in accordance with Directive 92/69/EEC Method B5.

7.1.6. *Skin sensitization*

Aim of the test

The test will provide sufficient information to assess the potential of the plant protection product to provoke skin sensitization reactions.

Circumstances in which required

The tests must always be carried out except where the active substance(s) or co-formulants are known to have sensitizing properties.

Test guideline

The tests have to be carried out in accordance with Directive 92/69/EEC Method B6.

7.1.7. *Supplementary studies for combinations of plant protection products*

Aim of the test

In certain cases it may be necessary to carry out the studies as referred to under points 7.1.1 to 7.1.6 for a combination of plant protection products where the product label includes requirements for use of the plant protection product with other plant protection products and/or with adjuvants as a tank mix. Decisions as to the need for supplementary studies must be made on a case by case basis, taking into account the results of the acute toxicity studies of the individual plant protection products, the possibility for exposure to the combination of the products concerned and available information or practical experience with the products concerned or similar products.

7.2. Data on exposure

7.2.1. Operator exposure

The risks for those using plant protection products depend on the physical, chemical and toxicological properties of the plant protection product as well as the type of the product (undiluted/diluted), and on the route, the degree and duration of exposure. Sufficient information and data must be generated and reported to permit an assessment of the extent of exposure to the active substance(s) and/or toxicologically relevant compounds in the plant protection product likely to occur under the proposed conditions of use. It must also provide a basis for the selection of the appropriate protective measures including personal protective equipment to be used by operators and to be specified on the label.

7.2.1.1. Estimation of operator exposure

Aim of the estimation

An estimation shall be made, using where available a suitable calculation model, in order to permit an evaluation of the operator exposure likely to arise under the proposed conditions of use.

Circumstances in which required

An estimation of operator exposure must always be completed.

Estimation conditions

An estimation shall be made for each type of application method and application equipment proposed for use of the plant protection product taking account of the requirements resulting from the implementation of the classification and labelling provisions of Directive 78/631/EEC for handling the undiluted or diluted product as well as the different types and sizes of containers to be used, mixing, loading operations, application of the plant protection product, the climatic conditions and cleaning and routine maintenance of application equipment.

At first an estimation shall be made with the assumption that the operator is not using any personal protective equipment.

Where appropriate, a second estimation shall be made with the assumption that the operator is using effective and readily obtainable protective equipment which is feasible to be used by the operator. Where protective measures are specified on the label, the estimation will take these into account.

7.2.1.2. Measurement of operator exposure

Aim of the test

The test shall provide sufficient data to permit an evaluation of the operator exposure likely to arise under the proposed conditions of use.

Circumstances in which required

Actual exposure data for the relevant exposure route(s) must be reported where the risk assessment indicates that a health-based limit value is exceeded. This will, for example, be the case when the results of the estimation of operator exposure provided for under point 7.2.1.1 indicate that:

- the Acceptable Operator Exposure Level(s) (AOEL) established in the context of inclusion of the active substance(s) in Annex I, and/or
- the Limit Values established for the active substance and/or toxicologically relevant compound(s) of the plant protection product in accordance with Council Directive 80/1107/EEC and Council Directive 90/394/EEC of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens at work ⁽¹⁾,

may be exceeded.

Actual exposure data must also be reported when no appropriate calculation model or no appropriate data are available to do the estimation provided for under point 7.2.1.1.

In cases where dermal exposure is the most important exposure route, a dermal absorption test or the results of a sub-acute dermal study, if not already available, may be a useful alternative test to provide data in order to refine the estimate provided for under point 7.2.1.1.

⁽¹⁾ OJ No L 196, 26. 7. 1990, p. 1.

Test conditions

The test must be done under realistic exposure conditions taking into account the proposed conditions of use.

7.2.2. *Bystander exposure*

Bystanders can be exposed during the application of plant protection products. Sufficient information and data must be reported to provide a basis for the selection of appropriate conditions of use, including the exclusion of bystanders from treatment areas and separation distances.

Aim of the estimation

An estimation shall be made, using where available a suitable calculation model in order to permit an evaluation of the bystander exposure likely to arise under the proposed conditions of use.

Circumstances in which required

An estimation of bystander exposure must always be completed.

Estimation conditions

An estimation of bystander exposure must be made for each type of application method. The estimation shall be made with the assumption that bystanders do not use any personal protective equipment.

Measurement of bystander exposure may be required when estimates indicate a cause for concern.

7.2.3. *Worker exposure*

Workers can be exposed following application of plant protection products, when entering treated fields or premises or handling treated plants or plant products on which residues remain. Sufficient information and data must be reported to provide a basis for the selection of appropriate protective measures, including waiting and re-entry periods.

7.2.3.1. *Estimation of worker exposure*

Aim of the estimation

An estimation shall be made using where available a suitable calculation model, in order to permit an evaluation of the worker exposure likely to arise under the proposed conditions of use.

Circumstances in which required

The estimation of worker exposure must always be completed.

Estimation conditions

An estimation of worker exposure must be made for each crop and task to be carried out.

At first the estimation shall be made using available data on the exposure to be expected with the assumption that the worker is not using any personal protective equipment.

Where appropriate, a second estimation shall be made with the assumption that the worker is using effective and readily obtainable protective equipment which is feasible to be used.

Where appropriate, a further estimation shall be made using data generated on the amount of dislodgeable residues under the proposed conditions of use.

7.2.3.2. *Measurement of worker exposure*

Aim of the test

The test shall provide sufficient data to permit an evaluation of the worker exposure likely to arise under the proposed conditions of use.

Circumstances in which required

Actual exposure data for the relevant exposure route(s) must be reported where the risk assessment indicates that a health-based limit value is exceeded. This will, for example, be the case where the results of the estimation of worker exposure provided for under point 7.2.3.1 indicate that:

- the AOEL(s) established in the context of inclusion of the active substance(s) in Annex I, and/or
- the Limit Values established for the active substance and/or toxicologically relevant compound(s) of the plant protection product in accordance with Council Directives 80/1107/EEC and 90/394/EEC, may be exceeded.

Actual exposure data must also be reported when no appropriate calculation model or no appropriate data are available to do the estimation provided for under point 7.2.3.1.

Where dermal exposure is the most important exposure route, a dermal absorption test, if not already available, may be a useful alternative test to provide data in order to refine the estimate provided for under point 7.1.3.1.

Test conditions

The test must be done under realistic exposure conditions taking into account the proposed conditions of use.

7.3. Dermal absorption

Aim of the test

The test shall provide a measurement of the absorption of the active substance and toxicologically relevant compounds through the skin.

Circumstances in which required

The study must be conducted when dermal exposure is a significant exposure route and where the risk assessment indicates that a health-based limit value is exceeded. This will, for example, be the case where the results of the estimation or measurement of operator exposure provided for under points 7.2.1.1 or 7.2.1.2 indicate that:

- the AOEL(s) established in the context of inclusion of the active substance(s) in Annex I, and/or
- the limit values established for the active substance and/or toxicologically relevant compound(s) of the plant protection product in accordance with Council Directives 80/1107/EEC and 90/394/EEC may be exceeded.

Test conditions

In principle data of an *in vivo* rat skin absorption study must be reported. If, when the results of the estimation using these *in vivo* skin absorption data are incorporated in the risk assessment, there remains an indication of excessive exposure, it may be necessary to perform an *in vivo* comparative absorption study on rat and human skin.

Test guideline

Appropriate elements of OECD guideline 417 are to be used. For the design of the studies it may be necessary to take into account the results of the skin absorption studies with the active substance(s).

7.4. Available toxicological data relating to non-active substances

Where available, a copy of the notification and the safety data sheet submitted in the context of Directive 67/548/EEC and Commission Directive 91/155/EEC of 5 March 1991 defining and laying down the detailed arrangements for the system of specific information relating to dangerous preparations in implementation of Article 10 of Council Directive 88/379/EEC⁽¹⁾ must be submitted for each formulant. All other available information should be submitted.

⁽¹⁾ OJ No L 76, 22. 3. 1991, p. 35.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 June 1994

declaring a concentration to be compatible with the common market and the functioning of the
EEA Agreement

(IV/M.430 — Procter & Gamble/VP Schickedanz (II))

(Only the English text is authentic)

(Text with EEA relevance)

(94/893/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, and in particular Article 8 (2) thereof,

Having regard to the EEA Agreement and in particular Article 57 (1) thereof,

Having regard to the Commission Decision of 17 February 1994 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations,

Whereas:

(1) On 17 January 1994 Procter & Gamble GmbH notified the Commission of a proposed concentration by which it intends to acquire the

whole of Vereinigte Papierwerke Schickedanz AG. This notification follows the withdrawal on 17 January 1994 of its initial notification of 9 December 1993.

The second notification relates to a modified transaction in so far as it includes an offered divestment of a part of VPS's catamenials business (see recital 8 below).

(2) After examination of the notification the Commission has concluded that the notified concentration falls within the scope of Regulation (EEC) No 4064/89.

On 17 February 1994, the Commission decided to initiate proceedings in application of Article 6 (1) c of the Merger Regulation.

I. THE PARTIES

(3) Procter & Gamble GmbH (P&G) is a wholly-owned subsidiary of the Procter & Gamble Company which is active in consumer laundry, cleaning, health and beauty products, paper products including sanitary protection products (except tampons), and food and beverages.

(4) Vereinigte Papierwerke Schickedanz AG (VPS) is a wholly-owned subsidiary of Gustav und Grete Schickedanz Holding KG (GGS), a partnership organized under the laws of Germany. VPS produces household paper and sanitary protection products.

⁽¹⁾ OJ No L 395, 30. 12. 1989, p. 1. (Corrigendum: OJ No L 257, 21. 9. 1990, p. 13).

II. THE OPERATION

- (5) Procter & Gamble GmbH will acquire the entire share capital of VPS, together with that of other GGS subsidiaries active in related businesses. Under the terms of the share transfer agreement between P&G and GGS and a side agreement between GGS, VPS and P&G, VPS will separate its baby nappy business from its other activities and hold it in a separate company prior to completion of the transaction. The agreements provide for P&G to acquire the VPS shares and then, immediately at closing, to transfer the shares of the separated company holding VPS's baby hygiene business to a third party, i.e., a trustee designated by Procter & Gamble on 22 December 1993.
- (6) This third party shall be assigned the mandate of finding final buyers within an initial period of [...] ⁽¹⁾ months following closing, to be extended if necessary by a further [...] months under certain conditions.
- (7) This commitment not to acquire control of VPS's baby diaper business forms an integral part of the notification and for this reason, despite the objections the Commission would have to any such acquisition, this Decision does not address this market.
- (8) Furthermore, with regard to concerns as to possible effects of the notified concentration as to feminine hygiene products, P&G included in its notification a commitment, offered unilaterally to the Commission and supplemented by an additional agreement between the parties, not to acquire control of the 'non-Camelia business' (i.e. the tangible and intangible assets related to three VPS brands — Blümia, Femina and Tampona — and VPS's private label business) of VPS's catamenial activities. Subsequently, and in the light of the objections raised by the Commission, P&G substantially altered both the brands to be divested and the terms of such a divestment (see Part VI of this Decision). It substituted the Camelia-branded feminine hygiene products for the non-Camelia products of VPS.

III. THE CONCENTRATION

- (9) P&G will gain sole control over VPS (subject to the exceptions of the baby diaper business). The

⁽¹⁾ [...]: In the published version of this Decision, some information has hereinafter been omitted, pursuant to Article 17 (2) of Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets.

operation is thus a concentration within the meaning of Article 3.

IV. COMMUNITY DIMENSION

- (10) The notified operation has a Community dimension since total worldwide turnover of the undertaking concerned (P&G ECU 23,626 billion and VPS ECU 681 million in 1992/93 respectively) exceeds the ECU 5 billion threshold; the aggregate Community-wide turnover of both undertakings concerned (P&G ECU [...] million and VPS ECU [...] million) is more than ECU 250 million; and the parties do not achieve more than two thirds of their EC turnover in one and the same Member State.

V. COMPATIBILITY WITH THE COMMON MARKET

- (11) The concentration concerns the following products manufactured by VPS: household hygiene paper products, feminine products (catamenials), adult incontinence products, cotton products and certain personal body care products (cosmetics).
- (12) Proceedings were initiated with respect to sanitary towels.

Household hygiene paper products

- (13) P&G is not active in Europe in these products which comprise, *inter alia*, toilet paper, paper handkerchiefs, facial tissues and kitchen towels. Sales of these products account for [...] ⁽²⁾ of the total sales of VPS (about [...] ⁽³⁾). P&G stated that the strategic aim of the proposed merger is to enter the European 'tissue market'. This is thought to be as large as the nappy and catamenial markets together (about ECU 5 billion). P&G is already a market leader in this sector in the US and Canada and it hopes to bring to bear its superior technological and product expertise in Europe through this transaction. The overall market shares of VPS are modest ([...] ⁽⁴⁾ in the EU and [...] ⁽⁵⁾ in Germany by volume; value figures not available). As for the individual products EU-wide market shares lie between [...] ⁽⁶⁾ (kitchen towels) and [...] ⁽⁷⁾ (handkerchiefs) and in Germany VPS will have [...] ⁽⁸⁾ in handkerchiefs and a [...] ⁽⁹⁾ share in toilet paper. Scott and JA/Mont are the leading suppliers and private labels play an

⁽²⁾ Between 40 and 45 %.

⁽³⁾ Between ECU 250 and 300 million.

⁽⁴⁾ Between 1 and 5 %.

⁽⁵⁾ Between 15 and 20 %.

⁽⁶⁾ Less than 1 %.

⁽⁷⁾ Between 15 and 20 %.

⁽⁸⁾ Between 35 and 40 %.

⁽⁹⁾ Between 15 and 20 %.

important role on a market which is expected to grow in the coming years.

In the absence of any overlap between P&G and VPS in this sector and in the light of VPS's limited market shares, the operation does not give rise to any competition concerns for these products.

Adult incontinence products

Product market

- (14) Adult incontinence protection products include fitted briefs, shields and pads, insert pads and undergarments. The different products are used for different degrees of loss of bladder and bowel control. Although adult incontinence products are similar to baby diaper and external sanitary napkins, suppliers and customers do not regard them as substitutable because they perform completely separate functions. The absorbency of incontinence products ranges from 150 ml of urine for light incontinence to 800—1 000 ml for heavy cases whereas feminine protection products are designed to absorb between 5 and 20 ml of fluid and the most absorbent baby diaper is designed to absorb about 160—190 ml of urine.
- (15) Adult incontinence products differ from diaper and fempro products not only in size and product design but also in raw material and to some extent in technology. The technology relating to super-absorbency is different in respect of incontinence products, baby diapers and sanitary napkins in order to meet the different absorbency requirements in each case. It is true that machines for napkins or baby diapers could theoretically be adapted in order to produce incontinence pads or briefs, but this, as other suppliers confirmed, does not seem to be commercially feasible. P&G agrees that notwithstanding a certain level of supply-side substitutability, adult incontinence products are a separate market.
- (16) As to the relevant geographic market, the investigation of the Commission produced contradictory results. VPS manufactures incontinence products in Germany and sells them in the Benelux, France, Italy, Spain, Germany, Austria and Switzerland (mostly under the Certina brand). P&G produces and sells the products under Attends in Western Europe and Lindor or Linidor in Italy, Spain and Portugal.
- (17) Similarly, the other big suppliers in Europe such as Mölnlycke ('Tena') and Hartmann ('Molicare') market their products in most of the EEA countries. They compete apparently with the same range of products under European-wide brands, a trend that could be further strengthened by proposed EU legislation harmonizing standards for medical devices, including adult incontinence products. This could suggest a Western European market.
- (18) Indication to the contrary, suggesting national markets, are, however, to be found in the form of specific supply and distribution channels which clearly distinguish these products from all other hygiene products. Adult diapers are basically considered a health care item. Products are distributed through hospitals, pharmacies and institutional suppliers even if some suppliers (e.g., Mölnlycke) currently try to distribute through retail and drug stores. In the United Kingdom, for example, approximately 80 % of the purchase are made by the National Health Service through six regional buying groups. In Germany pharmaceutical distributors tend to purchase from German suppliers.
- (19) However, the definition of the relevant geographic market for adult incontinence products can be left open, since even in the case of a national market, e.g. in Germany, the conclusion of the competitive analysis would not lead to serious doubts as to the compatibility of the concentration with the common market.
- (20) According to the notification, the new entity will achieve a market share in Western Europe of between [...] and [...] ⁽¹⁾ in the Community (throughout this paragraph volume figures have been taken when value figures were unavailable). Mölnlycke is the largest supplier with more than [...] ⁽²⁾ while Hartmanns has [...] ⁽³⁾ of Western European sales. In Germany, P&G would account for [...] ⁽⁴⁾ of the volume of the market and would have a [...] ⁽⁵⁾ value share. VPS's share in both volume and value would be [...] ⁽⁶⁾. This would amount to a combined market share of [...] ⁽⁷⁾ in value terms in Germany. Mölnlycke has [...] ⁽⁸⁾ of the German market (by volume) and Hartmann [...] ⁽⁹⁾ (also by volume).
- (21) Given this market structure and the fact that Mölnlycke and not P&G is the market leader on a European level, the Commission considers that the concentration will not give rise to the creation of a

⁽¹⁾ Between 15 and 20 %.

⁽²⁾ Between 35 and 40 %.

⁽³⁾ Between 10 and 15 %.

⁽⁴⁾ Between 15 and 20 %.

⁽⁵⁾ Between 15 and 20 %.

⁽⁶⁾ Between 10 and 15 %.

⁽⁷⁾ Between 30 and 35 %.

⁽⁸⁾ Between 30 and 35 %.

⁽⁹⁾ Between 20 and 25 %.

dominant position in Germany in respect of adult incontinence.

Cotton products and cosmetics

- (22) P&G does not sell cotton products (such as cotton pads, cotton balls and so-called basic cotton) in Europe and there is thus no increase in VPS's market shares. VPS has a leading cotton pad brand, Demak'up, which has a [...] ⁽¹⁾ market share in the seven Member States where it is sold. VPS estimates its EC market share for all cotton products at [...] ⁽²⁾. The Commission considers that, in the absence of any indications to the contrary, the mere fact of these market shares being acquired by P&G would not be sufficient to give rise to competition concerns.
- (23) Personal body care products include a large number of product lines (body/skin/hair care products, oral hygiene, scents, etc.), of which VPS only produces a limited range and sells most of it in Germany with an estimated market share of [...] ⁽³⁾. P&G's market shares also fall below 10 % in the EU and below [...] ⁽⁴⁾ in single Member States. For both, cosmetics represent a business unit of minor importance. Furthermore, numerous new products are launched in Western Europe each year following volatile consumer habits. The market seems to be intensely competitive. The concentration thus does not raise serious doubts as to its compatibility with the common market in this sector.

Baby nappies

- (24) As described above (paragraph 5), P&G would carry out a divestment of VPS's nappy business simultaneously with the closing of the acquisition.
- (25) P&G has, according to the parties' calculations, an EU volume-based market share of [...] ⁽⁵⁾, (value-based shares are not available), excluding the nappy business of Finaf, which is to be divested in the P&G/Finaf case while VPS has a share of [...] ⁽⁶⁾. While the increment is perhaps not large, the Commission has already made clear in the P&G/Finaf case that P&G should not increase its market share in this sector.
- (26) Given the market shares, the financial resources, the advanced technologies and the strong position

of P&G in relation to retailers, the Commission considers that, in the absence of the commitment contained in P&G's notification not to acquire control of the nappy business, the operation would create a dominant position for P&G even on the assumption of a Western European market for baby nappies. It accepts, however, that the proposed divestment will meet its concerns in this area.

Feminine hygiene products

A. The relevant product market

- (27) Feminine protection ('fempro') products comprise pant-liners, tampons and sanitary towels (pads). VPS manufactures all three while P&G makes only towels and pantliners, not tampons. Pantliners and towels are both external forms for protection relying on an adhesive pad being placed in underwear, whilst a tampon is worn internally. Collectively these products are also known as catamenials.
- (28) P&G claimed in its notification that all three feminine hygiene products constitute a single market. It argued, in respect of tampons and towels, that the two products share the same use; that women switch readily between them, especially in response to new products; and that manufacturers of towels compete vigorously with tampon producers. The Commission, however, considers that pantliners, tampons and sanitary towels each constitute separate product markets.
- (29) *Pantliners* are mostly worn as protection for inter-menstrual vaginal secretions, i.e. outside the menstrual period. They are also used menstrually, whether on their own as an insurance immediately before and after the actual period, during the so-called 'lighter days' (normally the last two days of the period when the menstrual flow is much lighter), or in conjunction with a tampon at any time during menstruation. They are not suitable for use alone as a primary method of menstrual protection. This usage pattern is confirmed by the absorbent capacity of a pantliner which is around one quarter that of a towel. Furthermore, the marketing of pantliners is geared to addressing a need for 'feminine freshness' rather than protection.
- (30) In terms of the supply side, it should be noted that while there may be some limited supply-side substitutability between the production of pantliners and towels because of similarities in the technology and materials used, in practice that substitutability is extremely limited. All suppliers other than Procter & Gamble stated that the substantial retooling required to alter the product produced on the dedicated machines used by the

⁽¹⁾ Between 35 and 40 %.

⁽²⁾ Between 10 and 15 %.

⁽³⁾ Between 5 and 10 %.

⁽⁴⁾ Between 15 and 20 %.

⁽⁵⁾ Between 45 and 50 %.

⁽⁶⁾ Between 1 and 5 %.

major producers makes such retooling uneconomic. Even if there were some limited supply side substitutability, it would be difficult for any increased capacity to be converted into market share by a company not already producing towels, given the non-technological barriers to entry to the towel market which are described later in the Decision.

(31) For the above reasons the Commission does not consider pantliners to be substitutable for tampons or towels as a primary method of menstrual protection.

(32) *Towels* are designed for menstruation (although there may be some marginal use for light incontinence). They consist of an absorbent pad in an envelope consisting of an impermeable back sheet and a permeable cover sheet. Within this basic design there are a large number of variations which manufacturers have developed in order to differentiate their product:

- a stay-dry versus fabric surface,
- with or without wings to hold the pad in place and protect underwear,
- shaped (e.g. butterfly shape) or straight-sided,
- flat or curved to fit the body,
- packaging — folded and individually wrapped or packed flat and unwrapped,
- central protection strip to wick moisture away from the centre of the towel and improve efficiency,
- thickness.

Perhaps the most important innovation in recent years has been the launch of new ultra-thin high-absorbency towels, such as the P&G product 'Always Ultra' and Johnson & Johnson's 'Silhouettes'.

(33) *Tampons* are used solely for menstruation. They are composed of a carded fleece of staple fibres compressed into a tampon. Tampons are internal devices and are either put in position manually (digital tampons) or with the aid of a plastic or cardboard applicator (applicator tampons).

(34) Both tampons and towels are sold in a range of absorbency capacities to cope with the variation in

the rate of flow between women and between different days of a period.

(35) In Germany, approximately one third of women use only tampons, one third only towels and one third use both products. In this decision these groups are referred to as solus tampon users, solus towel users and dual users. The exact proportions of the groups depend upon the source: a Link study supplied by P&G shows these groups in ratio 34:22:34 while figures derived by the Gesellschaft für Konsummarkt- und Absatzforschung (GfK) and also supplied by P&G show 28:35:33. Studies for other Member States show still different proportions.

(36) Among dual users, some purchases are for use of a tampon and towel in combination while others are for separate use. Where a woman buys both products but uses each at a different time, this does not mean that she is indifferent as to which method she uses. Dual use is based on the differences between tampons and towels which make the products non-substitutable in the individual consumer's eyes for a particular use.

(37) While both internal and external methods meet the basic need for some form of menstrual protection in the broadest sense, women appear to use each for distinct purposes, and to develop usage patterns according to strong personal preferences. The Commission's investigation has shown that this is not true merely of solus users but also of dual users. A survey of dual users prepared for Mölnlycke in Germany showed that they had specific usage patterns according to the situation. Although the sample of this study is small, it is sufficient to establish the existence of these preferences, whilst it is true that a larger sample would be needed to quantify these attitudes more reliably.

Activity	% dual users using only towels	% dual users using only tampons
Sports	7 %	66 %
Swimming	—	95 %
Socializing	10 %	51 %
In the office	21 %	41 %
At home	46 %	26 %

Source: Study on dual users in Germany prepared by Infratest Burke March 1994.

As can be seen, not all the women surveyed coincided in their choice of method for a particular situation, but what is of note is that such high proportions of women had a habitual preference for one or the other method for each situation. That the method preferred is not the same between women points to the intensely personal nature of the product and the vital role played by individual preferences.

- (38) This is not to ignore certain objective constraints on the choice of method, e.g. only tampons can be used for swimming, towels are less discreet than tampons, and women may be unable to use tampons immediately following childbirth, but these constraints are very limited in impact. Of much greater influence are consumer preferences. The importance of such consumer preferences was recognized in the earlier case 92/553/EEC (Nestlé/Perrier) ⁽¹⁾, where the Commission concluded that there are separate markets for soft drinks and bottled water because, while both quenched thirst, they were not recognized as substitutable by the consumer.

- (39) The differences between countries in the ratio of solus to dual use is also a function of the relative popularity of towels and tampons between women in different countries. This can be seen in the different 'penetration ratios' or ratio of usage of tampons to towels:

Country	tampon/towel ratio
UK	49:51
Germany	36:64
France	28:72
The Netherlands	25:75
Belgium	25:75
Denmark	22:78
Spain	12:88
Portugal	10:90
Italy	6:94
Greece	2:98

Source: (A) Nielsen volume figures for September 1992 — August 1993 compiled by a competitor.

- (40) While the choice of protection method is very subjective and personal, there are certain general

tendencies. A young woman's initial choice of both menstrual protection method and brand of product is often strongly influenced by the mother, elder sisters, close friends and health education programmes. Frequently the initial choice appears to be for a towel. Some young women then switch to tampons, particularly after leaving home. Some tampon users may then revert to towel use either permanently or temporarily after childbirth and in middle age. Medical or physiological reasons may oblige a woman to change her method of protection (e.g. heavy post-natal periods, choice of contraceptive method), and certain lifestyle and attitudinal changes may also be reflected in her choice of method.

- (41) In selecting a method of menstrual protection, non-price issues such as comfort, security and discretion are central. Towels traditionally had the disadvantage of being thick and indiscreet, although the new ultra-thin products overcome this problem to a large extent. Tampons still have some advantage in discretion and can be worn under tight-fitting clothing, while some women consider a tampon to be more comfortable, particularly for sports. Other non-performance considerations also play a role: towels may be seen by some women as more 'natural' because they allow the menstrual blood to flow and leave the body; for others there are perceived issues of morality in tampon use and for some women health concerns may play a role, particularly for teenagers considering whether to use tampons for the first time and who are afraid of damaging themselves by inserting a foreign body internally. Other health fears may arise out of toxic shock syndrome (TSS). The link between tampon use and TSS was first identified in the United States of America in 1981 and whilst in the USA and the United Kingdom almost all women are aware of the issue of TSS, elsewhere in Europe awareness of TSS is far lower.

- (42) While it is true that both tampons and towels broadly perform the same function, they do so in such a different way that they are not regarded as substitutable by the consumer once she has established a preference or pattern of usage. Consumers appear to have very personal preferences for a method, or particular combination of methods in the case of dual users, and these are dictated as much by the physiological and physical considerations discussed above as by the technical characteristics of the product. Changes in a woman's choice of protection method or combination of methods is not proof of the substitutability of towels or tampons for these women, however. The fact that they have a preferred method which they change as a result of changes in their personal circumstances does not

⁽¹⁾ OJ No L 356, 5. 12. 1992, p. 1.

mean that the women are indifferent as to the method they use; quite the contrary: it is because of the differences in characteristics between internal and external methods that women change, the better to meet their new circumstances.

Own label

- (43) Own-label towels account for about [...] ⁽¹⁾ by value and approximately [...] ⁽²⁾ by volume of towel sales in Germany. The same figures for Spain are [...] ⁽³⁾ and [...] ⁽⁴⁾ respectively. The very size of this difference between value and volume market shares raises the question of whether branded and own-label towels are in the same market. The own-label and store brand towels are a lower quality, lower price alternative to the branded products and are sold at a discount to branded towels (for example branded towels produced by VPS retail at prices 100 % higher than the own-label towels they produce for distribution chains). Retailers stated that whilst there was a price-conscious segment of consumers who bought own-label towels, considerable price increase would be necessary to persuade purchasers of branded towels to trade down to own label. Furthermore, it is necessary to recognize that own-label products in Germany, in terms of quality and reputation, are arguably not as developed as they are in the United Kingdom, for example.
- (44) The Commission considers that because of the sizeable discount at which own-label products are sold, there is only limited competition between branded and unbranded towels. Most products purchased involve for the consumer a trade-off between the best quality available and price. Sanitary towels would appear to be an area where many women are less prepared to compromise on quality for the sake of a low price, but faced with a branded towel price increase, some women may reassess this trade-off and decide that the new price is simply too high and buy a cheaper towel, accepting lower performance.

Prices

- (45) P&G argue that tampons and towels are priced in such a way as to compete head on with each other. In arguing this, P&G compare the average price of tampons (the tampon market leader in Germany) with that of Camelia pads (the market leader in

pads in Germany in 1993) and show that they are the same. Whilst this is correct, it should be noted that Camelia's actual retail prices range from DM 0,136 to DM 0,377 per unit (excluding VAT) and cannot be said realistically to be priced against ob prices. The Commission considers also that it is appropriate to look at the prices of P&G's own brand Always, which has become the market leader since the beginning of 1994: its average unit price is approximately 150 % that of ob. The Commission considers that in such a mixed situation it is not possible to draw even provisional conclusions from the relative price levels of tampons and towels.

Third party views

- (46) P&G's main competitors in Europe, Johnson & Johnson, Kimberly-Clark and Mölnlycke, all argued that there are separate markets for towels and tampons. Smaller competitors such as Rauscher and Hedwigsthal were of the same point of view. While the tampon manufacturer, Tambrands, at first stated that there is only one product market for both tampons and towels, subsequently it argued that there is in fact a separate product market for towels and that the Commission should give consideration to the availability of tampons as an alternative form of menstrual protection.
- (47) The Commission also contacted a large number of retailers in Germany, the UK, France, Spain and Austria. All but one of these retailers considered that tampons and towels were in different markets. Of the 21 retailers who expressed a view on the effect of towel promotions, 15 said that such promotions would have no effect on tampon sales, three said that the effect would be minimal, while one felt that such a promotion would increase sales for all catamenials.

Stability of usage patterns

- (48) As part of its evidence that women switch readily between tampons and towels, P&G commissioned a survey from GfK which asked women, *inter alia*, whether they would 'be prepared to switch to tampons/sanitary pads occasionally?' if a better pad/tampon were available or if the price of one method were increased by 10 %.

- (49) The results of this survey showed that 44 to 65 % of women would consider occasionally purchasing

⁽¹⁾ Between 10 and 15 %.

⁽²⁾ Between 20 and 25 %.

⁽³⁾ Between 10 and 15 %.

⁽⁴⁾ Between 15 and 20 %.

a different form of protection, or using it more frequently on the basis of an improved product, and 31 to 50 % on the basis of a 10 % price rise in the other form. In evaluating what conclusions it was legitimate to draw from this survey, the Commission considered first that there is a considerable difference between a willingness perhaps to try a product or to use it on an occasional basis and a lasting change in consumer habits. Secondly, it is necessary in interpreting data from surveys such as this to correct for overstatement on the respondent's part. A reputable model developed by a market research company used by several companies in this market describes how it is necessary to adjust for the natural desire of the interviewee to please; the fact that it is easier to say yes than no, and that the interest generated in the issue at the time of interview may not be lasting and may not be reflected in actual purchase behaviour in the future. This model assumes that it is necessary to adjust such scores downwards by 50 to 80 %.

- (50) A different consumer study commissioned in early 1993 by a Member State competition authority as part of an informal investigation of a national tampon market produced a very different result on the question of whether a woman would change her method of protection in the event of a price increase in one method. If prices for all brands of internal protection products rose by 10 %, then 95 % of solus tampon users would continue to use the same number of tampons (while 3 % would use fewer) and 80 % of dual users (tampons and towels) would continue to use the same number (12 % would use fewer). The same question asked for external products showed that the buying habits of 89 % of solus towel users and 78 % of dual users respectively would remain unchanged by a 10 % price increase while 11 % and 8 % respectively would use fewer. The degree of continued loyalty to a particular method is very high, particularly given the nature of this sort of study, which draws a woman's attention to a hypothetical price increase and emphasizes the possibility of switching. Especially significant is the large percentage of dual users who would be reluctant to change the intensity of their usage of a product, even though they are familiar with and actually use the alternative product.

- (51) P&G has provided data on the purchasing behaviour of individual women from the GfK purchase panel in support of its claim that women do not have a stable usage pattern of menstrual protection products. The purchase panel data shows that of those women on the panel who had purchased both a tampon and a towel in the first half of 1993, only 57 % had also purchased both a tampon and a towel in the second half of the year. This would seem to imply that nearly one half of all dual users become solus users every six months.

Similar panel data from A. C. Nielsen's household purchase panel of households with only one woman comparing nine-month periods show a more rigid purchase pattern, however. Of exclusive towel or tampon users in the first period, 87 % and 82 % respectively remained exclusive users in the second period. When the Nielsen panel data for the same periods are examined in terms of the number of units sold, which is a more important measure when assessing the price-constraining impact of any marginal substitutability between the two forms, it can be seen that for those women who only bought tampons in April to December 1992, only 6,3 % of their purchases in January to September 1993 were of pads. Similarly, 8 % of the purchases in the second period of those women who were exclusive pad purchasers in the first period were of tampons.

- (52) However, the fundamental problem in using purchase panel data in this context is that they reflect purchase patterns and not usage patterns. Average purchase cycles of towels are, according to Nielsen data, around 1,5 to two months and close to three months for tampons for all households in the panel. Women who are predominantly towel users, for example, may only buy tampons once a year or even less frequently and vice versa for predominantly tampon users. This problem is particularly relevant if comparisons are made between relatively short time periods such as six months. Furthermore, the panel data cannot explain why a purchase is made. In order to understand whether usage patterns are stable or continuously changing it would be necessary to know how many purchases took place owing to such factors as seasonal variations, child birth, women approaching menopause, and trial purchases.
- (53) P&G's arguments contradict the views of both competitors and retailers that women are particularly conservative and stable in their buying of feminine protection products, and are in fact highly loyal not only to a particular method or combination of methods but also to individual brands.

Price and cross-price elasticity

- (54) P&G claims that sales of towels are influenced by the price level of tampons and that they are therefore in the same product market. GfK scanner data provided by P&G purports to show a high own price elasticity for Always as well as the existence of cross price elasticity between towels and tampons. The scanner data from GfK of

weekly sales for 52 weeks from a sample of 120 stores with a surface of more than 800 m² thus shows that a [...] reduction in the price of Always produced on average a [...] increase in Always sales (own price elasticity of [...])⁽¹⁾ and a decrease in sales of ob tampons of [...] (cross price elasticity of [...])⁽²⁾, while a [...] increase in Always' price resulted in a [...] drop in Always sales (own price elasticity of [...])⁽³⁾ and an [...] increase in sales of ob (cross price elasticity [...])⁽⁴⁾). These data therefore seem to indicate a rather high own price as well as cross price elasticity to ob, in case of a price decrease. On the other hand the own price and cross price elasticities are much lower in case of a price increase. P&G has provided scanner data from other sources as well. The type of analysis is the same as for the GfK data and shows similar results.

(55) This type of analysis suffers, however, from several weaknesses. First, there are technical problems in calculating elasticities in this way. An own price elasticity calculated as [...] is for example an average of the effect of price reductions in the range 0 to 20 %. A 10 % price increase could for example exhibit a much lower price elasticity than a 20 % increase. Second, the calculation is only based on weeks when the price of Always was reduced. The analysis is therefore based on a rather limited number of observations. Thirdly, and more fundamentally, this type of analysis explains all variations in sales simply in relation to price changes on Always. This is obviously a very simple approach, which confuses variations in sales caused by such different factors as seasonal variations or promotions in other stores not included in the scanner sample with general price changes.

(56) A better way to estimate elasticities is to estimate a model including as many relevant variables as possible, i.e. to use a multivariate rather than a univariate approach. In this way it is possible to distinguish the various effects of the explanatory variables from each other. Therefore, a model based on a multivariate approach explains market behaviour in a more comprehensive way than would just price variations, and therefore reduces the risk of confusing one type of variation with another.

(¹) Between 1 and 2 %.

(²) Between 2 and 3 %.

(³) Between 2 and 3 %.

(⁴) Between 0 and 1 %.

(57) P&G has not provided an econometric analysis based on the GfK scanner data. However, A. C. Nielsen has developed an econometric price-promotion model ('Scanpro') based on scanner data similar to the GfK data, by means of which it is possible to estimate the effects of price promotions and general price changes whilst eliminating the effect of seasonal and other variations. The analysis is a standard product sold by A. C. Nielsen in many different countries for many different categories of consumer products and was supplied to the Commission in this case by Johnson & Johnson. The purpose is to enable companies to plan their promotional efforts better. An analysis was carried out using this model to compare Always Super Thin with ob. Such ultra towels are the towel type which could be expected to compete most closely with tampons. This analysis showed that neither ob promotions nor its long-term price development had had any significant impact on the sales of Always Super Thin when measured on a 95 % confidence level.

(58) The multivariate analysis by A. C. Nielsen provides additional useful insights and is a better way than the univariate analysis from GfK to understand the complex behaviour in the market place. It is, for example, likely that the price elasticities from the GfK analysis to a large extent reflect promotion effects. If they reflected long term rather than promotional elasticities, then even small price changes would lead to dramatic shifts in total market demand for ob tampons and Always Super Thin towels from one year to the next. P&G has also recognized that the GfK data could not be projected to the total market.

(59) These results are consistent with attitudinal survey data indicating that price is relatively unimportant for the consumer for this type of product. Furthermore, the analysis of scanner data provided by P&G contradicts the views of almost all retailers questioned, who said that promotions on towels resulted in reductions in sales of other towel brands but not of tampons. Where there was a slight effect, it was felt that this was due to stocking up by regular purchases, particularly dual users familiar with both products, of a brand when that brand was on promotion. However, as has been seen, a more elaborate econometric analysis makes it possible to reconcile the results from GfK's analysis with the views of retailers and competitors as well as providing elasticity estimates which can be projected to the market level.

(60) Whilst the A. C. Nielsen model is still, in some respects, crude, its results were confirmed by a separate multivariate analysis made by the American RLS company which was submitted to the Commission by a competitor. This study gave a price elasticity of 0,5 for pads, a cross-price elasticity of 0,3 for pads with respect to non-promoted price changes, and non-significant promotional elasticities. The study thus confirmed a low level of cross-price elasticity between tampons and towels found by the Nielsen study. Whilst this study relates to the USA and not Germany, the Commission notes that key market characteristics are similar: dual users constitute 39 % in Germany and 32 % in the USA while the penetration ratio is 40:60 in the USA and 39:61 in Germany.

(61) The conclusions of the econometric analyses above are confirmed by observations at the market level.

Impact of launch of Always

- (62) Were tampons and towels in the same market, it could be expected that events such as the entry of Always into the towel market and price increases in either market would have repercussions on the other market.
- (63) Always was launched in Germany in July/August 1991 and the following table shows the response

within six months and two years of average tampon and towel prices.

% change in price	Tampons	Towels ⁽¹⁾
within 6 months	+ 0,7	- 3,8
At February 1994	+ 18,2	+ 2,3

(1) Towels other than Always.

Source: Nielsen figures collated by a competitor.

As can be seen, average prices of towels other than Always at first fell slightly and then rose by only 2,3 % in two years. Tampon prices on the other hand rose slightly in the half year following the introduction of Always and then rose 18,2 % over the next two years.

(64) P&G has argued that tampons are substitutable for towels and that its Always towels have taken market share from tampons since their launch. The table below shows the relative volume share of towels and tampons of the combined towel and tampon market in Germany (referred to as the 'penetration ratio'), where Always was launched in July 1991.

Evolution in the penetration ratio (pads/tampons) showing P&G's share of towel usage separately
(volume based)

Country	July 1990/June 1991			July 1991/June 1992			July 1992/June 1993		
	towels		tampons	towels		tampons	towels		tampons
	P&G	others		P&G	others		P&G	others	
Germany	—	64	36	5	58	37	11	52	37
% change volume	(100)		(100)	+ 17 %		+ 20 %	+ 4,9 %		+ 5,5 %

Always launch July 1991.

Source: Commission calculation on the basis of Nielsen volume figures supplied by P&G.

(65) It should be noted for this table that the market growth in 1991/92 is thought to result from the inclusion of the new German *Länder* since reunification. It is necessary to use volume figures here in order to assess whether switching has taken place. As can be seen, in Germany the entry of

Always in July 1991 did not result in any reduction in tampons' share of the combined tampon and towel markets.

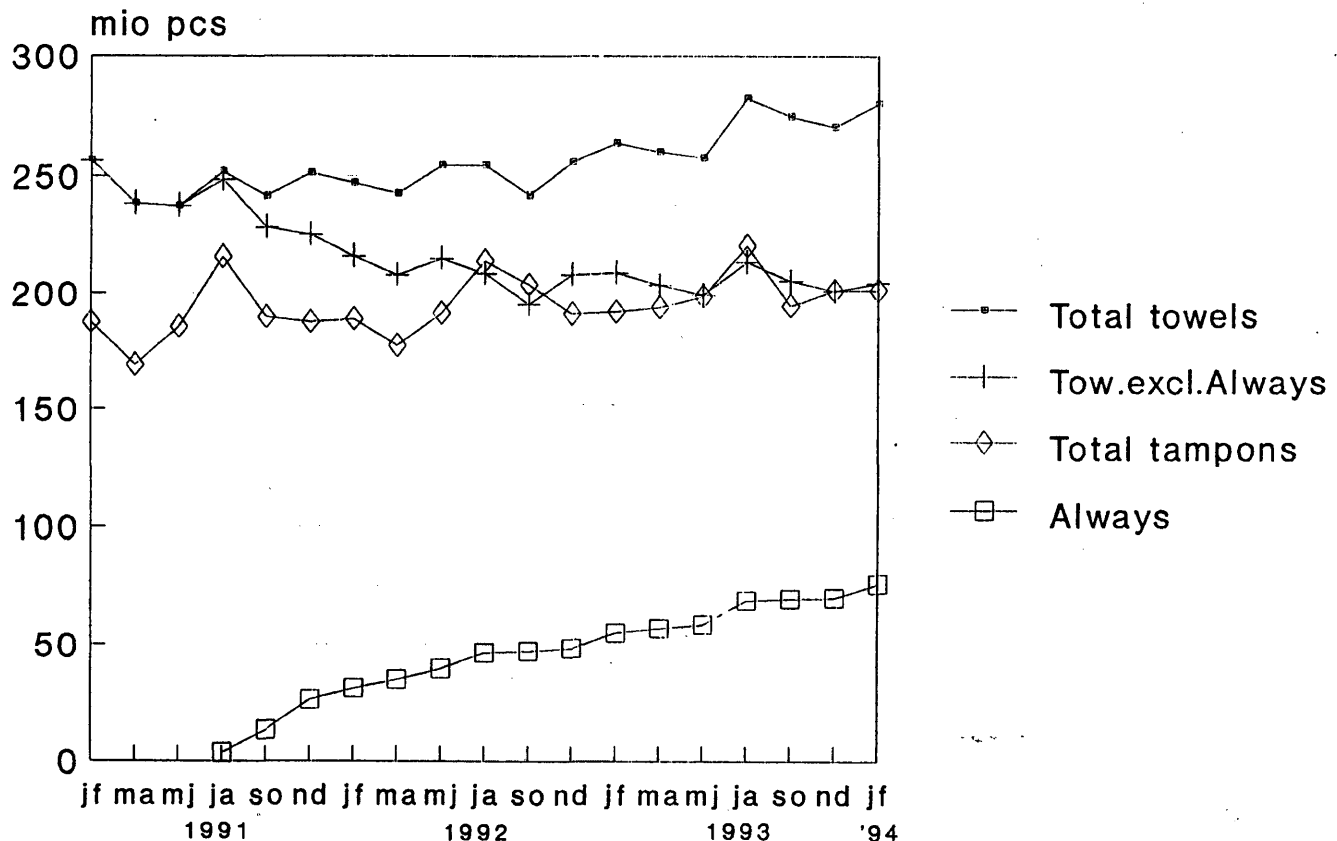
(66) P&G argue that this picture is misleading and that while the penetration ratio is stable in Germany,

Always has in fact obtained [...] of its market share (and [...] of its gains from other brands) from tampons, and that tampons have gained a similar volume from towels, particularly the thicker and also less premium variants. This analysis was prepared for P&G by GfK, and is again on the basis of a purchase panel with no explanation of the results obtained. Furthermore, the shifts shown in the graph in the next paragraph for the old *Länder* of Germany are

repeated in virtually all EEA states following the launch of Always, i.e. tampon volumes were unaffected. It seems very improbable that in all these cases exactly compensating shifts in volume from tampons to Always and from other towels to tampons occurred.

- (67) The impact of the launch of Always in the old *Länder* of Germany is shown in the following graph:

Sales in mio. units in West Germany



Volume

Source: Nielsen

- (68) As can be seen, tampon sales in 1993 are slightly higher than in the previous year and there appears to be little evidence of Always taking from tampon volume.

- (69) What can be seen in the next graph, supplied by a competitor but based on Nielsen data, is that Always has taken large market shares from other towel brands since its launch in the old *Länder* of Germany, particularly from VPS's Camelia brand:

(70) Another example of the low level of interplay between the two markets can be seen in the price rise of ob tampons in May/June 1993. Ob packs were reduced from 80 to 64 units while price was held constant (an effective 25 % price increase) and ob, with a 75 % share, is a good proxy for the German tampon market as a whole. Always prices remained constant following the ob move and its rate of growth in market share not only did not increase but slowed through the last six months of 1993. Similarly, volume of all towels did not show any marked response to the tampon price increase.

(71) Figures supplied by Mölnlycke show that in the Nordic countries, where Mölnlycke sells both tampons and towels, it dramatically increased its advertising and promotion spend on towels in response to the launch of Always in mid-1992 (mid-1993 in Norway) but there was little increase in the level of spend on tampons. Between 1991 and 1993 towel A&P expenditure was increased by over 200 %, whilst that on tampons by only 34 %.

Targeting of advertising

(72) The parties stated that manufacturers of both tampons and towels launched publicity campaigns aimed at encouraging users of external products to switch to internal ones and vice versa, arguing that manufacturers would not make such expenditure unless the products were in the same market. In the Commission's view, such advertising is not incompatible with the existence of separate markets because there is indeed a degree of switching in the long term and over the course of a woman's life as described earlier. The point of such advertising campaigns is to encourage such switching and to familiarize women with the arguments for switching in advance of major changes in their lives. Furthermore, much of this advertising is directed at adolescent women still experimenting with the two methods.

Supply-side substitutability

(73) Tampons are manufactured in an entirely different fashion, from a compacted fleece of staple fibres, while towels are made from 'cellulose fluff' which is the same wood-based raw material used in the production of nappies and household paper products. The technologies, while relatively unsophisticated and inexpensive, are unrelated.

Conclusion on relevant product market

(74) P&G argues that there is only one feminine hygiene market for towels, tampons and pantliners, and based itself upon a variety of household panel, scanner data and price studies. Whilst the Commission recognizes the seriousness of the research presented, it considers that the data is too narrowly specific to support the broad market conclusions which P&G draws from them. Furthermore, the Commission has examined market research studies provided by third parties which, while also presenting certain methodological difficulties, are broader-based and appear strongly indicative of separate markets. The Commission has been assisted in its analysis of the conclusions which it is legitimate to draw from the market research materials at its disposal by two independent experts in market research analysis.

(75) While none of the market research studies presented to the Commission is decisive, it considers that several are strongly indicative of the existence of separate markets for pads and tampons. If this indicative evidence is placed alongside the Commission's own analysis of the market and the views not only of other suppliers but also of retailers, with all of which it is consistent, the Commission concludes that there are indeed clearly separate markets not only for pantliners but also for pads and tampons.

B. Relevant geographic market

(76) P&G has submitted that the relevant geographic market is Western Europe, arguing that the major suppliers of feminine hygiene products are active in several or even most of the EEA countries and that European brand names used by these manufacturers are predominant in each country. Furthermore, they refer to the absence of legal of tariff barriers, to a high degree of standardization in advertising and packaging, low transport costs, European sourcing and an increasing pan-European purchase policy of retailers.

(77) In view of the structural elements set out below, and after examination of the competitive environment in the sanitary towel market in the EEA, the Commission has, however, concluded that at least in respect of Germany and Spain the relevant geographic market within which the market power of Procter & Gamble post-merger has to be assessed is national. Several factors indicate that the parties to the concentration are and will be able to determine their competitive behaviour in Germany and Spain without suffering

significant competitive constraints from outside these countries. It can be left open whether Austria also constitutes a separate geographic market for sanitary towels as the concentration does not lead to the creation of a dominant position in Austria as set out below.

1. Consumer preferences

- (78) Consumer demand for sanitary towels presents different characteristics in each Member State. This can be seen not only in the variation of the relative popularity of towels as opposed to tampons between Member States but also, and more importantly, within the category of sanitary towels. Whilst traditional thick and wingless towels are still the most commonly used sanitary towels (about 70 % in volume in the large Member States), innovations such as ultra-thin and winged-towels have led to varying consumer preferences. Ultra-thin, winged towels, for example, are used by French and British consumers more than by Spanish, Italian and German consumers. Thick, winged towels show the opposite tendency. A greater proportion of women use ultra-thin wingless towels in Germany than in France and the UK. While these usage patterns may not be sufficient on their own to identify national markets, they must be seen in the context of other points set out below.

2. Prices for sanitary towels

- (79) The Commission investigated the level of ex-factory prices and prices paid by distributors net of all discounts and rebates (net net prices) for towels in different Member States. It then indexed the prices, taking the average as 100. In the case of Procter & Gamble, the difference between the highest and the lowest indexed ex-factory prices in France, Germany, UK, Belgium and the Netherlands was [...] ⁽¹⁾ points. The same figure for net net prices was [...] ⁽²⁾ points. There were significantly higher differences in competitors' prices, however, from country to country. For each competitor, the difference between the highest and the lowest prices in these countries was up to 34 points for ultra-thin winged towels (in terms of net net prices) and up to 52 points in ex-factory prices. Maximum differences in thick, wingless towels range between eight and 34 points for different

suppliers (net net prices) and 19 to 57 points (ex-factory prices) ⁽³⁾.

- (80) In Spain and Italy, ex-factory prices and net net prices range significantly below the prices in all other Member States (notwithstanding the rapid growth in prices over recent years from a low base). This is particularly true for thick towels, where products by P&G (Arbora) or by Johnson & Johnson are more than 50 points cheaper in Spain than in Germany and other Member States. Even for ultra thin towels, prices differ by more than 25 points between Spain and other countries. This is equally true for ex-factory prices and for net net prices. Spanish retailers contacted by the Commission confirmed that the ultra-thin products Evax and Ausonia supplied by the two joint ventures by P&G and other companies are equivalent to the ultra-thin towel of Always.
- (81) Prices for towels have evolved at markedly different rates in Germany and other Member States. According to Nielsen figures supplied by a competitor, between January to April 1991 and January to April 1993 average towel prices in Germany rose by 10,6 %, whilst between May to August 1991 and May to August 1993, average towel prices rose by 24 % in France, 43 % in the UK and 45,5 % in the Netherlands.

3. Supply side

- (82) While it is true that the big suppliers of sanitary towels operate in several Member States and EFTA countries, it cannot be disregarded that there are 'home markets' for each supplier and that market shares vary significantly even between neighbouring countries.
- (83) Companies which have strong market positions in countries bordering on Germany (e.g. Kimberly-Clark's [...] ⁽⁴⁾ share in the Netherlands market, Mölnlycke's [...] ⁽⁵⁾ in Denmark, [...] ⁽⁶⁾ in France and [...] ⁽⁷⁾ in the Netherlands) are either not present or only to an insignificant extent in Germany itself. Even Johnson & Johnson, the strongest competitor of P&G in Germany post-merger with [...] ⁽⁸⁾, holds a significantly

⁽¹⁾ Between 10 and 20.

⁽²⁾ Between 10 and 20.

⁽³⁾ Prices for towels vary significantly relative to prices for tampons in the different Member States and do so independently of their relative penetration levels.

⁽⁴⁾ Between 25 and 30 %.

⁽⁵⁾ Between 60 and 65 %.

⁽⁶⁾ Between 15 and 20 %.

⁽⁷⁾ Between 30 and 35 %.

⁽⁸⁾ Between 10 and 15 %.

higher market share ([...] ⁽¹⁾) in Austria. Suppliers with strong positions in France (Kaysersberg, Mölnlycke and Kimberly-Clark) are similarly absent from the Spanish market.

- (84) P&G itself markets sanitary towels and pantliners in 13 EEA countries and by means of joint ventures in a further three: Italy, Spain and Portugal. VPS sells the full range of feminine hygiene products in Germany, Austria, Switzerland, Spain and Italy. VPS production facilities, however, are located in Germany with a plant in Spain. P&G sources [...] of its towel products for Italy and Spain from its plants in these countries. P&G's German plant in Crailsheim supplies Germany ([...]), France ([...]), UK/Ireland ([...]) and other EEA countries (around [...]).

- (85) The other main suppliers all sell their products in a range of EEA states, but they also have several production sites. Johnson & Johnson, which is the most widely active of Procter & Gamble's competitors, has six production sites in Western Europe. Mölnlycke, which operates primarily in France, the Netherlands, Belgium, UK, Denmark and the Nordic countries, has plants in the UK, the Netherlands, France and Norway, although in January 1994 they also acquired the Italian company Sodalco ('Nuvenia'). Kimberly-Clark is mainly active in the UK, Ireland and the Netherlands and supplies other countries such as France from its plants in the UK and the Netherlands. Thus none of Procter & Gamble's competitors sources its supplies from a single site and while they do not have separate production facilities in every EEA country, there appears to be a regional supply correlation. In any event, the mere centralization of plants would not, in itself, be incompatible with separate national markets.

- (86) The investigation made by the Commission as to the destination of towels produced in each plant showed that most of the suppliers and in particular Procter & Gamble situate their plants in a way which avoids long distances of transport, at least for large volumes. In particular, the principal markets such as Germany, the UK, France, Italy and Spain, are thus supplied over relatively short distances. One competitor explained that in order to enter an EEA country's market it purchased a local company because it was uneconomic to

supply from its geographically remote production sites. Procter & Gamble has confirmed that a supplier needs a manufacturing location which allows affordable distribution costs. It gave figures for transport costs of [...] ⁽²⁾ for deliveries from Germany to France and [...] ⁽³⁾ from Germany to the UK, while a competitor provided costings that show that for journeys to the UK, Sweden and Italy, transport costs represent [...] ⁽⁴⁾, [...] ⁽⁵⁾ and [...] ⁽⁶⁾ respectively of their inter-company transfer price. Most of the suppliers provide their destinations from neighbouring countries or at least over relatively short distances.

- (87) From the limited number of production facilities of the big suppliers it can be concluded that economies of scale are more important to some producers than the saving of transport costs. On the other hand, the impact of transport costs is, as was shown above, far from insignificant, and the big suppliers apparently tend to supply their major markets over relatively short distances.
- (88) Procter & Gamble themselves submitted that 90 % of suppliers to the German market for sanitary towels, for example, are provided by German suppliers (VPS, Pelz, Hedwigsthal) or by German plants of international suppliers (Procter & Gamble, Johnson & Johnson). The remaining share falls to private label supplies, which are partly imported. Other than this, imports are minimal although there are no legal or tariff barriers. In Spain local producers with local plants (including VPS) supply over 80 % of the market, and again most of the remaining share falls to private label.

4. Brands

- (89) Procter & Gamble argues that European brand names are predominant in Western Europe and that, even where names vary, manufacturers are using transnational technologies and multilingual packaging. The enquiries of the Commission did not confirm this, particularly in Germany and Spain. The existence of some 'Eurobrands' does, in any case, not automatically prevent the market from being essentially national.

⁽¹⁾ Between 30 and 35 %.

⁽²⁾ Between 1 and 5 %.

⁽³⁾ Between 5 and 10 %.

⁽⁴⁾ Between 10 and 15 %.

⁽⁵⁾ Between 5 and 10 %.

⁽⁶⁾ Between 5 and 10 %.

- (90) None of the suppliers of sanitary towels uses the same brand name across Western Europe, not even P&G, although it is present in 10 out of 12 EC Member States. The following survey of Member

States reveals a substantial variety of brands which shows that the competitive structures in the different countries still differ.

Towel brands in EU Member States ⁽¹⁾

	P&G	VPS	J&J	Kaysersberg	Kimberly-Clark	Mölnlycke
Germany	Always	Camelia	Silhouettes Serena			
France	Always		Silhouettes	Vania	Kotex- Freedom	Nana
United Kingdom	Always		Silhouettes Vespre		Kotex- Simplicity	Bodyform Pennywise
Italy	Lines		Silhouettes			Nuvenia
Spain	Ausonia Evax		Silhouettes			
Netherlands	Always				Kotex	Libresse
Belgium	Always			Vania		Nana Mimosept
Denmark	Always					Libresse
Portugal	Ausonia Evax		Serena Modess Stayfree			
Greece	Always		Serena			Nana
Ireland	Always		Vespre Stayfree Staydry		Kotex- Simplicity	

⁽¹⁾ Brands with a market share in excess of 3 %.

- (91) As can be seen, brands can be classed either as European (Always and Silhouette) or essentially national. Some of the latter category may extend over two or three neighbouring countries with close ties (e.g. Vania in France and Belgium, Ausonia and Evax in Spain and Portugal). A large proportion of sales in Europe are actually made by important, essentially national brands (eg, Lines and Nuvenia in Italy, Camelia in Germany, Evax and Ausonia in Spain). Since brands like Serena and Vespré (Johnson & Johnson), Kotex and Freedom (Kimberly-Clark) and Libresse and Nana (Mölnlycke) cannot, or cannot yet, be qualified as Pan-European brands, it can be said that sales of current European brands — essentially Always and Silhouette — achieved [...] ⁽¹⁾ in value and [...] ⁽²⁾ in volume in 1993 in Western Europe

(based on Nielsen market share data from P&G and sales figures from Johnson & Johnson).

5. Demand side

- (92) The German retail trade remains substantially national in character. Commercial terms for German retailers differ significantly from those for French or Italian retailers for example. Trade margins are much lower in Germany than in the United Kingdom, for example, and the number of retail outlets differs significantly from some other Member States (only 70 000 in Germany compared to 100 000 or even more in Italy and Spain, despite Germany's far greater population). Own-label products in Germany have a lower quality image and are less important in competitive terms than they are in other markets, e.g. the United Kingdom, where own-label is a much more developed concept and is priced closely to

⁽¹⁾ Between 30 and 35 %.

⁽²⁾ Between 15 and 20 %.

premium branded products. Accordingly, price differences between premium brands and private label products are significantly larger in Germany. In the case of VPS, the average retail price excluding VAT of its branded Camelia products in Germany is DM [...] ⁽¹⁾ as compared to DM [...] ⁽¹⁾—DM [...] ⁽¹⁾, for its distributor brands.

markets for sanitary towels. These barriers (which are discussed in detail in the Assessment) in themselves indicate that the geographical market is national.

High level of concentration

(93) Purchasing is conducted on a national basis. German, United Kingdom and French retailers stated that their contracts with multinational manufacturers of feminine hygiene products such as P&G were negotiated through the national sales organizations of those manufacturers and at a national level. The existence of national sales organizations is not only, as P&G submitted, due to language differences among EEA States. As was confirmed by retailers contacted by the Commission, retailers claimed to be unaware of, and indifferent to, prices in other countries, claiming that an attempt by a French distributor to purchase from Procter & Gamble (Germany) would result only in their being referred to Procter & Gamble (France). If the major distribution groups of France, Germany, Spain and the United Kingdom are unable to do this, it cannot be expected that the smaller and more fragmented retail groups in Spain and some other EEA states should do so. Only private label products might be purchased abroad to a limited extent by retail chains anxious to ensure the lowest prices. The retail chains then of course impose their own branding on the goods to conform to local tastes.

(96) The high degree of concentration in the German towel market, with three companies — Procter & Gamble, Johnson & Johnson and VP Schickedanz — holding [...] ⁽²⁾ (in value) and [...] ⁽³⁾ (in volume), constitutes a considerable barrier to entry. It increases the risks associated with new entry in the sense of a reaction by the established suppliers against newcomers with a view to defending the acquired market positions and profitability. The same is true of the Spanish market, where Procter & Gamble alone holds [...] ⁽⁴⁾ by value and [...] ⁽⁵⁾ by volume.

Brand loyalty

(97) The existence of a relatively high level of brand loyalty in the sector of sanitary towels makes it difficult to persuade users to switch to a new product and, for suppliers, to enter the market. In countries such as Spain and Italy, P&G entered the sanitary towel market by acquiring strong national brands which were retained afterwards, because of the value represented by these brands, i.e. the loyalty of customers to them.

Access to distribution

(98) The towel market is a mature market in terms of the number of brands and range of products. In Germany and Austria, access to retail chains with a new brand is not impossible, it was shown by the introduction of Always, but requires an innovative and premium product and substantial efforts in advertising and promotion (sampling, etc.).

Advertising sunk costs

(99) The establishment of a new brand would require heavy investment in advertising and promotion in order to persuade brand loyal customers to switch away from their usual brand. Such expenditure is a sunk cost and adds to the risk of entry.

6. Market entry barriers

(95) In addition to the varying competitive conditions prevailing in different EEA States, there are significant barriers to entry into the national

⁽¹⁾ The ratio of VPS's branded product prices to its distributor brand prices is between 2:1 and 2.5:1.

⁽²⁾ Between 80 and 85 %.

⁽³⁾ Between 60 and 65 %.

⁽⁴⁾ Between 80 and 85 %.

⁽⁵⁾ Between 65 and 70 %.

Past attempts of market entry

- (100) The barriers to entry to the German market in particular can be illustrated with reference to the failure of several attempts in recent years to enter the sanitary towel market in Germany, notwithstanding the success of the launch of 'Always' due to P&G's high level of commitment and investment in its launch (see Assessment).

Conclusion

- (101) Factors such as the possibility to price differently in Germany and Spain as opposed to other EEA States, the brand loyalty of customers, the high level of existing concentration and the investment risk associated with entry, form a conglomeration of factors creating an important barrier to entry to the German and Spanish markets. This has been confirmed almost unanimously by the retailers and industrial suppliers consulted by the Commission. The price differentials between Germany and other countries, the importance of the Camelia brand, national purchasing by retailers (even by large chains) and the failed attempts at market entry, all demonstrate Germany to be a national market. Similarly, the market structure in Spain is characterized by the very high combined positions of Ausonia and Evax, produced by Arboria and Ausonia, which are jointly controlled by Procter & Gamble. Other suppliers do not play a significant role. Spain, thus, presents the highest level of concentration within the EEA in sanitary towels. The existing brands, especially those mentioned above, are purely national; Always has not been introduced in Spain. In addition, the Spanish retail sector is still markedly fragmented in comparison with Germany.
- (102) P&G subsequently argued that the relevant geographic markets were regional. They identified three such regional markets: the nordic countries; other north European countries (Benelux, Germany, France, the United Kingdom and Ireland); and southern Europe. Whilst it is true that these groupings of countries may share certain common characteristics (such as penetration ratio), there are significant differences in the supply structure even within these groupings. In particular, major players may be absent or hold radically different market shares between neighbouring countries. Kimberly-Clark and Mölnlycke are not present on the German market but have considerable market shares in neighbouring countries. VPS, which was the market leader in Germany until 1993, has no presence in France, Benelux or the United Kingdom while the Belgian and French markets are characterized by important brands which are not supplied to neighbouring countries (Vania, Nana). Similarly the major brands in Spain, Ausonia and

Evax, are not present in Italy while major Italian brands such as Lines and Novenia are not present in Spain. While it cannot be excluded that there might be a France-Benelux market, the differences in market structure and brands would exclude Germany and Spain from such a market.

Prospective of the relevant geographic market

- (103) P&G submits that the relevant geographic market is already Western European. In particular, they refer to the presence of large transnational suppliers in the sanitary towel sector across Western Europe and to the increasing importance of European brand names. P&G itself appears to follow a European strategy with Always and in the light of the results of its investigation the Commission recognizes that there are some indications of a development towards a European market. At least one supplier other than P&G is attempting to harmonize national or regional brand names while others are using multilingually-labelled packages. Furthermore, developments in the retail trade, such as cross-border acquisition, and formal and informal transnational groupings of retailers, suggest the first tentative signs of an integration and Europeanization of the retail trade in the EEA. Relatively low transport costs and centralization of plants may support this view.
- (104) This does not mean, however, that the Spanish and German markets are anything other than national at present. Nor will the completion of a common market in this sector be achieved within the foreseeable future (e.g. within three years). In a sensitive, brand-loyal market such as this one, suppliers cannot switch to a European brand name too quickly without losing sales. The timescale for a possible Europeanization of the market exceeds the relevant perspective to be established by the Commission under the Merger Regulation and the assumption that markets will indeed become European at the end of this period must be regarded in the light of the evidence as by no means certain. The fact that, in the longer term, the sanitary towel market may, in fact, become European cannot therefore be taken into account at present.

C. Assessment

Overview of the towel market

- (105) The market for sanitary towels has been growing at less than 5% in volume in recent years in Europe. With population growth relatively

stagnant, increased demand is mainly due to use of a greater number of product units per period by women. In value terms the market has grown enormously since 1991/92. According to adjusted Nielsen figures supplied by P&G, the West European towel market has grown by 9 % and 16 % over the last two years while the same figures for Germany show increases of 32 % and 21 % in the value of the market. The West European towel market was worth over ECU 1 500 million per annum as of June 1993, while the German market was worth ECU 269 million per annum. This growth in the value of the market is due to the introduction in the early 1990s of new, sophisticated products which, for example, were thinner, considerably more absorbent and had 'wings' (adhesive tabs on the side of the towel to hold it in place) or were body-shaped, etc. These innovative products were and are able to command a considerable premium over more traditional products.

Suppliers

- (106) The major players in the towel market in the EEA are P&G, which makes towels and pantliners, and Johnson & Johnson (J&J), Mölnlycke and Kimberly-Clark, which all make towels, pantliners and tampons. P&G is present in all EEA countries and Switzerland, although its presence in Spain, Portugal and Italy is through joint ventures with local companies. J&J is also present in all EEA states except Denmark, although not for all three products. Mölnlycke's business is centred on the Nordic countries, France, the UK, Benelux and Greece, while that of Kimberly-Clark on France, the UK, Benelux and Ireland, with a marginal presence in Germany.
- (107) Johnson & Johnson is part of a worldwide personal care and toiletries company. It is the next largest towel producer after P&G in Western Europe, with [...] ⁽¹⁾. It is the largest supplier of pantliners in Western Europe with [...] ⁽²⁾, and the second largest tampon producer behind Tambrands, with [...] ⁽³⁾. In Germany, Johnson & Johnson is the third largest towel producer, behind P&G and VPS, as well as being the largest tampon supplier in Germany, with about 80 %. In Austria it is the largest towel producer, with a market share of [...] ⁽⁴⁾ by value, but the merger of VPS and P&G will result in P&G becoming the new market leader, with [...] ⁽⁵⁾. In Spain, Johnson & Johnson has only minimal (1 %) share of the towel market, although it is stronger in other catamenial products in Spain. Its towel product range includes ultra-thin high-absorbency towels similar to the 'Always' ultra towels, which were launched at a similar time and are also premium priced.
- (108) Mölnlycke, which owns Peaudouce of France, is the second largest towel manufacturer and also makes tampons and pantliners. It is wholly owned by Svenska Cellulosa AB, a Swedish corporation. Geographically its strength lies in Scandinavia, with a regional market share in excess of 50 % for pads (over 90 % in Norway), and it also has significant shares in the UK, France, Netherlands and Belgium. It is not present in Germany, Ireland, Spain, Portugal or Austria and has just bought a company in Italy which markets the Nuvenia brand.
- (109) Kimberly-Clark is one of the leaders in the US market for towels but has significant market shares only in the UK, Ireland, France and the Netherlands. It is not present in Austria and Spain and has only a 0,9 % share of the German market. It also makes tampons and pantliners. Kimberly-Clark does not market an ultra-thin product in Europe.
- (110) Further competitors in Germany are Pelz and Hedwigsthal, both of which have market shares clearly well under 5 %. Aldi, the retail discounter, sells an own-label brand which has [...] ⁽⁶⁾ in value and [...] ⁽⁷⁾ in volume of the German towel market according to a P&G estimate.
- (111) Kaysersberg is active in the household hygiene paper and sanitary protection sectors. The only catamenial products it produces are sanitary towels, sold under the brand name 'Vania', primarily in France and Belgium. Since February 1990, Kaysersberg has been the wholly-owned subsidiary of a Dutch holding company named Jamont NV, jointly owned by James River Corporation and Cragnotti and Partners. Kaysersberg is active in France in the feminine hygiene and adult incontinence protection sector through two companies: Vania Expansion for retailer chains and Polive for pharmacies. Both are owned 50/50 by Kaysersberg SA and Johnson & Johnson but are controlled by Kaysersberg alone.

⁽¹⁾ Between 10 and 15 %.

⁽²⁾ Between 35 and 40 %.

⁽³⁾ Between 35 and 40 %.

⁽⁴⁾ Between 30 and 35 %.

⁽⁵⁾ Between 35 and 40 %.

⁽⁶⁾ Between 5 and 10 %.

⁽⁷⁾ Between 15 and 20 %.

Market shares

- (112) In assessing the market shares of the parties, the Commission considers the most appropriate measure to be that of market share measured by value. The parties, however, have argued that volume market shares are more appropriate because the difference in price between different towels does not arise because they can be used for longer or because fewer of them can be used, but simply because the more expensive ones are more comfortable or perform better when used. Thus the number of units used by a consumer is a good indication of the hold of the manufacturer over that consumer in terms of future purchases. Whilst this might be true if higher prices did not reflect higher quality, in the case of the towel market they generally do.
- (113) Feminine hygiene products, and more particularly towels, are heterogeneous products differentiated according to size, absorbency (mini, normal, super or overnight) and the special features described earlier. These differences, which determine the attractiveness of the product to a consumer, are reflected in its price and thus in value market shares.
- (114) In the case of sanitary towels, premium branded products cost between 50 and 100 % more than secondary brands or private label products. The most expensive towels are the technically sophisticated ultra type, which constitute the growth sector in the market as a whole. A company's strength in this growth sector, which is reflected by its value market share, is an important indication of its competitive positioning.
- (115) The ability of a manufacturer to command a higher price for its products than for competing products, whether as a result of product innovation, advertising, branding or marketing, is

an important indication of the relative market power of that company compared with its competitors. This ability is reflected in value market shares but not in volume.

- (116) Furthermore, in a sector where heavily promoted branded goods predominate, value shares are an approximate indication of the financial resources available to a manufacturer for reinvestment in its brand, particularly through advertising.
- (117) For these reasons, the Commission considers that market shares in value better reflect the real market strength of companies in this market than market shares in volume (see also Commission Decisions 92/553/EEC of 22 July 1992 'Nestlé/Perrier', recital 40 and 93/252/EEC of 10 November 1992 'Warner Lambert/Gillette' ⁽¹⁾, recital 22).
- (118) The following market shares were supplied by P&G and are for both volume and value. The figures are based on Nielsen data and have been adjusted by P&G to account for Nielsen's imperfect coverage ⁽²⁾. The data given in the table below is for those three national markets where the operation results in a significant increase in market share for P&G.

⁽¹⁾ OJ No L 116, 12. 5. 1993, p. 21.

⁽²⁾ Nielsen does not cover certain important retail outlets (it estimates its coverage factor in Germany to be 76 %). P&G have therefore assumed that relative market shares of suppliers of Nielsen stores are identical to those of the market as a whole, except in respect of Aldi, which sells only own-label goods. Furthermore, to the extent that competitors of P&G produce own-label products, these are included in 'others' in Nielsen data. J&J and P&G do not produce own-label fempro products.

(119) National markets, market shares of sanitary towels — 1993 ⁽¹⁾

	Germany		Spain		Austria	
	Value 1993 (%)	Volume 1993 (%)	Value 1993 (%)	Volume 1993 (%)	Value 1993 (%)	Volume 1993 (%)
P&G	35—40	20—25	75—80	65—70	20—25	15—20
VP Camelia	20—25	20—25	1— 5	1— 5	10—15	10—15
P&G + Camelia	60—65	40—45	80—85	65—70	35—40	30—35
VP other brands	5—10	10—15	0	<1	1—5	1—5

Source: A.C. Nielsen adjusted by P&G.

⁽¹⁾ Exact market shares deleted as a business secret.

	Germany		Spain		Austria	
	Value 1993 (%)	Volume 1993 (%)	Value 1993 (%)	Volume 1993 (%)	Value 1993 (%)	Volume 1993 (%)
Johnson & Johnson	10—15	5—10	1— 5	<1	30—35	20—25
Mölnlycke	—	—	—	—	—	—
Kimberly-Clark	<1	<1	—	—	—	—
Rauscher	—	—	—	—	15—20	25—30
Private labels	10—15	20—25	10—15	15—20	5—10	1— 5
Others	5—10	10—15	5—10	10—15	1— 5	10—15

Source: A.C. Nielsen adjusted by P&G.

Germany

- (120) The transaction will give rise to an addition of market shares on national markets in the four markets where VPS is present. Even after taking into account the divestment of VPS's non-Camelia business offered by Procter & Gamble, its post-merger market share would be [...] ⁽¹⁾ in value ([...] ⁽²⁾ in volume) of the German market. Without any divestment of the non-Camelia business the shares would be [...] ⁽³⁾ (value) and [...] ⁽⁴⁾ (volume). The next largest competitor after the merged entity would be Johnson & Johnson with [...] ⁽⁵⁾. Aldi's share of the market through its sales of own-label towels is estimated by P&G to be [...] ⁽⁶⁾, while small producers like Pelz and Hedwigsthal have together [...] ⁽⁷⁾ (their individual shares are not recorded by Nielsen). Kimberly-Clark has only [...] ⁽⁸⁾ of the German towel market.

- (121) Procter & Gamble's market share continues to grow, although the rate of increase has recently slowed somewhat in Germany. In the year to June 1992 following the launch of Always in Germany, P&G gained a [...] ⁽⁹⁾ (in value) which increased to [...] ⁽¹⁰⁾ in the year to June 1993 and to [...] ⁽¹¹⁾ in the year to December 1993. VPS's Camelia brand, like other brands, suffered considerable losses in market share in this period, so the combined market share of P&G and Camelia rose more slowly, although there has been a steady increase ⁽¹²⁾.

⁽¹⁾ Between 60 and 65 %.

⁽²⁾ Between 40 and 45 %.

⁽³⁾ Between 65 and 70 %.

⁽⁴⁾ Between 50 and 55 %.

⁽⁵⁾ Between 10 and 15 %.

⁽⁶⁾ Between 5 and 10 %.

⁽⁷⁾ Between 5 and 10 %.

⁽⁸⁾ Less than 1 %.

⁽⁹⁾ Between 15 and 20 %.

⁽¹⁰⁾ Between 25 and 30 %.

⁽¹¹⁾ Between 35 and 40 %.

⁽¹²⁾ Exact market shares deleted as business secret.

Germany	value	volume
July 1991/June 1992	45—50 %	30—35 %
January 1993/December 1993	55—60 %	35—40 %
January 1993/December 1993	60—65 %	40—45 %
November 1993/ December 1993	60—65 %	40—45 %

Spain and Italy

- (122) In Spain, P&G's already strong position via its joint ventures Arbora and Fater of [...] ⁽¹³⁾ by value ([...] ⁽¹⁴⁾ in volume) will be increased by [...] ⁽¹⁵⁾. Johnson & Johnson's share is only [...] ⁽¹⁶⁾ value ([...] ⁽¹⁷⁾ volume), with the bulk of the remaining sales in the market being own-label sales and other small producers.

- (123) In Italy, the operation will give P&G, through its joint venture with Finaf which currently has a [...] ⁽¹⁸⁾ ([...] ⁽¹⁹⁾) share of the Italian market, an increase of only [...] ⁽²⁰⁾ in market share.

Austria

- (124) In Austria, VP Camelia will add [...] ⁽²¹⁾ to P&G existing [...] ⁽²²⁾ market share, giving the merged

⁽¹³⁾ Between 75 and 80 %.

⁽¹⁴⁾ Between 65 and 70 %.

⁽¹⁵⁾ Between 1 and 5 %.

⁽¹⁶⁾ Between 1 and 5 %.

⁽¹⁷⁾ Less than 1 %.

⁽¹⁸⁾ Between 70 and 75 %.

⁽¹⁹⁾ Between 65 and 70 %.

⁽²⁰⁾ Less than 1 %.

⁽²¹⁾ Between 10 and 15 %.

⁽²²⁾ Between 20 and 25 %.

entity a total share of [...] ⁽¹⁾ (value) and [...] ⁽²⁾ (in volume). The nearest competitor is Johnson & Johnson with [...] ⁽³⁾ [...] ⁽⁴⁾ in volume) followed by a local producer Rauscher with [...] ⁽⁵⁾ [...] ⁽⁶⁾).

Barriers to entry

Brand loyalty

(125) Should the chosen method of menstrual protection fail, the consequences are both physically unpleasant and socially embarrassing for the woman. Women appear to place great importance on the security and reliability of the product. They are therefore reluctant to experiment with an untried product. Most women display a very high level of loyalty not only to their chosen method of protection but also to a particular brand of product. They have a brand in mind when they shop. As one United Kingdom retailer phrased it: 'Customers do not browse in a store'.

(126) The Commission has examined a number of consumer research studies which show a high level of brand loyalty:

- data supplied by a competitor and prepared by GfK shows that in 1993, of total Always volume in Germany, 49 % is sold to women who are 100 % loyal to Always for their purchases of towels throughout an entire year,
- a study prepared by Dymparez in 1993 on the Spanish market concluded that the importance of brands and brand loyalty was growing and that 54 % of consumers always buy the same brand,
- a study conducted by Infratest Burke in Italy for a competitor of P&G in March 1994 shows that 89 % of women questioned concurred with the statement 'I have been using the same brand of protection for a long time'.

(127) P&G's own data for Germany shows that [...] of Always towel customers over 100 % loyal to the brand over a year. A further [...] bought Always towels in 67—99 % of their purchases. Thus the effective level of brand loyalty to Always for towel

users was that over half used Always alone or almost alone.

(128) Such levels of brand loyalty reflects the cost of failure, force of habit and desire for familiarity with a trusted product in such an intimate area.

(129) Furthermore, some women distinguish between different types of towel for different purposes and buy one brand of ultra towel and another brand of maxi/overnight towel. Such women may be totally loyal to the two brands but will be shown up in statistics such as these as disloyal.

(130) Such brand loyalty acts as a barrier to entry since, with a market which is growing at under 5 % by volume per annum, any entrant must take market share away from an incumbent. To do this, the entrant must persuade women not only to try out their product, but also to buy it on a repeated basis and to stop buying their habitual brand.

Price insensitivity

(131) When Always Ultra and the other innovative towels, such as J&J Silhouettes, were launched, they were priced at a considerable premium compared with ordinary towels. While they were innovative and offered superior performance, the size of the premium can be seen as indicative of the low level of price sensitivity for this product, as can the size of the price range for pads in Germany: from ECU 0,052 to ECU 0,181 each, i.e. the most expensive is over three times the price of the least expensive. Consumer surveys show price not to be a decisive factor for the majority of women in their choice of towel:

— 48 % of dual users surveyed in Germany for a competitor of P&G said that they would still buy their preferred brand of towel if it increased in price by 10 %, even if other brands were still available in the store,

— 64 % of women surveyed in a study made by Infratest Burke in Italy said they purchased a brand regardless of price. Far more important are factors such as comfort, absorbency and reliability,

— the retailers contacted almost all stated that most women did not change brands because of price. More precisely, the retailers contacted felt that a price difference of at least 10—20 %

⁽¹⁾ Between 35 and 40 %.

⁽²⁾ Between 30 and 35 %.

⁽³⁾ Between 30 and 35 %.

⁽⁴⁾ Between 20 and 25 %.

⁽⁵⁾ Between 15 and 20 %.

⁽⁶⁾ Between 25 and 30 %.

would be necessary for a woman to consider changing brand and even then it was unlikely.

Innovation

(132) The market is already well developed with a number of well-known and well-established brands and a wide range of product variants. Given the high method loyalty and significant brand loyalty in sanitary towels as set out above, market entry appears to be extremely difficult without a product which is perceived by the consumer as genuinely innovative in a number of ways. Only marginal changes or slight superiority of a new brand may not be sufficient to overcome the attachment consumers have developed to established brands. P&G's Always presented a substantially innovative package of improvements which was able to penetrate the market rapidly. It is difficult to forecast new product development of similar importance by a competitor in the near future. In particular, new entrants who are not already manufacturers of towels in other geographic markets would have difficulty developing a leading-edge product and so would be handicapped in any entry attempt.

(133) Furthermore, there appears to be a considerable 'first mover advantage' in that the first company to launch a new generation of products can establish a market position which is extremely difficult to attack, even with an improved product. The first company with something new to offer may be able to persuade women to switch to its new product because it offers improved performance, but it will be more difficult for companies introducing a similar product subsequently to gain custom. Those women who were originally attracted to the new product will already have switched to the first company's product, while those who have not switched are perhaps less likely in any case to do so. In Denmark, the Netherlands and Sweden, where Mölnlycke was the first to launch an ultra product, Procter & Gamble, even with a superior product, has found it difficult to repeat the gains in market share it has made elsewhere.

Difficulty of low-price entry strategy

(134) Competition in this market is largely conducted on advertising, performance and image. Since

consumers are, as was explained above, relatively price-insensitive, a low-price low-promotional spend entry strategy based solely on undercutting the incumbent is inherently less likely to succeed. To the extent that advertising creates demand and determines sales, it is an important factor in the willingness of distributors to stock a new product. A low-price strategy, however, would not generate the returns necessary to fund such advertising, or to pay high listing fees to distributors to encourage them to stock a poorly-promoted brand.

Access to retail

(135) With the increasing concentration of the retail industry, especially in Northern Europe, entry for new brands is becoming more difficult. Instead of having ten or more important distributors from which to gain a presence on the supermarket shelf, suppliers have to gain distribution from only five or six key accounts if they are to achieve a viable position. Furthermore, there are some indications of a sporadic trend for distributors to rationalize the number of brands they stock in order to concentrate their negotiating power and gain larger volume discounts. While retail concentration in southern Europe is considerably lower currently, such a trend is beginning there as well.

Advertising and promotion

(136) P&G's launch of Always in Europe was accompanied by what other industry participants have viewed as an unprecedented promotion of the new product, including both consumer sampling and media promotion.

(137) Advertising is a key factor in generating demand for branded consumer goods. It is a means for manufacturers to attempt to reduce the demand elasticity, or price sensitivity of consumers, for their product. If successful, it gives rise to a 'virtuous circle' from a supplier's point of view, since the enhanced turnover generated allows the supplier to fund yet more sales-generating advertising. Since the reverse is also true, a 'vicious circle' of low sales reducing the ability of a supplier to fund advertising, it strengthens the market position of the strong and weakens that of the weak. Competition in the branded towel market is thus based as much on advertising as on price. As in more price sensitive markets, the

- ability to be competitive depends on operational efficiency and economies of scale which help keep the cost base low, although this is in order not to reduce prices but to leave as much cash-flow free for promotion as possible. A distinction should also be made between advertising and promotion expenditure aimed at encouraging women to test a new entrant's product and on-going brand support.

(138) In terms of market entry, it is clear that such entry must be sufficiently decisive and successful in order to break into the virtuous, self-reinforcing levels of market share and advertising expenditure, and that this must be achieved quickly. If it is not, then the sunk costs of entry are further and dramatically increased. Kimberly-Clark's attempted entry into the German market would appear illustrative: after the initial failure to win sufficient distribution and market share, Kimberly-Clark appears to have stopped funding promotion of its brand which resulted in sales rapidly dwindling to a negligible level. A new entrant needs not only to spend on advertising in order to encourage women to try out its new product, but it must spend sufficiently to stand out above the background of on-going brand support advertising.

(139) P&G also seemed aware of these factors and in their plans for the launch of Always in Belgium spoke of achieving '..... high brand awareness during the introduction..... [by spending] heavily in the media for the first [...] ⁽¹⁾ at a level of [...] ⁽²⁾ the total yearly pad segment's media spending', that is at a level of [...] ⁽³⁾ times the expenditure of all other suppliers put together for those [...]. Furthermore, [...] key sizes of the new towel were to be sampled in [...] of households.

⁽¹⁾ Period.
⁽²⁾ Multiple.
⁽³⁾ Multiple.
- (140) P&G spent the following sums on advertising, sampling, trade promotion and listing fees for retailers when launching Always ultra thin in individual EEA countries:

Launch year	Country	Expenditure (ECU million)
February 1992/ January 1993	United Kindom and Ireland	[...]
November 1991/ October 1992	France	[...]
July 1991/June 1992	Germany	[...]
July 1990/June 1991	Belgium and Luxembourg	[...]
May 1992/April 1993	Netherlands	[...]
August 1992/July 1993	Austria	[...]

(141) The Commission accepts that these figures represent the launch of an innovative product in national markets where P&G was not present (although it was already present in Europe through its Iberian and Italian joint ventures). However, the size of these expenditures is markedly higher than those of competitors on launches of new ultra-thin products. For example, while Procter & Gamble spent DM [...] million in launching ultra towels in Germany, Johnson & Johnson spent less than [...] of this amount. Mölnlycke's launch expenditure in France and the United Kingdom was less than [...] that of Procter & Gamble.

(142) P&G has also continued to spend markedly more than its competitors on all types of promotion in the years following the launch of Always. Its competitors have responded by increasing their own on-going brand support in order to defend their market share, as is shown in the following table:

(143) Increase of advertising and promotion expenditure on towels in %

Company	1992/91				1993/92			
	UK	F	B	NL	UK	F	B	NL
Johnson and Johnson	+ 63 %	—	—	no change	- 8 %	—	—	+ 56 %
Kaysersberg	—	+ 61 %	no change	—	—	no change	- 18 %	—

Company	1992/91				1993/92			
	UK	F	B	NL	UK	F	B	NL
Mölnlycke	+18 %	-17 %	no change	+21 %	+38 %	+87 %	+118 %	+35 %
Kimberly-Clark	+77 %	no change	—	-8 %	-23 %	+7,7 %	—	no change

(144) Procter & Gamble quote figures from DMB&B showing that, between 1989/90 and 1992/93, advertising as a percentage of total feminine hygiene sales in Germany rose from [...] ⁽¹⁾ to [...] ⁽²⁾. This compares with [...] ⁽³⁾ to [...] ⁽⁴⁾ for diapers and [...] ⁽⁵⁾ to [...] ⁽⁶⁾ for detergents over the same period. Whilst the overall ratio of market sales to advertising expenditure may not therefore be out of line with some other consumer goods, the barrier to entry caused by the high levels of advertising is now significantly higher than it was at the time of P&G's entry.

(145) In terms of barriers to entry, the marked increase in the level of on-going promotional support has significantly raised the level of expenditure necessary for a new entrant wishing to stand out above the 'background noise' of this on-going brand support, so that the absolute amount of money required to overcome the promotional barrier to entry has been significantly increased. Furthermore, the effect of this increase in the underlying level of advertising expenditure is also to increase the minimum viable market share on entry since the potential entrant knows that in order to fund competitive levels of advertising, it must achieve sufficient sales. Incumbents such as P&G, with large market shares, can spread their advertising costs over much larger sales volumes. Given that a campaign in a particular magazine or media channel has a fixed cost irrespective of the turnover of the product being advertised, there are important economies of scale in advertising. Retaliation by incumbents with significant market shares against new entrants is thus cheap and easy, and until the new entrant achieves a similar market share, incumbents have a cost advantage on one of the key competitive parameters.

(146) This increase in the market level of advertising thus increases risk not only for potential entrants but also for competitors, particularly those who may not have the resources or, as importantly, the will to spend such large sums.

(147) Advertising and promotion are sunk costs which are not recoverable in the event of failure in the market, so that the two effects described above will dramatically increase the financial risk of market entry, even if they are not in and of themselves insuperable barriers and even if there are potential competitors with the financial resources necessary: entry must be not only possible but a sound business proposition.

High level of concentration

(148) Prior to this transaction, the top three companies in Germany held over 80 % of the market by value while in Spain, P&G's two joint ventures alone held 80 %. Post-merger, the two largest companies in Germany, P&G and J&J, will hold [...] ⁽⁷⁾ by value between them of the market ⁽⁸⁾, while in Spain, P&G's two joint ventures will hold [...] ⁽⁹⁾ more of the market as a result of the merger. These high levels of concentration constitute in themselves a barrier to entry for newcomers. The higher the share of the market leader, the harder it will be for a retailer not to stock the leader's brand and prefer a newcomer's product. It furthermore facilitates reactions against newcomers by incumbents who can defend shelf-space through special rebates for retailers or additional in-store promotion and media-spending. Furthermore, the larger the market share of the incumbents, the larger their advantage in terms of economies

⁽¹⁾ Between 1 and 5 %.

⁽²⁾ Between 10 and 15 %.

⁽³⁾ Between 5 and 10 %.

⁽⁴⁾ Between 5 and 10 %.

⁽⁵⁾ Between 5 and 10 %.

⁽⁶⁾ Between 15 and 20 %.

⁽⁷⁾ Between 70 and 75 %.

⁽⁸⁾ Herfindahl-Hirschman-Index of concentration in Germany by value as calculated by the Commission:

- pre-merger: 2 670,

- post-merger: 4 110.

⁽⁹⁾ Between 1 and 5 %.

of scale in advertising and other areas. Overheads such as sales and marketing expense, as well as advertising itself, can all be spread over larger sales to release more cash flow for advertising and other retaliatory action.

- (149) The barriers to entry enumerated above are not necessarily insuperable, particularly when taken individually, but taken together they are a very strong disincentive for any company contemplating entry into this market. P&G was able to overcome these barriers with the combination of an innovative product and massive sampling and publicity spend but, precisely as a consequence of this entry, some of the barriers, most notably advertising, access to retail and the high level of concentration, have increased significantly since the entry of P&G.
- (150) The reality of these barriers can be seen in the history of entry in the German market. Kimberly-Clark launched the Freedom brand of towels in Germany in 1988/89, but the brand never achieved higher than a 2 % share and in 1993 had only 0,9 %. In 1979 Mölnlycke entered the German market with an innovative body-shaped product, Libresse Formé, via a distribution agreement with Henkel Kosmetik, part of Henkel AG. Notwithstanding the distribution agreement with Henkel, Mölnlycke was not able to achieve more than 35 to 40 % weighted distribution and finally had to withdraw with a loss. In the early 1980s Unilever tried to launch a towel under the brand Cosmea. This product was innovative (ultra thin and individually wrapped) but still did not succeed, and Unilever sold the brand to Pelz, which holds 3 % of the market with it. Between 1970 and 1985, there have been several unsuccessful attempts to establish the brand Vania in Germany by Kayserberg.

Dominance and contestability

- (151) As has been shown above, P&G will hold high market shares post-operation in Germany, Spain, Austria and Italy on a towel market characterized by high barriers to entry. In establishing whether or not P&G will be dominant on these markets, the question remains as to whether P&G's position will be constrained by actual or potential competitors or by retailers.

- (152) In the case of Austria the investigation of the Commission has led it to conclude that, in view of the structure of the Austrian sanitary towel market both before and after P&G's acquisition of VPS,

P&G is unlikely to hold a dominant position as a result of this transaction. P&G launched Always in Austria in the summer of 1992. It gained considerable market share from Johnson & Johnson and Rauscher, which together with Camelia would afford P&G a [...] ⁽¹⁾ share of the Austrian market. P&G currently faces two competitors, however, with significant market shares: Johnson & Johnson, the previous market leader in Austria and a well-resourced multinational, with [...] ⁽²⁾ and Rauscher with [...] ⁽³⁾ through its two established national brands (Senta, Cresta). The structure of the Austrian sanitary towel market is thus more balanced than in Germany. Whilst P&G's position will be strengthened as a result of the concentration, the Commission considers that the existence of the two other suppliers with significant shares in this market will constrain P&G's competitive behaviour. Whilst it is possible that P&G will further increase its market share through organic growth in the future, this is not certain and in any case the market situation would not have been caused by this concentration but by organic growth.

- (153) In the case of Italy, P&G will increase its [...] ⁽⁴⁾ share by only [...] ⁽⁵⁾ (by value). While the Commission considers that market share is *prima facie* evidence of dominance, it does not believe that a [...] ⁽⁶⁾ increase will constitute a strengthening of a dominant position.
- (154) Given P&G's strength in Germany and the implications of its purchase of VPS for the Spanish market, it must be assessed whether P&G will, as a result of the increased share of the German and Spanish towel markets which it will obtain by acquiring VPS, be in a position to act independently of its competitors and customers in these markets on a lasting basis.

P&G's market position

- (155) The speed and success of Procter & Gamble's entry into Europe has been remarkable. It has wrested market share not only from traditional

⁽¹⁾ Between 35 and 40 %.

⁽²⁾ Between 30 and 35 %.

⁽³⁾ Between 15 and 20 %.

⁽⁴⁾ Between 70 and 75 %.

⁽⁵⁾ Less than 1 %.

⁽⁶⁾ Less than 1 %.

national brands such as Camelia, but also from its global competitors, Johnson & Johnson, Kimberly-Clark and Mölnlycke. P&G's competitors have developed their own innovative products and, in response to Always' challenge, have dramatically increased their promotional expenditure in defence of their market shares (see above). However, the combination of the Always product and Procter & Gamble's other competitive advantages has resulted in extremely fast organic growth.

(156) Sanitary towels are products where suppliers enjoy a relatively high level of brand loyalty and reduced price sensitivity. Women must purchase them on a regular basis but they constitute only a small percentage of a woman's total monthly expenditure. As a product, therefore, the sanitary towel sector is one in which price increases beyond competitive levels would not necessarily result in reduced sales.

(157) P&G is particularly strong in the ultra-thin segment of the towel market. Its product is a recent innovation and its share of the total market is growing rapidly. P&G's strength in the fastest growth area of the market is an additional factor strengthening its market power.

(158) P&G is one of the largest suppliers of branded grocery goods to the retail trade. Many of its brands are 'must-haves' for the retailer, such as Always for most of the retailers consulted by the Commission. So P&G is in a much stronger position in commercial relations with grocery distributors than many of its competitors. By supplying [...] ⁽¹⁾ of the German retailers' feminine hygiene sales, P&G is in a strong position when it comes to obtaining access to all-important shelf-space in major supermarket chains for its new products.

(159) P&G has considerable expertise in developing and marketing non-food consumer brands and understands well that the very heavy up-front investment required to create a brand can nonetheless be extremely profitable when evaluated over a relatively long time period.

(160) P&G's total turnover is over twice that of Johnson & Johnson, its next largest competitor in the sanitary towel business. More importantly, the sanitary towel turnover of Johnson & Johnson and Mölnlycke is around one third of that of P&G in

Europe. This is important in the context of the advertising economies of scale explained above. For the same advertising/sales ratio as its competitors, Procter & Gamble can fund up to three times as much promotional spend in absolute terms. P&G's financial position is further strengthened by its positions on other markets such as washing powders and detergents, since even if resources are not transferred between different business segments, the ability of each to incur risk is determined by the strength of the whole.

Competitive pressure from tampons

(161) P&G has argued that, even if there were two separate product markets for tampons and towels, tampons would exercise a competitive pressure on the towel market which should be taken into account in the assessment of the merger. The Commission does not consider such a competitive pressure from tampons as significant in respect of price competition.

(162) The first aspect of this is the degree to which women change their usage for non-price reasons, which can be several. A change in contraceptive methods can necessitate a change in the method of menstrual protection since the IUD can cause heavy bleeding, which is best dealt with by a towel, while the contraceptive pill reduces bleeding, facilitating tampon use. Women cannot use tampons immediately after childbirth and are obliged to use towels for a certain period of time, while other women approaching menopause may also only be able to use towels. In such cases there is clearly little competition between methods either on price or performance (given that one method has a clear functional advantage over the other). Other women, however, may change their method of protection, again not for price reasons, but because of the performance characteristics of the two methods. Particularly important here are adolescent women who wish to experiment with both methods to find which suits them best. Similarly, it is likely that there are some women who change method later in life because of the non-price characteristics of the two products. This might be because of perceptions of towels as, for example, the more 'natural' method, or of tampons as more 'modern'.

(163) There is thus a range of women who do change their usage habits for a variety of reasons other

⁽¹⁾ Between 15 and 35 %.

than price. These changes would be made regardless of the relative prices of the products and are essentially a given in the market which would occur whether P&G raised its towel prices or not. The level of usage change these women account for is difficult to estimate but one competitor estimated that, over the nine-month period taken in the A.C. Nielsen household purchase study, about 4 % will have had babies while 3 % will have become menopausal, which may require a change to towels. Changes in contraceptive method and adolescent experimentation would also need to be taken into account. Given the size of the switching found by the A.C. Nielsen household panel study (6 to 8 % products purchased or 13 to 18 % of women involved), the fact that part of this 'switching' is more apparent than real due to long purchase cycles and stocking, and the number of women switching for non-price reasons, the amount of price-sensitive switching is clearly very small.

(164) Nevertheless, even if price-sensitive switching were not minimal, given the low levels of cross-price elasticity found in the studies described earlier, it is clear that it would still be profitable for P&G to raise prices since the revenue generated by the consumers which they risk losing would be less than the increased revenue they would gain from all other consumers.

(165) Tampons not only form a separate market from towels, but also do not exercise any noticeable competitive pressure on them since most movement from one to the other is on the basis of non-price factors.

Purchasing power by food retailers

(166) P&G has argued that retailers exert strong competitive pressure in the sector of feminine hygiene products owing to the significant purchasing power exercised by large retailers and transnational buying groups.

(167) As was set out above, transnational buying groups do not currently and will not for the foreseeable future play a significant role in the field of sanitary towels. As to the structure of the retail sector in

Germany, it is true that it is highly concentrated. However, the existence of purchasing power which would be able to constrain the competitive behaviour of P&G can currently not be assumed for several reasons. Compared to other consumer food products, which are exclusively sold in grocery outlets, the demand side is less concentrated in sanitary towels because they are also sold through pharmacies and drugstores. Less than [...] ⁽¹⁾ of P&G's sales (VPS: [...] ⁽²⁾) go to the three biggest retailers in Germany, which in turn account for less than 40 % of total retail sales.

(168) An expert report ('Sondergutachten') published on 18 February 1994 under the German Act against Restrictions of Competition by the Monopolkommission, a group of independent competition experts appointed by the President of the Federal Republic of Germany, on 'Market structure and competition in retail' stated that the purchasing markets of retail in Germany are not characterized by purchasing power since suppliers of grocery goods dispose of alternatives for selling their goods and the demand side is marked by competition. The high intensity of competition between German retailers with respect to consumers has a further competitive impact on competition on the demand side. The retail sector in Spain is far more fragmented than in Germany and so has much less power than the German trade.

(169) Even if it were assumed that retailers were in a strong position *vis-à-vis* suppliers of grocery goods, this would have to be considered differently in the field of sanitary towels because of the significant loyalty and brand method loyalty of consumers. Whilst retailers might try to limit P&G's negotiating power by reducing the number of put-ups stocked per manufacturer, they are caught between the supplier and the consumer demand generated by that supplier's advertising. This advertising creates consumer pressure on a distributor to stock a brand which is advertised in order to meet the demands of its customers. Given the advertising capacity of P&G, the leading brands Always and Camelia are therefore almost indispensable for retailers, as confirmed by most of the retailers contacted by the Commission.

(170) Even if it were accepted that retailers did have some countervailing power to use against P&G, it is also important to examine what the motivation

⁽¹⁾ Less than 50 %.

⁽²⁾ Less than 50 %.

of the stores would be to do so. P&G has, in launching Always, argued in promotional literature for distributors that Always was a value-added product and that part of the increased sale price it could command would be shared with distributors which stocked it. Higher prices might thus simply mean higher margins for distributors. Furthermore, given the relative price insensitivity of consumers in this sector and their brand loyalty, and the effect of advertising, which is to reduce the price elasticity of the advertised good, the distributor will be able to pass on the increase to the customer without losing volume. There is thus little motivation for a retailer to resist a price increase by P&G.

- (171) It could be argued that post-concentration, retailers will wish to diversify their supplier base since P&G will supply the top two brands in Germany. Retailers are, however, generally reluctant to delist premium brands like Always and Camelia, which present a high level of product support, high margins and, thus, significant turnover, in favour of an untried new product.

Current competitors

- (172) P&G's closest competitor in Germany is Johnson & Johnson (J&J) with a market share of [...] ⁽¹⁾. Its product line is not markedly inferior to that of P&G (it launched its ultra-thin variant in August 1992) but its market share has been halved from [...] ⁽²⁾ in the two-and-a-half years since the launch of Always. Between 1990 and 1991 J&J increased its advertising support for its brand Silhouette by 90% to respond to the launch of Always in July 1991 but appears to have had only limited success against P&G. In Spain, J&J, despite being the only other multinational present, has only a share of [...] ⁽³⁾ which does not pose a significant competitive threat to P&G's joint ventures.
- (173) There are two other small competitors in Germany, Pelz and Hedwigsthal. Both of these are, in competition terms, marginal with market shares of under 5% and with only secondary brands. They do not have the resources or products to pose any serious threat to P&G's market position or constrain its behaviour.

⁽¹⁾ Between 10 and 15%.

⁽²⁾ Between 25 and 30%.

⁽³⁾ Between 1 and 5%.

- (174) As mentioned earlier, own-label products constitute [...] ⁽⁴⁾ by value and [...] ⁽⁵⁾ by volume of the German towel market and sell at around half the price of premium branded products. As was also explained earlier, the competition offered by own-label products in Germany and Spain is extremely limited given the price and quality gap. What own-label products do provide is an alternative for the consumer in the face of extreme increases in the prices of branded goods. There is a point at which a consumer, even in this market, would conclude that the improved performance of the branded product over the own label did not merit the increased price. Given the relative price insensitivity of this market, however, it is not likely that own-label products would constrain price increases in branded products unless they were highly exaggerated.

Potential competition

- (175) For market entry or the potential for such entry to constrain P&G's behaviour in the German and Spanish markets, it would be necessary to examine whether such entry is probable, whether it would be competitively meaningful and effective and whether it could take place within a time frame short enough to deter P&G from exploiting its market power.
- (176) The first group of possible entrants are those feminine hygiene suppliers who are present in other States but not in a particular country or group of countries. In the case of Germany and Spain, Mölnlycke, Kayzersberg and even Kimberly-Clark, to the extent that its share of the German market is minimal and declining, could be considered as potential entrants. Outside the existing players in Europe there are two groups of companies which might be considered potential entrants: sanitary protection companies such as the Japanese firms Unicharm and Kao and own-label specialists such as Confab (US) or Disposable Soft Goods (Hong Kong) and also other branded consumer goods companies.
- (177) Kao and Unicharm are the only major producers of feminine hygiene products who are not present on the EEA market at present (although Unicharm is in a joint venture with Mölnlycke on the baby nappy market). However, they lack marketing experience and distribution organizations in

⁽⁴⁾ Between 10 and 15%.

⁽⁵⁾ Between 20 and 25%.

Europe. One Japanese company stated that it is 'almost impossible' for them to enter an EEA towel market given the position of P&G in Europe and also that, with only absorbent products to sell, it would be too expensive to establish its own distribution network. Manufacturers of consumer goods such as Unilever, Nestlé or Philip Morris would have the financial resources but no experience in the feminine hygiene sector or related markets and would also have to create a product and brand *de novo*.

- (178) While there are thus several conceivable potential entrants, the question is whether any of them would be likely to enter the German or Spanish market within the next two to three years or as a timely response to excessive pricing in the market. As was discussed earlier with regard to Germany, there have been several failed attempts at entry in the last 10 to 15 years while illustrate the difficulty of penetrating this market on any scale less than that undertaken by P&G with Always.

- (179) As explained earlier in the discussion of the barriers to entry in the towel market, successful entry is all or nothing and must combine a product which is perceived as innovative by the consumer with a huge advertising and promotion effort. This last point is necessary to build market share and distribution quickly. Competitors of P&G have estimated that the minimum viable market share is between 15 and 20 % if a supplier is to be able to generate the resources to fund the advertising necessary to obtain adequate weighted retail distribution (estimated by competitors for Germany to be at about 70 %) and retain market share once won. A minimum market share is also necessary to begin to be able to reap economies of scale, particularly in advertising. This requirement of a minimum viable market share limits further the potential for entry. A low-cost entry strategy based on undercutting the existing brands rather than out-promoting them would be unlikely to succeed, given not only the relatively low level of price sensitivity among consumers but also the need to fund the advertising necessary to persuade brand loyal consumers to switch brands and thus obtain retail distribution and any sales at all.

- (180) Even if a company were to decide to enter the market, such a decision would be a long-term one and could not provide an immediate constraint on excessive pricing. Sanitary towels are not commodity products and new entry would entail the development, in some cases, of a new brand and probably an innovative product which would then have to be market tested, sampled, and

heavily promoted before being launched. Furthermore, the sort of investment required to enter the German and Spanish market, particularly with P&G as an incumbent, and the associated investment risk, means that entry, if it comes, will not be 'hit-and-run' entry taking opportunistic advantage of short-term price levels but will be a long-term strategic decision by the entrant that the German and Spanish markets offer a profitable business opportunity despite the barriers and difficulties and that attacking P&G's dominant position in this market through such entry is a corporate priority. It is therefore unlikely that P&G will feel constrained by the threat of such entry, aware as it is both that the costs and risks of entry are too high for all but the most committed of entrants, and that the level of commitment necessary for entry into the market is such that any decision to enter will not be taken quickly, nor a product introduced to the market precipitously.

- (181) While P&G's increment on the Spanish market is admittedly not large at [...] ⁽¹⁾ by value, it is significant given both P&G's very high existing market share [...] ⁽²⁾ by value) and the fact that, by this transaction, P&G denies any potential entrant the possibility of entering by buying the Camelia brand in Spain. Apart from Camelia, there is on the premium brand level only Johnson & Johnson with marginal market shares (Silhouette [...] ⁽³⁾, Serena and Vespré [...] ⁽⁴⁾). Other manufacturers' brands together hold [...] ⁽⁵⁾ and private label products [...] ⁽⁶⁾. Such small market positions will not enable these competitors to constrain the two brands of P&G's joint ventures, which have [...] ⁽⁷⁾ and [...] ⁽⁸⁾ respectively. Given the significant brand loyalty in this sector and the well-established position of Ausonia and Evax, the acquisition of one of the remaining premium brands reinforces the dominant position of P&G's joint ventures on the Spanish market.

- (182) Such dominance is, in the view of the Commission, likely to cause harm to the consumer in several ways, in particular on the German market:

— price — P&G will be able to increase prices for both Camelia and Always independently of the competitive reaction of other suppliers. Its freedom to do so will spring both from its

⁽¹⁾ Between 1 and 5 %.

⁽²⁾ Between 75 and 80 %.

⁽³⁾ Less than 1 %.

⁽⁴⁾ Less than 1 %.

⁽⁵⁾ Between 5 and 10 %.

⁽⁶⁾ Between 10 and 15 %.

⁽⁷⁾ Between 45 and 50 %.

⁽⁸⁾ Between 30 and 35 %.

market dominance in Germany and from the relatively low price sensitivity of consumers in this market. P&G will be particularly free to do so in the ultra-thin segment where the only competitor to the Camelia and Always versions are Johnson & Johnson's Silhouettes brand. Furthermore, it is probable that Johnson & Johnson's strategy as the closest competitor would be to follow any price increases introduced by P&G in order to rebuild profitability in its loss-making towel business in Germany,

- innovation and quality — the acquisition will eliminate competition on innovation between VPS and P&G. Both Camelia and Always will use globally developed P&G technology and any innovations which might have been developed by VPS, or by VPS under different ownership, will be lost to the consumer. Once again the only serious competitor on innovation will be Johnson & Johnson,
- choice — P&G's acquisition is unlikely to result in any immediate reduction in consumer choice. It is highly probable, however, that P&G will subsequently rationalize the broad range of product variants of Camelia and Always in order to maximize the efficiency of its towel business in Germany, thus reducing consumer choice.

Conclusion

- (183) In view of the above results of the investigation and particularly the discussion of market shares, barriers to entry and potential competition, the Commission considers that there are a number of factors relevant to the German and Spanish markets for sanitary towels whereby the acquisition by P&G of VPS, even after the divestment of VPS's baby nappy business, will enable P&G post-merger to act independently of its customers and competitors in these markets.
- (184) In Germany, P&G will hold a post-merger market share of [...] ⁽¹⁾ by value and [...] ⁽²⁾ by volume on a market where its closest competitor will have only [...] ⁽³⁾ by value and [...] ⁽⁴⁾ by volume, the balance being fragmented between other suppliers and own-label sales. These figures take into account P&G's initial offer to divest the non-Camelia feminine hygiene business of VPS

(this offer has subsequently been replaced by one to divest Camelia — see paragraph 8 of this Decision). Given these figures, the barriers to entry to the German market and the history of attempts at market entry, the Commission considers that P&G's market power will not be constrained by either actual or potential competitors. Indeed, the very acquisition of VPS and its important German brand, Camelia, which is the last major national independent brand, would render entry into the German market for other entrants more difficult by obliging them to enter *de novo* rather than through the acquisition of an existing player.

- (185) As was already set out above, the increment of another [...] ⁽⁵⁾ to the market position of P&G on the Spanish market would strengthen P&G's dominant position on a market which is isolated by the high level of concentration. Not only would there be an increment in an already dominant position but the Camelia brand, which might constitute an entry vehicle for a new entrant, would be lost.

VI. COMMITMENTS PROPOSED BY PROCTER & GAMBLE

- (186) P&G has offered to modify the original concentration plan as notified by entering into the following commitments:

P&G hereby gives the following undertakings to the Commission with respect to VP's Camelia-branded feminine hygiene products business, which comprises: (i) the Forchheim plant and the production lines dedicated to the manufacture of feminine hygiene products; (ii) the Camelia brand name; (iii) all other assets and liabilities that form part of or are necessary for the operation of VP's Camelia-branded feminine hygiene products business (hereafter referred to as the "Business").

1. P&G undertakes that, as soon as practicable after the Commission has adopted a favourable decision under Regulation (EEC) No 4064/89 and in any event no later than at closing of its acquisition of the shares of VP, it shall appoint an independent trustee to be approved by the Commission, to act on its behalf in overseeing the ongoing management of the Camelia Business to ensure its continued viability and market value and its rapid and effective divestiture from the rest of P&G's activities (hereafter referred to as "the Trustee"). The Trustee shall simultaneously

⁽¹⁾ Between 60 and 65 %.

⁽²⁾ Between 40 and 45 %.

⁽³⁾ Between 10 and 15 %.

⁽⁴⁾ Between 5 and 10 %.

⁽⁵⁾ Between 1 and 5 %.

appoint Goldman Sachs International Ltd ("Goldman Sachs") to act on its behalf in conducting good faith negotiations with interested third parties with a view to selling the Business. P&G shall agree in turn with the Trustee and Goldman Sachs on their respective remuneration, it being understood that part of the remuneration of Goldman Sachs shall consist of a fee related to the consideration of the sale.

2. P&G undertakes that it shall give the Trustee an irrevocable mandate to find a valid purchaser for the Business within [...], it being understood that such purchaser shall be a viable existing or prospective competitor independent of and unconnected to P&G and, possessing the financial resources and proven expertise in consumer product markets, enabling it to maintain and develop the Business as an active competitive force in competition to P&G's catamenials business on the various markets concerned. [...] P&G shall take all reasonable steps to encourage the relevant personnel currently employed in the Business, including sales and administrative personnel, to take up employment with such independent third party. P&G shall be deemed to have complied with this undertaking if, within this [...] period, it has entered into a binding letter of intent for the sale of the Business, provided that such sale is completed within a time limit agreed to by the Commission. P&G undertakes to give, on an arm's length basis, all assistance requested by the Trustee and Goldman Sachs prior to the sale of the Business to a third party.
3. In the reports referred to in paragraph 10 below, the Trustee shall indicate to the Commission whether it believes that a purchaser with which it is proposed to sign a letter of intent fulfils the description of a valid purchaser set out in paragraph 2 above, and it considers that negotiations with such a purchaser should continue. If within one week of receipt of the relevant advice from the Trustee, the Commission does not formally indicate its disagreement with the Trustee's assessment of a purchaser, negotiations with such party as a valid purchaser shall be free to proceed.
4. Providing the offers concerned have been received from purchasers recognized as valid according to the procedure laid down in paragraph 3, P&G alone shall be free to accept any offer or to select the offer it considers best in case of a plurality of offers.

The value of any such offers shall be determined by the price offered plus other obligations affecting the value of such offers.

5. Where a binding agreement for the sale of the Business has been signed, the purchaser shall be associated forthwith to any ongoing contractual negotiations for supply of catamenial products with Germany retail distributors in order to ensure that the viability of the Business is preserved. Until such a binding sales agreement exists, the Trustee shall be associated with these negotiations.
6. P&G undertakes that, within the [...] period referred to in point 2 above and in any event before the completion of the sale of the business to a third party, the Forchheim plant shall be rendered capable of being transferred to an independent third party and, most particularly, that the Forchheim plant is capable of being managed separately from P&G.
7. Prior to the completion of the sale of the Business to a third party, P&G shall ensure that the Business is managed as a distinct and saleable entity with its own management accounts and a sales and distribution effort for the Business that is separate from P&G's catamenials business and with its own research and development facilities as presently exist under VP's management. P&G further undertakes that the Business shall have its own management composed of ex-VP or other currently non-P&G personnel that shall, under the guidance and control of the Trustee be under instructions to manage it on an independent basis in order to ensure its continued viability, market value and independence from P&G. On the request of the Trustee, P&G shall provide sufficient financial resources to this end in the ordinary course of business. Prior to the completion of the sale of the Business to a third party, P&G shall not integrate the Business into any P&G business unit, nor shall it appoint or second any P&G employee to the Business. P&G also undertakes that it shall make no structural changes to the Business without prior Commission approval.
8. P&G shall not integrate VP's secondary and own-label catamenial business into its own

commercial and production structures for catamenials until the sale of the Camelia Business is completed.

9. P&G shall not obtain from the Business management any business secrets, know-how, commercial information, or any other industrial information or property rights of a confidential or proprietary nature relating to the Business.
10. P&G undertakes that it shall cause the Trustee to provide a written report either before a letter of intent is to be signed and in any event on a bi-monthly basis on relevant developments in its negotiations with third parties interested in purchasing the Business, and that such reports, together with supporting documentation, shall be furnished to the Commission. Such supporting documentation shall include a report by the management of the Business on its on-going commercial operations.

11. Without prejudice to the powers of the Commission to ensure enforcement of the above undertakings as conditions and obligations under Article 8 (2) of Regulation (EEC) No 4064/89, any dispute between P&G and the third party purchasing the Business arising out of or in connection with the implementation of these undertakings shall be submitted to independent arbitration to be mutually agreed between P&G and such third party, it being understood that the time needed for such arbitration shall not affect the deadline laid down for the completion of the sale of the Business set out in paragraph 2.'

- (187) The Commission is satisfied that P&G's offer to divest a business including the Camelia towel brand will prevent P&G from acquiring a dominant position in Germany and from reinforcing its dominant position in Spain. Post-concentration and post-divestment of Camelia the market structure in Germany and Spain will be as follows, taking into account that P&G will not now divest the non-Camelia business of VPS ⁽¹⁾:

(¹) Exact market shares deleted as business secret.

	Germany		Spain	
	Value % 1993	Volume % 1993	Value % 1993	Volume % 1993
P&G	35—40	20—25	75—80	65—70
VP other brands	5—10	10—15	0	<1
Total P&G	40—45	30—35	75—80	65—70
VP Camelia	20—25	20—25	1— 5	1— 5
Johnson & Johnson	10—15	5—10	1— 5	<1
Kimberly-Clark	<1	<1	—	—
Private labels	10—15	20—25	10—15	15—20
Others	5—10	10—15	5—10	10—15

As can be seen, P&G will increase its share of the German market by [...] to a total share of [...] by value with Camelia holding a [...] and J&J a [...] share. The increase in P&G's market share will be solely attributable to its acquisition of VPS's secondary and store brand business (i.e. non-premium brands) while P&G's existing Always business will be subject to competition from two significant suppliers of branded premium towels. In Spain, P&G's share will increase by less than [...]. The Commission has therefore concluded that the commitments offered by P&G in respect of the Camelia-branded feminine

hygiene business of VPS are sufficient to prevent the creation or reinforcement of a dominant position on the German and Spanish markets, or indeed elsewhere in the EEA.

- (188) If the sale of assets to be divested has not taken place by the end of the time period set out in P&G's commitment, the Commission reserves the right to require that P&G divest all assets and interests of VP Schickedanz, and thereby that P&G and VP Schickedanz be fully separated in order to restore conditions of effective competition, as provided by Article 8 (4) of the Merger Regulation.

Furthermore, if any of the obligations accepted by P&G are breached, the Commission reserves the right pursuant to Article 8 (5) to revoke its authorisation decision.

- (189) These actions will be taken without prejudice to the Commission's right to impose fines pursuant to Article 14 (2),

HAS ADOPTED THIS DECISION:

Article 1

Subject to the full compliance with all conditions and obligations contained in Procter & Gamble's commitment *vis-à-vis* the Commission in respect of the Camelia-branded feminine hygiene business of VPS, as set out in recital 186 of this Decision, the concentration notified by Procter & Gamble GmbH on 17 January 1994 relating to the acquisition of VP Schickedanz AG is

declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

Procter & Gamble GmbH,
Procter & Gamble European Technical Center,
Temsestraat 100,
B-1820, Strombeek-Bever.

Done at Brussels, 21 June 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 13 December 1994

relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(IV/32.490 — Eurotunnel)

(Only the English and French texts are authentic)

(Text with EEA relevance)

(94/894/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal,Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway ⁽²⁾, as last amended by the Act of Accession of Spain and Portugal,Having regard to the notice ⁽³⁾ published pursuant to Article 19 (3) of Regulation No 17 and Article 26 (3) of Regulation (EEC) No 1017/68,

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

Whereas:

I. THE FACTS

A. The notification

- (1) On 2 November 1987 the Channel Tunnel Group Limited (hereinafter referred to as CTG), a company incorporated under English law, and France Manche SA (FM), a company incorporated under French law, notified a usage contract concluded on 29 July 1987 by British Railways Board (BR) and Société nationale des chemins de fer français (SNCF), requesting a declaration of non-applicability of the prohibition in Article 2 of Regulation (EEC) No 1017/68, in accordance with Article 5 of that Regulation. The notification was approved by all parties to the contract.

- (2) The Commission published a summary of the notification ⁽⁴⁾ in accordance with Article 12 (2) of Regulation (EEC) No 1017/68.
- (3) The Commission then decided not to express any serious doubts within the period of 90 days laid down in Article 12 (3) of Regulation (EEC) No 1017/68, thus exempting the contract for three years running from the date of publication in the *Official Journal of the European Communities*, that is to say until 15 November 1991. This Decision renews that exemption.

B. Brief description of the fixed link

- (4) The fixed link comprises a twin bored rail tunnel link, with associated service tunnel, under the English Channel between Fréthun in the Pas-de-Calais and Cheriton in Kent, together with terminal areas and dedicated facilities for control of access to and egress from the tunnels, including in particular the frontier control facilities.

There are crossovers between the two single track tunnels to facilitate train and shuttle movements in the reverse direction during periods of maintenance or incidents to trains, shuttles or fixed installations.

- (5) The signalling system is designed to allow three-minute headways between trains and/or shuttles and shorter headways will be possible in future.

The system will be capable of being upgraded to provide fully automatic train operation.

- (6) The infrastructure must allow the operation of international trains between United Kingdom and Continental stations and of shuttles carrying cars, coaches, caravans and freight vehicles between Fréthun and Cheriton.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No L 175, 23. 7. 1968, p. 1.

⁽³⁾ OJ No C 210, 30. 7. 1994, p. 15.

⁽⁴⁾ OJ No C 292, 16. 11. 1988, p. 2.

- (7) The passenger shuttles will usually consist of two rakes each made up of 13 carrier wagons together with loading and unloading wagons. Wagons will either be double-deck to carry vehicles not exceeding 1,93 metres in height or single-deck to carry vehicles such as coaches and caravans.
- (8) The freight shuttles will consist of up to 25 carrier wagons together with two loading and unloading wagons. Carrier wagons will be designed to carry lorries weighing up to 44 tonnes. The length of a freight shuttle excluding the locomotive will be approximately 560 metres and the trailing load will be in the region of 2 000 tonnes.

C. The enterprises

- (9) The Channel Tunnel Group Ltd (CTG) is a wholly-owned subsidiary of Eurotunnel plc, a company incorporated under English law, whose registered office is in London.
- (10) France Manche SA (FM) is a wholly-owned subsidiary of Eurotunnel SA, a company incorporated under French law, whose registered office is in Paris.
- (11) The objects of CTG and FM are the planning, financing, construction and operation of the Channel Tunnel.
- (12) The object of Eurotunnel SA is the acquisition of shareholdings in companies engaged directly or indirectly in the construction or operation of a fixed cross-Channel link or any other fixed link and, more generally, all operations of a financial, commercial and industrial nature likely to facilitate such activities.
- (13) The object of Eurotunnel plc is the acquisition of the entire share capital issued by CTG, thus acting as a holding and coordination company, and the undertaking of all activities relating to the planning, development, construction, financing and operation of tunnels or other fixed transport links under the Channel, together with all other related activities.
- (14) CTG and FM are concessionaires for, and managers of, the Channel Tunnel and have for the purpose set up a partnership, Eurotunnel, represented by two joint chairmen. The term 'Eurotunnel' will be used in this Decision to refer to both concessionaires.
- (15) British Railways and Société nationale des chemins de fer français are two railway undertakings within the meaning of Article 3 of Council Directive 91/440/EEC⁽¹⁾.

D. The concession

- (16) By an instrument dated 14 March 1986 CTG and FM were jointly and severally granted by the United Kingdom Secretary of State for Transport and the French Minister for Transport the right to

carry out the development, financing, construction and operation of a fixed link under the English Channel between the Department of Pas-de-Calais in France, and the County of Kent in England. The duration of the concession was originally to be 55 years but was extended in 1994 to 65 years.

E. The usage contract

- (17) The usage contract was concluded on 29 July 1987 by CTG and FM, in their capacity as concessionaires, and by BR and SNCF, in their capacity as railway undertakings which would use the Tunnel.
- (18) Generally speaking, the contract covers the use of the Tunnel by passenger and freight trains operated by the railways, and by shuttles carrying motor vehicles and their passengers and operated by Eurotunnel.
- (19) According to the parties, the contract is intended to establish an equitable and feasible division of the new infrastructure, i.e. the fixed link, between the two separate markets, consisting, on the one hand, of the markets in the transport of passengers and freight by train, operated by BR and SNCF, and, on the other, the market in the transport of accompanied motor vehicles through a special system of shuttles operated by Eurotunnel. The parties maintain that this separation is justified by the fact that the concessionaires have neither the experience nor the resources necessary to provide by themselves a complete rail-transport service.
- (20) Under the contract, the concessionaires undertake to keep the Tunnel open for the passage of trains throughout the term of the agreement and in accordance with the technical specifications which have been laid down.
- (21) The capacity of the Tunnel is measured in standard paths per hour in each direction. The concessionaires are to use their best endeavours to ensure that on the commencement date its capacity will be at least 20 standard paths per hour.
- (22) The railways undertake to operate regular commercial services for both passenger and freight trains from the specified commencement date throughout the term of the agreement, complying with specified quality and frequency criteria. They must also ensure that the Tunnel carries the highest possible level of traffic compatible with their normal commercial criteria.
- (23) BR and SNCF further undertake to have on their own territory sufficient railway infrastructure for transport in the Tunnel, in the 12 months following its opening, of 17 400 000 passengers, 5 200 000 tonnes of non-bulk freight and 2 900 000 tonnes of bulk freight.
- (24) BR and SNCF are also required to have, by the time of opening of the Tunnel, enough suitable rolling-stock to carry the traffic.
- (25) Under Clause 6.2 of the contract, BR and SNCF are entitled throughout the term of the agreement

⁽¹⁾ OJ No L 237, 24. 8. 1991, p. 25.

to 50 % of the capacity of the fixed link, per hour in each direction, to operate international passenger and goods trains unless they agree to surrender part of their entitlement, any withholding of such agreement requiring justification.

- (26) Eurotunnel accordingly undertakes to sell to BR and SNCF according to their needs up to 50 % of the capacity of the Tunnel. BR and SNCF undertake to operate the transport services specified in recital 22 but do not undertake to buy 50 % of the capacity of the Tunnel.
- (27) In the course of the proceedings BR and SNCF informed the Commission that over 12 years the capacity needed to provide their transport services would average approximately 75 % of the capacity reserved to them by the usage contract.
- (28) As consideration for use of the fixed link, the railways are to pay the concessionaires usage charges comprising a fixed component and a variable component. For the first 12 years of usage, these charges will consist of a minimum amount laid down in Clause 7.5 of the contract.
- (29) In addition, a portion of the costs incurred by the concessionaires in connection with the operation, maintenance and renewal of the fixed link are to be reimbursed by the railways in accordance with principles laid down in Schedule V to the contract.
- (30) Clause 25 of the contract requires the concessionaires and BR and SNCF to discuss the marketing of their services with the aim of ensuring the optimum use of the fixed link.
- (31) Furthermore, under Clause 28.5 of the contract, the concessionaires are to use their best endeavours within the framework of the investment programme to allow the railways to operate motorail and motorail sleeper services, it being understood that such operation must not be such as to prejudice the commercial operations of the concessionaires.
- (32) The term of the contract is identical to the period of the concession, namely 65 years.

F. The legislative framework in which the agreement operates

- (33) Article 61 of the EC Treaty lays down that freedom to provide services in the field of transport is governed by the provisions of the Title relating to transport. The principles of freedom to provide services laid down in Articles 59 and 60 of the Treaty must therefore be implemented by establishing the common transport policy based on Article 75 of the Treaty.
- (34) That is the objective of Directive 91/440/EEC, which introduces for railway undertakings and international groupings a right of access, on certain

conditions, to the railway infrastructure of Member States in order to provide international rail transport services.

- (35) That Directive has created a new legal framework within which the rules on competition between enterprises must produce their effects. Within this legal framework, enterprises may conclude agreements whose lawfulness must be assessed in the light of the rules on competition.
- (36) The scope of the Directive is defined by applying two criteria:
 - the Directive applies, first, to the management of railway infrastructure, as defined in Annex 1.A to Commission Regulation (EEC) No 2598/70 of 18 December 1970 specifying the items to be included under the various headings in the forms of accounts shown in Annex I to Council Regulation (EEC) No 1108/70 of 4 June 1970⁽¹⁾, with the exception of the final indent,
 - the Directive applies, second, to rail transport activities of the railway undertakings established, or to be established, in a Member State, with the exception of undertakings whose activity is limited to the provision of solely urban, suburban or regional services.
- (37) Pursuant to Clause 23.1 of the contract, the concessionaires must request the governments of the United Kingdom and France to include the fixed link under the Cotif⁽²⁾ in the list of lines governed by the uniform rules concerning contracts for international carriage of passengers and luggage by rail (CIV)⁽³⁾, and the uniform rules concerning contracts for international carriage of goods by rail (CIM)⁽⁴⁾. The concessionaires must be indicated as operators of such lines as to the trains.
- (38) Furthermore, the fixed link constitutes infrastructure for the passage of international trains and shuttles, the latter forming a rail transport system whose operation is geographically restricted to the Tunnel.
- (39) The fixed link thus constitutes railways infrastructure within the meaning of Article 3 of Directive 91/440/EEC, Eurotunnel being the manager. BR and SNCF are railway undertakings having rights of access to the railway infrastructure on the conditions laid down in Article 10 of the Directive.

G. Observations received from interested parties

- (40) After it had published the notice required by Article 19 (3) of Regulation No 17 and Article 26 (3) of Regulation (EEC) No 1017/68,

⁽¹⁾ OJ No L 278, 23. 12. 1970, p. 1.

⁽²⁾ Convention concerning international carriage by rail, dated 9 May 1980.

⁽³⁾ Appendix A to the Cotif.

⁽⁴⁾ Appendix B to the COTIF.

the Commission received observations from ten interested parties, making three main points:

- care had to be taken to give full effect to the provisions of Directive 91/440/EEC dealing with the conditions of access to infrastructures;
- the proportion of paths reserved to BR and SNCF must not be too high, as this would prevent others from running a sufficient number of trains;
- any exemption must not be for too long a period, given the changes currently under way in the operation of the market.

II. LEGAL ASSESSMENT

A. The relevant legal provisions and procedural rules

- (41) The parties to the contract notified it under the procedural rules in Regulation (EEC) No 1017/68.
- (42) However, the contract is concerned not only with transport but also with the provision of infrastructure, which does not constitute transport.
- (43) Regulation No 17 was made inapplicable to transport by Council Regulation No 141⁽¹⁾; this was done in order to take account of the distinctive features of the transport sector.
- (44) The third recital to Regulation No 141 states that 'the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services'.
- (45) According to Article 1 of Regulation No 141: 'Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article 86 of the Treaty, within the transport market.' The 'supply of transport' consists, here, in making available to users international trains for the transportation of passengers and goods, together with shuttles capable of transporting road vehicles. Such services are to be regarded as true transport services.
- (46) Regulation No 141 and the procedural regulations specific to the transport sector consequently cover only those anti-competitive practices which are

concerned with the transport market in the sense that they relate directly to the provision of a transport service.

- (47) It is clear from the case-law of the Court of Justice⁽²⁾ that the organization of dock work, while it may be complementary and indispensable to sea transport, must nevertheless be distinguished from sea transport and constitutes a separate market.
- (48) That being so, the Commission takes the view that the business of providing an infrastructure lies outside the scope of the procedural regulations specific to the transport sector, and that it falls under Regulation No 17 where the application of Articles 85 and 86 of the EC Treaty is concerned.
- (49) In the present case, then, the procedural regulation applicable to the provisions of the contract dealing with transport services is Regulation No (EEC) 1017/68, while Regulation No 17 applies in respect of the provision of infrastructure.
- (50) Since the contract is liable to produce effects in the territory of the European Economic Area, its lawfulness must also be examined in the light of Article 53 of the EEA Agreement.

B. The relevant markets

B.1 *The market in the provision of hourly paths for rail transport in the Channel Tunnel*

- (51) The Channel Tunnel is an essential railway infrastructure whose manager sells capacity to railway undertakings wishing to run international trains.
- (52) The use of hourly paths on this infrastructure is indispensable to the railway undertakings supplying transport services; they incorporate the purchase price of the paths into the price they charge their customers, who pay an all-in price to the carrier.
- (53) The fact that users pay an all-in price to the carrier, however, is not in the Commission's view sufficient to show that the infrastructure manager's activity forms an integral part of the supply of transport within the meaning of Article 1 of Regulation (EEC) No 1017/68.
- (54) According to the case-law of the Court of Justice⁽³⁾ and the Commission's practice as developed in its decisions⁽⁴⁾, the provision of port services may constitute a reference market for the purposes of the competition rules.
- (55) The Commission considers that this argument may be transposed to the present case, as far as the provision of hourly paths in the Channel Tunnel is concerned.

⁽²⁾ Case C-179/90, *Merci convenzionali porto di Genova*, [1991] ECR I-5923.

⁽³⁾ See footnote to paragraph 47.

⁽⁴⁾ Decision 94/19/EC of 21 December 1993, *Sea Containers v. Stena Sealink* (OJ No L 15, 18. 1. 1994, p. 8).

⁽¹⁾ OJ No 124, 28. 11. 1962, p. 2751/62.

- (56) This infrastructure constitutes an essential facility for railways wishing to provide transport services between the United Kingdom and the Continent.
- (57) The Commission concludes that the provision of infrastructure capacity in the Channel Tunnel is a reference market geographically confined to the Channel Tunnel and its access areas. In accordance with the findings of the Court of Justice already referred to, this market constitutes a substantial part of the common market.

B.2 The markets in the international transport of passengers and freight between the United Kingdom and the Continent

- (58) According to the case-law of the Court of Justice, 'the concept of the market implies that there can be effective competition between the products [or services] which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the [services] forming part of the same market' ⁽¹⁾.
- (59) Consequently, in the case of transport, technical substitutability between different modes of transport alone is not sufficient to demonstrate that they form part of the same market.
- (60) It is necessary to assess whether these different modes of transport are sufficiently interchangeable from the standpoint of users.
- (61) Furthermore, the Court of Justice has ruled that there is no global market in transport ⁽²⁾. Possible alternative transport must be appraised in terms of each international route.
- (62) It must therefore be concluded in this case that the undertakings which will provide transport services between the United Kingdom and the Continent will be operating on several markets which have different characteristics and where competition between modes of transport functions in different ways. The following markets in particular can be identified.
- (63) There is the market in the transport of goods travelling in the same vehicle, container or swap body, the goods remaining unloaded throughout the operation.

Following the opening of the Channel Tunnel this can be done:

- by lorry, using the railway services and shuttles operated by Eurotunnel,
- by lorry, using sea transport services, and

— by international train between a terminal in the United Kingdom and a terminal on the Continent ⁽³⁾.

- (64) The transport of passengers travelling in the course of their business and the transport of passengers travelling for leisure purposes are two separate markets, because of the nature of the services they are looking for and the nature of competition between modes of transport.
- (65) Business travellers seek a rapid form of transport offering a high level of comfort, and with frequencies and timetables suited to business constraints. The price is not a decisive factor in their choice of mode of transport. The aeroplane, the high-speed train and the high-quality night train are all possibilities.
- (66) Those on leisure trips, who bear their own costs, attach greater importance to the price; rapidity, comfort and frequency are not decisive factors. Here rail travel, road travel using a Channel Tunnel shuttle or sea transport for one leg of the journey, and economy-class air travel can constitute substitute modes of transport ⁽⁴⁾.
- (67) Thus the markets described at recitals 62 to 66 do not form an exhaustive list.

C. The concept of agreement

- (68) The usage contract signed by CTG, FM, BR and SNCF constitutes an agreement within the meaning of Article 85 of the EC Treaty, notwithstanding the terminology used in that contract.

D. Restrictions on competition

D.1 Restrictions on competition on the transport markets

- (69) Pursuant to Article 10 of Directive 91/440/EEC, in the transport of passengers and conventional freight, international groupings of railway undertakings have access rights to the railway infrastructures in the Member States of establishment and transit rights in the infrastructure of other Member States for the purposes of operating international transport services.
- (70) In order to operate combined international transport services, each railway undertaking has rights of access to railway infrastructure in the Community.

⁽¹⁾ See, for example, Case 85/76, *Hoffman-La Roche v. Commission*, [1979] ECR 461, at paragraph 28.

⁽²⁾ Case 66/86, *Ahmed Saeed Flugreisen*, [1989] ECR 803.

⁽³⁾ See Commission Decision 94/594/EC, ACI (OJ No L 224, 30. 8. 1994, p. 28).

⁽⁴⁾ See Commission Decision 94/663/EC, *Night Services* (OJ No L 259, 7. 10. 1994, p. 20).

- (71) These rights are available to existing railway undertakings and to any new railway undertakings, including subsidiaries of existing railway undertakings which may establish themselves in a Member State as railway undertakings.
- (72) Furthermore, the Directive leaves Member States free to enact more liberal legislation governing access to infrastructure.
- (73) In the case at issue here, the usage contract provides for a division of the transport markets between, on the one hand, Eurotunnel, which operates the shuttles and, on the other, BR and SNCF, which operate international trains carrying passengers and freight.
- (74) In accordance with Clause 28.5 of the contract, BR and SNCF may operate motorail and motorail sleeper services which may, under certain conditions, compete with shuttles operated by Eurotunnel. However, under the contract, these operations may not be such as to prejudice Eurotunnel's commercial operations.
- (75) Eurotunnel, however, as a railway undertaking within the meaning of Directive 91/440/EEC, could legally operate international combined transport trains between the United Kingdom and the Continent in competition with BR and SNCF.
- (76) Similarly, Eurotunnel could legally form an international grouping with another railway undertaking and operate international trains carrying passengers or conventional freight in competition with BR and SNCF.
- (77) Moreover, the carriage of lorries on shuttles constitutes a form of international combined transport of goods within the meaning of Directive 91/440/EEC.
- (78) BR and SNCF may therefore operate such services or passenger transport services individually or as an international grouping under Article 10 of that Directive and in competition with Eurotunnel.
- (79) By dividing the abovementioned markets between BR, SNCF and Eurotunnel, the usage contract has as its object and effect an appreciable prevention or restriction of competition in breach of Article 85 (1) of the EC Treaty.

D.2. Restrictions on competition on the market in the provision of hourly paths for rail transport in the Channel Tunnel

- (80) Eurotunnel, as the Channel Tunnel concessionaire, owns all of the hourly paths for the operation of transport services through the Tunnel.
- (81) However, the terms of the contract show that half of the capacity of the Tunnel is reserved for shuttle services and the other half for international passenger and freight trains.

- (82) Furthermore, BR and SNCF are at all times entitled to 50 % of the capacity of the Tunnel to operate international trains, or actually 100 % of the hourly paths available for that category of transport unless they surrender part of their entitlement. Under the terms of the contract, BR and SNCF do not undertake to buy 50 % of the capacity of the Tunnel but the managers of the infrastructure undertake to sell that capacity if the need arises.
- (83) Accordingly, other railway undertakings cannot obtain from the managers of the infrastructure the hourly paths necessary to operate international trains carrying passengers or freight in competition with BR and SNCF.
- (84) It must therefore be concluded that the contract has as its object and effect the restriction of competition on the market in the provision of hourly paths for rail transport in the Tunnel and on the transport markets.

E. Effect on trade between Member States

- (85) The contract covers the conditions for the use of the Channel Tunnel, which links two Member States. It therefore affects trade between Member States within the meaning of Article 85 of the EC Treaty.

F. Article 85 (3) of the EC Treaty and Article 5 of Regulation (EEC) No 1017/68

(a) Contribution to economic progress

- (86) The Channel Tunnel constitutes railway infrastructure intended to permit the transport of passengers and freight between the United Kingdom and the Continent.
- (87) That transport will be performed by international trains linking stations in the United Kingdom and the Continent, and by shuttles carrying vehicles between France and the United Kingdom.
- (88) On the basis of the statistics available, it is difficult to give a definite forecast of the level of traffic services provided by shuttles and by international passenger and freight trains.
- (89) In any event it is necessary that road vehicles arriving at an entry to the Tunnel should be carried in satisfactory conditions. Likewise, it is in the interests of consumers to be able to make proper use of international train services from the opening of the Tunnel.
- (90) It is important to bear in mind here that the shuttle transport of vehicles and the international rail transport to be offered are new services requiring investment in specialized equipment which will be recovered over long periods.

- (91) The specialized shuttle equipment can be used only in the Tunnel. The international trains to be used for transport through the Tunnel could technically be used elsewhere, but this would not be justifiable in commercial terms.
- (92) Generally speaking, therefore, transport operators need certain assurances that infrastructure capacity will be available for shuttle operations and for international trains.
- (93) The availability of capacity for shuttle services and for international trains is also important in order to ensure the development of competition between these two modes of transport.
- (94) The Commission is therefore of the opinion that the division of Channel Tunnel capacity between the shuttle services and international trains is of such a nature as to promote economic progress, having regard to the particular features of the Tunnel.
- (95) Furthermore, due account must be taken of the fact that the operation of both shuttle services and international trains requires advanced technology and specialized equipment which are not interchangeable.
- (96) Given the particular nature of this case, it may therefore be considered that the specialization of BR and SNCF in international trains and Eurotunnel in shuttles is such as to contribute to economic progress.
- (97) It should also be emphasized that construction of the Tunnel involves considerable private investment and that the undertaking on the part of BR and SNCF to operate international trains during the concession period, using the hourly paths sold by Eurotunnel, manifestly contributes to the success of the project. Another point worth emphasizing is that BR and SNCF have undertaken to pay charges in lump-sum form throughout the first 12 years. This undertaking makes a direct contribution to the project's financial equilibrium.
- (98) The undertakings given also represent important guarantees for the banks which are providing financing for the overall Eurotunnel project.
- (99) The Commission is therefore of the opinion that the agreement involved is such as will promote economic progress.

(b) Benefits to consumers

- (100) Consumers will benefit directly from the establishment of regular services by shuttles and international trains throughout the term of the contract, providing alternative cross-Channel transport in competition with other forms of transport. They will in particular benefit directly

from the increased competition that will result from the introduction of new services.

(c) Indispensable nature of the restrictions

- (101) The division of the Tunnel's capacity between shuttle services and international trains is indispensable, notably in view of the requirements of the transport policy of the Community and of the Member States.
- (102) Nevertheless, in the light of the forecasts of traffic and of the number of paths actually used, the reservation for BR and SNCF of all of the hourly paths available for international trains is not essential to them for the provision of their transport services and contribute to the success of the project. Clause 6.2 of the contract in fact stipulates that the concessionaires may request BR and SNCF to agree to surrender part of their entitlement to use the fixed link and that such agreement is not to be unreasonably withheld. It is in any case necessary to minimize the effects on competition by ensuring that railway undertakings other than BR and SNCF are able to obtain hourly paths to operate international trains. The Commission will therefore attach appropriate conditions and obligations to its decision.

(d) No elimination of competition

- (103) For the same reasons as are set out in recital 102, the agreement involved must not eliminate all competition and the Commission will therefore attach appropriate conditions and obligations to its decision.

G. Exemption procedures

- (104) Under Article 13 of Regulation (EEC) No 1017/68 and Article 8 of Regulation No 17, any exemption decision must indicate the period for which it is valid, and conditions and obligations may be attached.
- (105) In determining the length of the exemption, account must be taken of the exceptional nature of the infrastructure and of the need to create the conditions for its successful use.
- (106) It must be emphasized here that the agreement is of great importance to the project.
- (107) The funding for the project is mostly in the form of bank loans, to be repaid essentially over a period of some 30 years. The undertakings given by BR and SNCF under the usage contract manifestly help to guarantee these loans.
- (108) The Commission therefore considers that, having regard to the exceptional circumstances of the case, an exemption of 30 years can be granted.

(109) Certain conditions and obligations must nevertheless be attached to the exemption to make sure that the restrictions on competition do not go beyond what is indispensable and that the agreement does not afford the undertakings involved the possibility of eliminating competition.

(110) On this matter, SNCF and BR made the following observations to the Commission:

Given a 12-year time span, and subject to the obvious limits of any forecasts, the capacity needed for all this traffic represents an average of about 75 % of the capacity reserved to BR and SNCF under the usage contract concluded with Eurotunnel. That figure takes account of disparities in the speeds of the various types of traffic in the tunnel. The average rate of 75 % is also liable to fluctuate according to the time of day: it is impossible for the time being to be more categorical, in view of the uncertainties as to the pattern of demand.

Eurotunnel stated that, on the basis of its traffic forecasts, the reservation of 75 % to BR and SNCF seemed unexceptionable.

(111) Under Clause 6.2 of the contract, Eurotunnel may request BR and SNCF to agree to surrender part of their entitlement to buy capacity in the fixed link — such agreement not to be unreasonably withheld.

(112) The Commission therefore considers that BR and SNCF would not be justified in objecting to other railway undertakings buying hourly paths from the manager of the infrastructure in order to provide international passenger or freight train services.

(113) However, BR and SNCF must have available the hourly paths necessary to provide an appropriate level of service, that is 75 % of the capacity of the Tunnel reserved for international trains, so that they can operate their own services and those of their subsidiaries. Although BR and SNCF have stated that 75 % is to be understood as a daily figure, the Commission believes that the reservation of 75 % of capacity for those undertakings alone should be set as an hourly figure, for the following reasons:

(114) In the first place, the agreement between Eurotunnel and BR/SNCF as to the reservation of capacity is expressed on an hourly rather than a daily basis.

(115) In the second place, it is essential that railway undertakings other than BR and SNCF should be able to secure paths at all hours of the day, including peak hours. It is generally agreed that, for any given service, the paths are not all equally useful or equally valuable. In the case of a

businessman, for example, it is essential that the services offered shall enable in to reach the main European capitals in the early morning and to return home in the late afternoon. The interchangeability between different international trains is therefore limited within certain fixed periods. Hence it is indispensable that users should genuinely create competition between two or more carriers at the hours which are relevant to them.

(116) This must not prevent the proportion of paths from being adjusted by agreement between the manager of the infrastructure, BR, SNCF and any other railway undertakings concerned.

(117) Thus BR and SNCF should be able to use more than 75 % of the hourly capacity if the need arises and if the infrastructure manager has capacity available.

(118) The other railway undertakings should likewise be able to use more than 25 % of the hourly capacity if the manager has capacity available.

(119) Such adjustment must not restrict the right of BR and SNCF to use up to 75 % of the hourly paths reserved for international trains, nor the right of the other railway undertakings to use up to 25 %.

(120) The fixing of the percentage of hourly paths actually needed by BR and SNCF is linked to traffic forecasts, which are very difficult to make over a period of 30 years.

(121) The proportion of paths reserved to BR and SNCF, 75 %, must therefore be re-examined by the Commission after 12 years, that is to say, not later than 31 December 2006.

(122) In view of the length of the period of exemption, the railways involved must also inform the Commission every year of the number of hourly paths actually used, and Eurotunnel must inform it of the number of any applications for paths which could not be met because none was available.

(123) This Decision does not prejudice the applicability of Article 86 of the EC Treaty, in particular as regards the fixing of charges for use of the Tunnel, nor that of Directive 91/440/EEC.

(124) This Decision makes Article 85 (1) of the EC Treaty, Article 2 of Regulation (EEC) No 1017/68 and Article 53 (1) of the EEA Agreement inapplicable to the usage contract of 29 July 1987 between BR, SNCF and Eurotunnel, and it is without prejudice to the Commission's position should the parties to that contract, or the content

thereof, be changed, or in the event of any major change in market conditions,

HAS ADOPTED THIS DECISION:

Article 1

In accordance with Article 85 (3) of the EC Treaty, Article 5 of Council Regulation (EEC) No 1017/68 and Article 53 (3) of the Agreement on the European Economic Area, Article 85 (1) of the EC Treaty, Article 2 of Regulation (EEC) No 1017/68 and Article 53 (1) of the Agreement on the European Economic Area are hereby declared inapplicable for a period of 30 years beginning on 16 November 1991 to the usage contract dated 29 July 1987 made between the Channel Tunnel Group Ltd, France Manche SA, the British Railways Board and the Société nationale des chemins de fer français.

Article 2

The following conditions and obligations are attached to the exemption provided for in Article 1:

A. Conditions

- (a) In accordance with Clause 6.2 of the usage contract, BR and SNCF must not withhold their agreement to the sale by the managers of the infrastructure to other railway undertakings of the hourly paths necessary to operate international passenger and freight services.
- (b) However, BR and SNCF must have available the hourly paths necessary to provide an appropriate level of services during the period up to 31 December 2006, that is up to 75 % of the hourly capacity of the Tunnel in each direction which is reserved for international passenger and freight trains, in order to operate their own services and those of their subsidiaries.
- (c) Over the same period the other railway undertakings and groupings of undertakings shall have available at least 25 % of the hourly capacity of the Tunnel in each direction in order to run international passenger and freight trains.
- (d) The conditions set out in (b) and (c) shall not prevent BR and SNCF, during that period, from using more than 75 % of the hourly capacity if the other railway undertakings do not use the 25 % of capacity remaining.
- (e) The conditions set out in (b) and (c) shall similarly not prevent railway undertakings other than BR and

SNCF from using, during that period, more than 25 % of the hourly capacity if BR and SNCF do not use the 75 % of capacity which is reserved to them.

- (f) Such adjustments shall in no way restrict the right of BR to use up to 75 % of the hourly paths reserved for international trains during that period if the need arises, nor the right of the other railway undertakings to use up to 25 % of that capacity.
- (g) The proportion of paths reserved to BR and SNCF will be re-examined by the Commission before 31 December 2006.

B. Obligations

- (h) BR and SNCF must inform the Commission every year from 1 January 1995 onwards of the number of hourly paths used, by hour and in each direction, calculated on a monthly basis.
- (i) The Channel Tunnel Group Ltd and France Manche SA must inform the Commission every year from 1 January 1995 of the average number of applications for hourly paths submitted by railway undertakings or groupings of railway undertakings other than BR and SNCF which could not be met because none were available.

Article 3

This Decision is addressed to:

1. British Railways Board,
Euston House,
24, Eversholt Street,
UK-London NW1 1DZ;
2. SNCF,
88, rue St Lazare,
F-75009 Paris;
3. The Channel Tunnel Group Limited,
The Adelphi,
John Adam Street,
UK-London WC2N 6JT;
4. France-Manche S.A.,
112, avenue Kléber,
BP 166, Trocadéro,
F-76770 Paris Cedex 16.

Done at Brussels, 13 December 1994

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 15 December 1994

relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(IV/34.768 — International Private Satellite Partners)

(Only the English and Italian texts are authentic)

(Text with EEA relevance)

(94/895/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 2, 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption, submitted pursuant to Articles 2 and 4 of Regulation No 17 on 28 June 1993 by the parties concerned below,

Having regard to the request made by the parties on 14 February 1994, to extend the application and notification to Article 53 of the EEA Agreement,

Having regard to the summaries of the application and notification published ⁽²⁾ pursuant to Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. INTRODUCTION

- (1) On 28 June 1993, 20 agreements relating to the creation of a company were notified to the Commission. The company, International Private Satellite Partners (hereinafter referred to as IPSP) has been created under the form of a limited partnership organized under United States law, and

has been formed to provide (a) international business telecommunications services to businesses in Europe and North America using its own satellite system on a one-stop shop basis; and (b) to offer bulk transmission capacity to third parties, to the extent that the capacity of the satellites is not fully utilized by IPSP or its partners.

Following the entering into force of the EEA Agreement, the parties requested the Commission on 14 February 1994 to extend the notification to cover also Article 53 of the EEA Agreement. Following such request the Commission started the relevant cooperation procedure with the EFTA Surveillance Authority.

B. THE PARTIES

(a.a) *The partners*

- (2) Orion Satellite Corporation (hereinafter referred to as 'OrionSat'), which is a company organized under the laws of the State of Delaware, created by its ultimate parent company, Orion Network Systems, to serve as the general partner in IPSP. It holds the United States Federal Communications Commission (hereinafter referred to as 'the FCC') licence to construct, launch and operate IPSP's two satellites and has broad authority to manage and control IPSP's development and operations.

Orion Network Systems, which is also a limited partner in IPSP, provides telecommunications facilities and services, in particular point-to-point transmission services using subleased capacity.

OrionSat, as general partner, has a [...] ⁽³⁾ interest in the partnership that has to be added to an additional [...] held by Orion Network Systems.

- (3) British Aerospace Communications, which is a limited partner of IPSP belonging to the British Aerospace group (hereinafter referred to as 'BAe') of companies, and formed by the latter specifically for the purpose of investing in IPSP.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 305, 11. 11. 1993, p. 13 and OJ No C 159, 10. 6. 1994, p. 2.

⁽³⁾ [...] Blanks between square brackets indicate business secrets deleted pursuant to Article 21 (2) of Regulation No 17.

It holds a [...] interest in IPSP. The British Aerospace Group is mainly engaged in the design and manufacture of civil and military aircraft, guided weapon systems, satellites and sub-systems, payloads and launch vehicle equipments and motor vehicles. In particular, it is the prime contractor for the IPSP satellites.

The total turnover of the BAe group in 1992 was £ 9 977 million (ECU 13 000 million).

- (4) COM DEV Satellite Communications Ltd, which is a limited partner of IPSP in which it holds a [...] interest. It was incorporated specifically by its ultimate parent company, COM DEV Ltd, for the purpose of investing in IPSP.

The COM DEV group is an important supplier of satellite payloads subsystems for communications, space science and remote sensing applications.

- (5) General Dynamics Commercial Launch Services, which is a limited partner of IPSP in which it holds a [...] interest. It provides spacecraft launch services and will also provide such services for the IPSP satellites.

It belongs to the General Dynamics Co. which is engaged in the manufacture and sale of weapon systems and platforms, space transportation, and building materials. The consolidated turnover of General Dynamics Co., in 1991 was US \$ 8 751 million (ECU 7 250 million).

- (6) Kingston Communications International Ltd (hereinafter referred to as 'Kingston'), which is a limited partner of IPSP in which it holds a [...] interest. It was incorporated specifically by its parent company, Kingston Communications (Hull) plc, for the purpose of investing in IPSP.

Kingston Communications (Hull) plc is a United Kingdom company, being the licensed operator of the public switched telephone network in the city of Hull and its surrounding area.

Kingston Communications (Hull) plc and BAe have incorporated a jointly controlled joint venture, Kingston Satellite Services Ltd, intended to act as the agent of both parent companies in discussions with IPSP concerning the offering of IPSP services.

The 1991 total turnover of the Kingston group was £ 59 million (ECU 77 million).

- (7) MCN Sat. US, which is a United States corporation formed with the primary purpose of holding the investment of the French group Matra-Hachette in IPSP where it holds a [...] interest.

The Matra-Hachette group is active in aerospace, in particular in the manufacture of various types of

satellites (through Matra Marconi Space), defence, telecommunication and CAD-CAM equipment, automobile transportation, publishing, broadcasting, movie production and advertising. Its overall turnover in 1992 was FF 55 000 million (ECU 8 350 million).

- (8) STET — Società Finanziaria Telefonica per Azioni, which is an Italian company whose majority shareholder is the Istituto per la Ricostruzione Industriale (hereinafter referred to as 'IRI'), the largest Italian State company. STET's institutional function, as IRI's holding company for the telecommunications sector, is to guarantee the coordination of financial and commercial aspects in the provision of telecommunications services, manufacturing products and network installation. STET as limited partner holds a [...] interest in IPSP.

As will be described later, STET will have the exclusive responsibility for promoting the sale of IPSP satellite capacity and international business telecommunications services in Italy and 'Eastern Europe'.

- (9) Trans-Atlantic Satellite, Inc., which is a subsidiary of the Japanese company Nissho Iwai Co., formed mainly for the purpose of investing in IPSP where it holds a [...] interest. In addition it will also work as a subcontractor to BAe for certain components of the IPSP satellites. In this respect it obtained a turnover of US \$ 3 million (ECU 2,5 million) for the year ending 31 March 1992.

Nissho Iwai Co. is a general trading company active in trade in, and import and export of all types of domestic Japanese and foreign merchandise. Its turnover in the year ending 31 March 1992 was ECU 86 700 million. The Nissho Iwai Group has a substantial interest in a number of companies in the telecommunications business. In particular, it participates in the capital of Satellite Japan Corporation, a Japanese satellite operator, the main business of which is to sell bulk transponder capacity in Japan only. This company was merged with the Japanese company JC-Sat. The merger was cleared by the Commission last year.

(b.b) *The limited partnership*

- (10) IPSP has been organized first to provide international business telecommunications services (e.g. internal corporate networks, bulk data transfer, data collection and transport, fax and electronic document distribution, and network services by satellite and using very small aperture terminals (hereinafter referred to as 'VSATs') to multinational companies on a 'one-stop shop',

'end-to-end' basis covering North America and Europe; and secondly, to offer transmission capacity on its satellites to the extent capacity is not fully utilized by IPSP and its partners.

- (11) The closing of IPSP under the notified structure started in 1982 when OrionSat filed an application with the FCC for a licence to operate an international satellite system. Following the granting of the licence, OrionSat initiated, in 1988, the process of consultation with Intelsat. The consultation lasted one year and, once finished in 1989, OrionSat entered into a contract with BAe as prime contractor for the construction and launch of the satellite system. At the same time and through the closing of the partnership, at the end of 1991, OrionSat held discussions and negotiations with prospective partners and negotiated a loan financing package from an international consortium of banks.

- (12) Under the terms of the FCC's licence, IPSP or its customers were not allowed to interconnect the IPSP satellite facilities with a switched telephone network for the purpose of providing telecommunications services. However, in December 1993, the FCC adopted a new policy pursuant to which it is now possible for separate satellite systems (like IPSP) to apply to carry up to 1 250 64-kbps equivalent circuits of public switched traffic.

1. Service and facilities

- (13) IPSP intends to build, launch and operate high-power Ku-band telecommunication satellites to be positioned in orbital positions 37°5 W and 47° W longitude. The first satellite, built using the Eurostar platform — developed jointly by BAe and Matra Marconi Space through a joint venture called Satcom International — will contain 28 transponders of 54 MHz bandwidth and six transponders of 36 MHz bandwidth, that will make 1 728 MHz of usable communications capacity per satellite. The geographical reach ('footprint') of the satellites will cover much of North America, much of the EEA and portions of central and eastern Europe.
- (14) It is expected that the first satellite will be operational by December 1994 and the second sometime thereafter. Their design life will be 12 years.
- (15) Prior to the launching and operation of its own satellites, IPSP will provide the services by relying on leased facilities.
- (16) In addition, IPSP will operate its own tracking, telemetry and command facilities being built in the US to control the satellites, that will be backed up by additional facilities to be built in Italy.

- (17) Customers of IPSP will have to install two-way VSATs on their premises in order to access the services.

2. Financial contribution

- (18) The complex financial arrangements supporting IPSP are as follows:
- (a) the partners have invested a total of US \$ 90 million in equity distributed according to their respective interests in IPSP. OrionSat's contribution as general partner amounts to US \$ 30 million made up of the FCC licence, certain contract rights and other tangible and intangible assets;
 - (b) in addition they have obtained a senior debt facility of up to US \$ 251 million for the first satellite from a syndicate of international banks;
 - (c) certain of IPSP's partners have committed additional funds for an amount of US \$ 9 million;
 - (d) furthermore, with a view to guaranteeing IPSP a sufficient level of utilization of the satellites' capacity, the limited partners have also agreed to lease capacity on the satellites up to a total amount of [...], and of [...] transponders. As will be described later that capacity could be re-leased by the limited partners to customers of IPSP;
 - (e) finally, the limited partners have entered into additional contingent lease capacity contracts with IPSP that will require them to make additional contributions to IPSP in exchange for additional transmission capacity up to [...] transponders, in case of negative cash flow, to allow IPSP to service the senior debt.

3. Central management and integrated operations

- (19) As IPSP has been created to provide services to customers on the basis of a fully interconnected network enabling the provision of uniform services at uniform prices, the general partner is given exclusive responsibility for management and control of IPSP and, subject to certain limited rights of review and approval by the limited partners, has broad authority to carry out the development, operation and marketing and promotion of IPSP's business.
- (20) This control by OrionSat is also a requirement of the FCC in order that the licence that OrionSat holds can be transferred to IPSP.

4. Marketing and distribution

- (21) IPSP will market and distribute its services with the assistance of a number of local marketing and operating companies that will be nominated by IPSP as representative agents or distributors. Apart from STET, which is the exclusive distributor for Italy and the exclusive representative agent for a group of countries collectively referred to in the agreements as 'eastern Europe' (Austria, Hungary, Poland, Romania, Bulgaria, Malta, the former USSR, the former Czechoslovakia and the former Yugoslavia), such agents or distributors will work on a non-exclusive basis. They may, but need not, be limited partners. As in some Member States licences to provide uplink services are not available yet, IPSP will have to work with the national telecommunications operators (hereinafter referred to as 'TOs') which will act as agents. This situation is expected to last until the Community's liberalization of satellite services is effective and implemented.

C. THE RELEVANT MARKET

(a.a) *Product market(s)*

- (22) IPSP will compete in two markets:

- that of international private business telecommunications services,
- that of the offer of bulk satellite transmission capacity.

1. International business private telecommunications services

- (23) Services of the kind that IPSP will offer to its customers are intended to address the growing need of multinational companies for advanced end-to-end communications between their geographically dispersed locations around the world and/or between them and their customers and suppliers of raw materials and intermediate products. The services include, among others, voice calling, high-speed fax, data storage and transport and video conferencing.
- (24) Such services can be included in the emerging market for international (or even global) value-added services to large corporations and other intensive users of advanced telecommunications services.
- (25) This is one of the segments of the overall telecommunications market with the biggest potential for growth in the years to come, taking full advantage of the current ongoing process of liberalization of telecommunications and of the growing convergence of telecommunications and electronics, in particular software.

It is significant that most of the alliances in the telecommunications field being announced nowadays include provisions to enter the value-added segment (sometimes as a first step of a broader alliance), and in particular the provision of advanced value-added services to the world's biggest corporations.

- (26) The services can be provided to customers either using terrestrial facilities and establishing physical links by means of coaxial or optical-fibre cables, or using satellite facilities and VSATs. It is widely accepted that satellites are particularly recommended as regards customers' locations in remote territories and in areas having a very poor terrestrial infrastructure.
- (27) Although some of the other alliances being announced include also the provision of services by satellite — as part of a basket of services to be provided mainly through cables — IPSP is the first venture that will offer services only through satellites.
- (28) Another particularity of IPSP is that contrary to most of the alliances being announced — that are formed by incumbent TOs — IPSP's partners are (apart from STET and Kingston) private companies not previously active in the telecommunications field.
- (29) According to the parties, this lack of private initiative is due to the fact that such companies still face significant barriers to entry arising from:
- the remaining regulation of telecommunication services in many countries notwithstanding the substantial changes that are taking place. That means that IPSP will not be able to operate on its own where exclusive rights still exist and that it will have to apply for licences to provide uplink/downlink services where total liberalization of the satellites' earth segment is not achieved. In addition, IPSP will have to coordinate with the international satellite organizations to provide services via separate satellite systems,
 - the size of the investment necessary to enter the market, in particular if the entrant is acquiring its own transmission facilities. In this respect, the cost of the construction, testing and launch of the two IPSP satellites alone is budgeted at a minimum cost of US \$ 425 million,
 - the difficulty, cost and length of time necessary to establish a business of sufficient size and reputation, including building up brand familiarity and a customer base, in this market in particular.

2. Offering of bulk satellite transmission capacity

- (30) This is a market of secondary importance for IPSP. The parties have declared that they will be active

on it only in case demand for IPSP's services is less than expected.

- (31) Up to now, the supply of space segment capacity is mainly in the hands of three international satellite organizations (hereinafter referred to as 'ISOs'): Intelsat, Eutelsat and Inmarsat. They are the ultimate owners of a considerable number of telecommunication satellites in orbit (Intelsat for instance currently operates 13 geostationary satellites). All three have a very similar structure, e.g. they are organizations implemented by a number of agreements signed by sovereign States, represented by their governments or by their designated public or private telecommunications operators (known as 'signatories'), to provide space segment required (a) for international public telecommunication services either to all areas of the world (Intelsat) or to Europe (Eutelsat) or (b) for improved maritime and aeronautical communications (Inmarsat).
- (32) Under ISOs' respective conventions, direct access to satellite segment capacity and earth station terminal facilities are reserved to the signatories (who also own the terrestrial networks), so that private satellite operators, who are in competition with signatories, are compelled to ask them for obtaining the capacity. This situation places signatories in a very strong position that further reinforces their already strong position in the telecommunications market as a whole.
- (33) In addition, owners of separate satellite systems, such as IPSP, have to undergo (i) a consultation process with Intelsat (and/or Eutelsat) designed to ensure that such separate satellite systems will cause no significant economic harm to ISOs' system and (ii) a technical coordination process, also with the relevant ISOs, to ensure the technical compatibility of the new facilities and their operation with the use of the frequency spectrum and orbital space used by the existing and planned ISOs' space segment.

To date, and following the consultation process carried out by IPSP with Intelsat, Sweden, Denmark, Germany, Belgium, Luxembourg, Italy, Ireland, Austria, the United States and the United Kingdom have currently granted landing rights to IPSP or its representative. In addition, IPSP has also initiated the consultation process with Eutelsat with the support of the United Kingdom, Italy and Ireland.

(b.b) *Geographic market*

- (34) IPSP will be active primarily in the area covered by the geographic reach of the satellites, i.e. much of North America, much of the EEA, and portions of

Central and Eastern Europe. It is considered that this would be the geographic market covered by the agreements. This area would however be further extended by using terrestrial links and networks to cover customers' premises located outside the footprints of the satellites.

(c.c) *Position of IPSP in the market*

- (35) IPSP estimates that the total private line service market represented approximately ECU 8,4 billion in 1990, of which private corporate communications for transatlantic and intra-European services accounted for ECU 1,4 billion. IPSP's projections for 1995 anticipate the latter figure to grow to ECU 3,5 billion of which IPSP will account for some ECU [...] or a [...] market share.

D. THE NOTIFIED AGREEMENTS

(a.a) *List of agreements*

- (36) IPSP in its present form is a result of a lengthy and complex negotiation by and between its current partners. This complexity is clearly reflected by the number of agreements included in the notification intended to cover the organization and financing of IPSP, the satellites, arrangements for IPSP to obtain the assistance of its partners and others in marketing and so on. They are the following:
- Second Amended and Restated Agreement of Limited Partnership (and related further amendments), which sets forth the basic principles under which IPSP has been organized and will be operating.
 - Communications Satellite Capacity Agreements and Contingent Communications Satellite Capacity Agreements concluded between IPSP and each of the limited partners (or the affiliates thereof) through which the latter have entered into seven-year commitments for substantial capacity on the IPSP satellite system for their own internal needs but also for resale to third parties through IPSP and intended to ensure a minimal use of the satellites' capacity, and have also undertaken to use and pay for either additional contingent capacity or make capital contributions in case a cash flow deficit occurs. The latter agreements have been concluded to respond to requirements made for IPSP's senior debt lenders.
 - Agreement of Principles setting forth the general principles under which IPSP will offer

its services to customers, including also the general terms upon which it may obtain the assistance of local marketing and operating companies as representative agents or distributors of IPSP.

- Amended and Restated Preferred Bidder Agreement under which IPSP will give preference to partners in procuring various products and services to the extent that such partners' bids for the products are at least as favourable to IPSP as those of other bidders.
- Service Provision and Distribution Agreement for Italy between IPSP and STET under which STET, for as long as the provision in Italy of international business telecommunications is regulated so that, under Italian law, only STET can provide them, is designated the exclusive distributor for IPSP in Italy. Once deregulation has occurred, and provided that STET complies with certain performance criteria, STET will keep the exclusive right to promote the sale of IPSP's services in Italy.
- First Refusal Agreement for Italy between IPSP and STET under which IPSP will give STET a right of first refusal for the provision of bulk satellite capacity to customers in Italy for services in Italy. This agreement will become effective if and when the provision of satellite capacity in Italy becomes liberalized.
- Representative Agent Agreement for the Sale of Satellite Capacity in eastern Europe between IPSP and STET which sets forth the terms and conditions (including targets to be met by STET) under which STET is designated the exclusive agent of IPSP for the sale of bulk satellite capacity in 'eastern Europe'.
- Service Provision and Representative Agent Agreement for eastern Europe between IPSP and STET under which STET is appointed the exclusive and representative agent of IPSP in 'eastern Europe' for the provision of services provided that STET complies with a number of performance criteria set forth in the agreement.

(b.b) *Details of the specific arrangements*

1. Provisions concerning the management and structure of IPSP

- (37) The agreements contain, in particular, the following provisions:
- (38) — Under Article 7.01(a) of the Limited Partnership Agreement, the general partner of IPSP is given full, exclusive and complete discretion in the management, operation and

control of the business and affairs of IPSP. Conversely, limited partners are prohibited from taking part in the day-to-day management of IPSP except as expressly provided in the agreements (Article 7.10 of the Limited Partnership Agreement, and Article 2 of the Agreement of Principles). This discretion of the general partner extends also to the setting up of IPSP prices and other commercial conditions.

- (39) — Notwithstanding the above, limited partners can exert a certain influence on the management of IPSP through a permanent structure that is created and composed of the following committees:

(a) Partners Planning and Policy Review Committee

Created under Article 7.11(a) of the Limited Partnership Agreement, this Committee consists of one member nominated by each partner. The general partner is to submit a number of actions to the Committee, which has the right to approve or disapprove them by a majority vote. Most important of those actions are:

- the establishment of any pricing policy with respect to IPSP's sale of services which is intended to result in the sale of satellite transmission capacity to customers generally at prices which are lower than those charged to limited partners or the sale of satellite transmission capacity to certain IPSP partners at prices or terms materially different from the prices and terms offered or available to IPSP partners generally,
- the decision by the general partner to increase the budget above a given percentage,
- the approval of business plans for IPSP services concerning (i) IPSP resources, (ii) additional funding, and (iii) the initiation of IPSP services prior to the launch of the satellites.

(b) Technical Committee (Article 7.15 (b) of the Limited Partnership Agreement).

This is an advisory committee on all matters relating to the technology and operation of the IPSP satellite system and transmission networks. In particular, and with regard to IPSP services, it recommends technical standards for the equipment and operations.

- (c) Under Article 7.04 of the Limited Partnership Agreement, certain major decisions by the general partner that would

have a significant impact on the limited partners' investments, are subject to a majority vote by them. They include dissolution of IPSP, its merger or consolidation with another entity, and the sale of a material portion of IPSP's assets.

- (40) — In order to ensure that OrionSat devotes its full-time efforts to the management of IPSP, under Article 7.06 of the Limited Partnership Agreement, the general partner is prevented from engaging in any business other than the management of the partnership without the prior written unanimous consent of the limited partners. In addition, neither OrionSat nor Orion Network Systems, Inc. may have other business interests or may engage in other business ventures that compete directly or indirectly with IPSP.

Conversely, limited partners are free to compete with IPSP in the provision of services to customers. They also remain free to acquire business interests or engage in other business ventures with competitors of IPSP or limited partners thereof (Article 7.06 of the Limited Partnership Agreement and Article 7 of the Agreement of Principles).

2. Most favoured provisions

- (41) The agreements contain a number of provisions referred to as 'most favoured nation' under which IPSP warrants that limited partners will get the best prices, terms and other conditions that IPSP is offering to each of its customers for similar capacity and/or services. Such provisions are included in Article 16.02 of the Limited Partnership Agreement and also in Articles 16.01 of the various Capacity Agreements, 21.01 of the various Contingent Capacity Agreements, and in Articles 4.5 and 15.1 of the Service Provision and Distribution Agreement for Italy, 3.5 of the Capacity Sale Agreement for eastern Europe and 4.4 and 15.11 of the Service Provision Agreement for eastern Europe.

These provisions in turn give IPSP comparable protection as to services and equipment it obtains from partners in order to enable it to function at a competitive cost level. This protection, however, does not apply in the case of contracts between a limited partner and Intelsat, Eutelsat, Inmarsat and domestic satellite systems.

3. Sales of satellite capacity at prices below those paid by limited partners

- (42) Under Articles 16.01 (b) of the Capacity Agreements and 21.01 (b) of the Contingent Capacity Agreements, if IPSP wants to sell or lease satellite capacity to third party customers at a pro rata price per MHz per month that is below the

one that limited partners have agreed to pay to IPSP under the abovementioned agreements, then IPSP must offer them the same amount of additional transponder capacity being offered to customers at the same price but with a 10% discount and on the same other terms and conditions.

4. Use by IPSP of satellite capacity contracted by limited partners

- (43) Under Article 8 of the Agreement of Principles, and as long as IPSP is generating sufficient positive cash flow to cover senior debt service, IPSP undertakes to make use first of capacity which limited partners have contracted on a firm commitment basis — i.e. under their respective capacity agreements — and which they are unable to use for their internal needs.

5. Calls for tenders by IPSP

- (44) Under Article 2 of the Preferred Bidders Agreement, when IPSP calls for tenders worth more than US \$ 1 million, if one or more limited partners supplies a bid which is no less favourable to IPSP than third party proposals with regard to price, design, performance, payment, delivery schedule and other terms and conditions, then, subject to a possible 'best and final' round of bids, IPSP is to award the contract to the limited partner(s) whose bid(s) achieve those criteria, terms and conditions.

6. Marketing and distribution conditions

(a) General

- (45) The marketing and distribution of IPSP services will be centrally planned and managed but implemented in a decentralized manner. In addition, services will be offered at a uniform price and quality level.
- (46) These principles are implemented through the following specific arrangements:
- IPSP has sole and exclusive control and operation of the satellite system (Articles 7.01 and 7.10 of the Limited Partnership Agreement, 8.01 of the Capacity Agreements and 13.01 of the Contingent Capacity Agreements),
 - the marketing and distribution of international business telecommunications services are the responsibility of the general partner (Article 2 of the Agreement of Principles), who will also establish all prices for IPSP services (except where prohibited by law, given exclusive rights granted to the TO in certain countries to do so). In addition sales of services will be centrally managed by the general partner but primarily undertaken by representative agents chosen by the general partner (and that could include limited partners). In contracting with

agents or distributors, the general partner is to obtain competitive prices, terms and conditions and provide performance criteria and goals for such agents. Finally, contracts will be made in the name of IPSP,

- Attachment A of the Agreement of Principles provides that where IPSP services are to be provided in a territory where exclusive or special rights exist relating to the provision of such services, the IPSP services will be provided to the customer under a separate contract, drawn up in accordance with the laws applicable in that territory and concluded between the customer and IPSP's agent, that in such cases will normally be the national TO.

(b) *Specific arrangements with regard to STET*

(b.1) Regarding the Italian territory

- (47) Under Article 2 of the Service Provision and Distribution Agreement for Italy, STET is appointed as IPSP's exclusive distributor in Italy for as long as the Italian telecommunications market is regulated ⁽¹⁾.

If the Italian territory becomes deregulated, the exclusive right of STET will be converted into an exclusive right to promote the sale of IPSP's services in Italy. This right will be dependent upon STET's compliance with certain performance criteria expressed in terms of revenue targets. In case STET fails and does not take all reasonably necessary steps to remedy such failure within a period of 18 months, then IPSP is to be permitted to appoint other distributors in the Italian territory on a non-exclusive basis. However, STET will still be a non-exclusive distributor.

Conversely, STET undertakes not to promote IPSP services outside the Italian territory with the exception of the 'eastern European' territory ⁽²⁾ (Article 2.3. of the Service Provisions Agreement).

In spite of such exclusivity, if IPSP or one of its agents, distributors or partners after the Italian territory has been deregulated, is requested to provide services in Italy, they can do so.

Once deregulation is in place, if a customer located in Italy wants to purchase from IPSP a comprehensive package of international business telecommunications services, also including ground operations services with respect to its Italian site(s),

then IPSP will in principle subcontract with STET for the purpose of providing ground operations services in Italy. However, the final decision as to the use of STET's ground operation services lies in the hands of customers; so that, if for cost or other reasons, customers prefer to obtain the ground operations services elsewhere, then IPSP would provide the package of services without the ground operations services.

- (48) In addition, under the First Refusal Agreement for Italy, when the provision of satellite capacity in Italy becomes liberalized, IPSP is to give STET the opportunity, during a 60-day period, to provide the bulk satellite capacity requested by a customer located only in the Italian territory or, if the customer prefers to acquire the capacity from IPSP, to provide such capacity to IPSP on the same terms and conditions agreed with the customer. In any case, the capacity referred to is the capacity committed by STET and the IPSP's satellites. The purpose of this provision is to give STET a certain priority in discharging the risks it has assumed in undertaking such commitment. However, the price and terms of the lease or sale of satellite capacity to customers, and also to Italian customers, are determined by IPSP.

- (49) Finally, under Article 3.3 of the Service Provision and Distribution Agreement for Italy, IPSP undertakes to forward to STET inquiries from prospective customers who wish to receive telecommunications services within the Italian territory and not extending beyond it.

(b.2) Regarding the countries collectively referred to as 'eastern Europe'

- (50) The two relevant agreements are very similar to those regarding Italy except that in the present case STET is being appointed IPSP's exclusive representative agent for the purpose of offering IPSP's bulk satellite capacity and services.

- (51) According to that exclusivity, and for as long as the countries concerned are regulated (and during the first year following their deregulation), IPSP and the limited partners undertake not to promote the sale of either bulk satellite capacity ⁽³⁾ obtained from IPSP or satellite telecommunications services offered on other satellite systems and satellite telecommunication services provided by IPSP or that are reasonably equivalent to the IPSP services promoted by STET.

⁽¹⁾ For the meaning in the text of the words 'regulated' or 'deregulated' as regards Italy, see recital (36), fifth indent.

⁽²⁾ However, this provision does not prevent STET from engaging in passive sales outside Italy.

⁽³⁾ This agreement applies only to customers located in the eastern European territory, and not to customers located elsewhere who require capacity for a number of sites, also including one or more sites in the eastern European territory.

- (52) However, IPSP can sell bulk capacity in the countries independently from STET and limited partners are free at any time to market satellite capacity obtained from other satellite systems, international business telecommunications services provided using capacity on the IPSP's satellites, provided that the services are not reasonably equivalent to the IPSP's services marketed by STET. Furthermore, following one year after deregulation in the countries concerned, limited partners will be allowed to offer additional bulk satellite capacity obtained from IPSP and/or services that are equivalent to those marketed by STET, provided nonetheless that no logo or trade name belonging to IPSP is used.

Finally, any third person or entity having purchased satellite capacity from IPSP would be free at any time to sell the capacity or any satellite telecommunication services, provided that no logo or trade name belonging to IPSP is used.

- (53) STET's exclusive rights under the two agreements will continue for as long as it meets certain performance criteria defined in the agreements.

7. No third-party observations

- (54) Following the two publications pursuant to Article 19 (3) of Regulation No 17 made to cover Article 85 of the EC Treaty and Article 53 of the EEA Agreement respectively, no comments were received from third parties.

II. LEGAL ASSESSMENT

A. APPLICATION OF ARTICLES 85 (1) OF THE EC TREATY AND 53 (1) OF THE EEA AGREEMENT TO IPSP

- (55) On the basis of arguments developed below, partners of IPSP are not to be considered as actual or potential competitors in the relevant markets to be addressed by IPSP.

- (a) In order for IPSP to enter the market as a facilities-based provider, it has been necessary to obtain a number of authorizations and licences, and to arrange for the financing, construction, launch and operation of two satellites. In this respect, it is considered that none of the partners is in a position to meet all of those requirements alone but only through cooperation in a venture like the present one. In this respect,

— only IPSP's general partner, OrionSat, has the necessary authorizations and licences

from the FCC and Intelsat to launch and operate the satellites. Moreover, the terms of the FCC licence prevent the general partner from releasing control over it without prior FCC approval and define very clearly the kind of services that IPSP would be allowed to provide (see recital (12)),

- none of the IPSP partners holds the necessary authorizations and licences to provide international telecommunications services in all the countries inside the footprint of the satellites. Only STET and Kingston (apart from OrionSat itself) hold any licence to offer telecommunications services but STET is limited to Italy, and Kingston to the town of Hull and the surrounding area. As regards the other limited partners, they (or their ultimate parent companies) are industrial companies active in different segments of the aerospace market and have neither the licences nor the experience required in providing communication services to other companies on a competitive basis (although some of them have gathered some experience by managing their own internal networks).

- (b) None of the IPSP partners could reasonably be expected to make the investment, and assume the substantial risk associated with it, required to enter the market. The very high barriers to entry, the substantial amount of market power in the hands of the incumbent TOs in the overall telecommunications market and of ISOs in the satellite transmission market, the advanced technologies involved, the substantial inherent risk of failure associated with space operations and the broad geographic area covered, together with the amounts required and the bargaining power of customers (in particular the big multinational corporations), make this venture very risky. In view of the above, it is not realistic to consider, from an economic point of view, that any of the partners would enter the market alone.

- (c) In addition, as regards marketing and distribution, the principle of uniform prices and other conditions in different territories, together with the implementation of such marketing in a decentralized manner, seems appropriate to fulfil the needs for world-wide telecommunications services, on a one-stop-shopping and billing basis, of customers having branches or subsidiaries dispersed in different territories.

The provision of such services is not adequately guaranteed by the existing bilateral arrangements between TOs, under which each one provides its own facilities within its own country. This means that each national TO prices its portion of the network separately, contracts with the customer separately, and bills it separately, for a set of services that is often not uniform in all territories involved given the different technical features of each network involved. In this respect, the result of a combined network so created is as strong as its weakest link and so, the number of services and the features thereof are those supported by the less performant national network involved. In addition, operational matters such as monitoring quality, correcting faults and providing customer service are also performed separately.

National TOs are becoming increasingly aware of the importance of the market for international business telecommunications and of the inconveniences resulting from the situation described. As indicated, they are trying to overcome them by forming consortia with other TOs to offer such services (and, in most cases, to do other things). Some of them have already been notified to the Commission.

- (56) The creation and implementation of IPSP, by introducing a new competitor, may be expected to increase the level of competition in a fast-growing segment of the overall telecommunications market, until very recently reversed to companies holding exclusive rights. This would help to accelerate the pace at which new and uniform services are offered to customers and to improve their price and performance.
- (57) The impact in the market for bulk satellite transmission capacity is expected to be positive as well as quite important, in particular, because the creation of IPSP means creating an alternative, and private, supplier of space segment capacity to the incumbent and very strong ISOs and to national systems controlled by national TOs. Thus, IPSP would mean increasing the choice available to service providers demanding space segment capacity.
- (58) In conclusion, the implementation of IPSP, one of the first private ventures to enter the evolving telecommunications market, falls outside the scope of both Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement.

B. APPLICATION OF ARTICLE 85 OF THE EC TREATY AND ARTICLE 53 OF THE EEA AGREEMENT TO CONTRACTUAL PROVISIONS

- (59) The following provisions fall outside both Article 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement:
- the fact that STET is nominated exclusive distributor of IPSP's services in Italy while the Italian market is regulated. This provision merely reflects the fact that under Italian law STET still enjoys exclusive rights in some of the areas to be addressed by IPSP. Even in the absence of the agreement, no other company would have been able to distribute IPSP's services in Italy,
 - provisions concerning the nomination of STET as exclusive representative agent in 'eastern Europe' apart from Austria. As the countries concerned are outside the EC and the EEA, these provisions do not produce any appreciable effect in the EEA.
- (60) The following provisions are to be considered as non-appreciable restrictions of competition:
- As regards the agreements relating to the Italian territory, the exclusive right to promote the sale of IPSP's services in Italy granted to STET after deregulation has occurred is not an appreciable restriction of competition because:
 - (a) IPSP's services are by definition international, so that Italian customers can sign a contract for the same services with agents or distributors not located in Italy through their subsidiaries or facilities outside Italy,
 - (b) potential customers of IPSP will be big corporations often having facilities in several countries,
 - (c) as the only exclusivity remaining after liberalization will be the exclusivity to promote the sale of the IPSP's services in Italy, IPSP's agents and distributors other than STET will be free to sell the IPSP's services in Italy,
 - (d) STET is not prevented from dealing with competitors of IPSP, and
 - (e) most importantly, IPSP is expected to have a market share below 5% of the two markets concerned.

— As regards the agreements relating to the Austrian territory, the above reasoning concerning the Italian territory is also valid. In addition, the exclusive rights that STET has, as agent for IPSP, are more limited than those STET has as regards Italy (see recitals 51, 52 and 53), given that IPSP can address itself directly to customers and that limited partners can market capacity and/or services obtained from other satellite systems and even services making use of satellite capacity obtained from IPSP.

(61) For the following reasons, the provisions detailed below, while putting restraints on the partners' freedom of action, are concluded to be directly related and necessary to IPSP, and do not exceed what the creation and operation of IPSP requires. Consequently they are to be treated, under the competition rules of the EC Treaty and of the EEA Agreement, as ancillary restraints.

(a) The non-competition provision is ancillary because it refers only to the general partner and is a logical consequence of the sole responsibility granted to it. The provision is aimed at ensuring that the general partner devotes itself to the management of IPSP's business on a full-time basis. As for limited partners, as indicated above, they are free to compete with IPSP.

(b) The 'most favoured nation' provisions are ancillary because they are intended to ensure that IPSP treats each limited partner, which will normally also be a customer of IPSP, on an equal basis — but not on more favourable terms — as regards the other limited partners and, in particular, third party customers, with no investment made in IPSP.

(c) The preference to be given to limited partners in respect of certain calls for tenders issued by IPSP, under the Preferred Bidder Agreement, can also be considered ancillary on the basis that a certain preference towards limited partners seems natural, in exchange for the substantial amounts of money they have invested in the venture, and considering that most of them are themselves active in different segments of the aerospace market, and so are manufacturers of equipment of the same kind as that required by IPSP. It has also to be noted that the provision, as it reads, does not give limited partners any advantages as to price or other terms and so it is not expected to produce any appreciable foreclosure effect affecting the competitive position of third parties. In any event, and given both the structure of the relevant markets and in particular the presence of powerful incumbent companies, any abusive interpretation of this provision seems to be excluded if the venture

is to succeed in gaining a presence in the markets it will address.

(62) Ancillary restraints are to be assessed together with the company created. In this respect, as IPSP has been concluded not to fall within the scope of Article 85 (1) of the EC Treaty and of Article 53 (1) of the EEA Agreement, then neither do the provisions detailed above,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the notified agreements relating to the creation of the International Private Satellite Partners company (IPSP).

Article 2

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the non-competition obligation on the general partner under Article 7.06 of the Limited Partnership Agreement, the 'most favoured nation' provisions under Article 16.02 of the Limited Partnership Agreement, under Article 16.01 of each Capacity Agreement, under Article 21.01 of each Contingent Capacity Agreement, under Articles 4.5 and 15.1 of the Service Provision and Distribution Agreement for Italy, under Article 3.5 of the Capacity Sale Agreement for Eastern Europe and under Articles 4.4 and 15.11 of the Service Provision Agreement for Eastern Europe, and in respect of the preference to be given to limited partners under Article 2 of the Preferred Bidder Agreement, the appointment of STET as exclusive distributor of IPSP in Italy under Article 2 of the Service Provision and Distribution Agreement for Italy and the appointment of STET as exclusive representative agent of IPSP under Articles 2 of the Representative Agent Agreement for the Sale of Satellite Capacity in Eastern Europe and of the Service Provision and Representative Agent Agreement for Eastern Europe.

Article 3

This Decision is addressed to:

International Private Satellite Partners, L.P.,
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

Orion Satellite Corporation
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

British Aerospace Communications Inc.,
Suite 500, 13873 Park Center Road
Herndon, Virginia 22071
USA

COM DEV Satellite Communications Ltd
155 Sheldon Drive
Cambridge, Ontario N1R 7H6
Canada

Kingston Communications International Limited
Telephone House,
Carr Lane
GB-Hull HU1 3RE

MCN SAT U.S., Inc.,
c/o Matra Aerospace, Inc.,
1735 Jefferson Davis Highway
Suite 810
Arlington, Virginia
USA

Orion Network Systems
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

STET — Società Finanziaria Telefonica per Azioni
Corso d'Italia 41
I-00198 Rome

Trans-Atlantic Satellite, Inc.,
c/o Nissho Iwai American Corporation
1211 Avenue of the Americas
New York, N.Y. 10036
USA

General Dynamics Commercial Launch Services, Inc.,
9444 Balboa Avenue
San Diego, California 92123
USA.

Done at Brussels, 15 December 1994

For the Commission
Karel VAN MIERT
Member of the Commission

COMMISSION DECISION

of 16 December 1994

relating to a proceeding under Article 85 of the EC Treaty

(IV/33.863 — Asahi/Saint-Gobain)

(Only the English and French texts are authentic)

(Text with EEA relevance)

(94/896/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, in particular Articles 2, 4, 6 and 8 thereof,

Having regard to the notification made on 3 January 1991 by Saint-Gobain Vitrage International, Courbevoie, France and Asahi Glass Company Ltd, Tokyo, Japan pursuant to Article 4 of Regulation No 17, concerning the Joint Venture Agreement entered into on 30 March 1990 and amended on 7 December 1992, as well as the Licence and Technical Assistance Agreement and the Licence Agreements,

Having regard to the summary of the notification published ⁽²⁾ pursuant to Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. The proceeding

- (1) By letter dated 3 January 1991, Saint-Gobain Vitrage International (hereinafter referred to as 'SG') and Asahi Glass Company Ltd (hereinafter referred to as 'AG') notified a number of agreements made between them whereby they set up a joint venture company (hereinafter referred to as 'the JVC') for the joint research and development of bi-layer products, bi-layer technology and bi-layer film, the construction of pilot plants and the joint production of bi-layer film.

The Joint Venture Agreement provides for the exclusive transfer of bi-layer technology owned by

SG and AG to the JVC, which is the object of a separate agreement namely the Licence and Technical Assistance Agreement, and provides for the JVC being the exclusive worldwide licensor of bi-layer technology.

B. The undertakings

- (2) SG is part of the Saint-Gobain Group, a diversified group of companies established in France and organized into seven divisions, including flat glass, industrial ceramics, insulation and construction materials. The 1990 turnover of the Saint-Gobain Group was FF 69 billion with the flat glass division accounting for FF 12,724 billion.

AG is part of the Asahi Glass Group, a company established in Japan with over 29 overseas subsidiaries and affiliates, including Glaverbel, Maasglas and Splintex in Europe. It is a major international supplier of glass-related products, chemicals and ceramics. In 1990 its world-wide turnover was US\$ 8 177 million. Sales of glass and related products amounted to around US\$ 3 298 million in 1989.

C. The product

- (3) The agreements are aimed at research and development in a relatively new field — bi-layer technology and products derived therefrom.

Bi-layer products are products characterized by a glass/plastic construction resulting from laminating a piece of mineral glass with one or more plastic films among which at least one film has mechanical energy absorption and at least one film is polyurethane. The intended applications of bi-layer products are in safety glazing for (a) ground transportation vehicles (windshields, side windows, rear windows), and (b) architectural applications.

Bi-layer film: means any plastic film used in bi-layer products.

Bi-layer technology: means all patents covering, and know-how used in connection with, any and all aspects of the design, production, manufacture and use of bi-layer products, including the following:

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 111, 21. 4. 1993, p. 6.

- (a) the design, definition, composition and specification of bi-layer products;
 - (b) the related evaluation procedure;
 - (c) the design, definition, composition, specification, production and manufacture of all components of bi-layer products, except the piece of mineral glass referred to in the definition of bi-layer products, provided that bi-layer technology shall include treatments for and adaptations of such pieces of mineral glass as are specific to the design, definition, composition, specification, production or manufacture of bi-layer products;
 - (d) the processes for manufacturing bi-layer products, including laminating and finishing;
 - (e) the processes and techniques related to the applications and use of bi-layer products.
- (4) The parties will initially be aiming their bi-layer product at the automobile industry, primarily for use as a safety glass in windshields and also possibly for side and rear windows. The potential customers, therefore, for the new product are car/vehicle manufacturers.

At present the safety glass most commonly used in car/vehicle manufacture is tempered and/or laminated glass, the laminated variety tending more to be used for the front windshield, and tempered glass for side and rear windows. The main concerns of motor manufacturers in their choice of a safety glass product are (not necessarily in order of priority) design flexibility, weight saving, cost and safety. The advantages of using a urethane based bi-layer product in the manufacture of windshields, rather than conventional laminated glass, are considered to be:

- better safety performance (greater resistance to impact),
- better surface performance (greater stain and scratch resistance),
- lower optical distortion,
- weight savings (a bi-layer windshield could save up to 2,5 kg per square meter),
- design flexibility.

D. The market

- (5) Any development of a new technology at first requires the selection of a specific R&D track, depending on the existing level of knowledge as well as an assessment of the probability of success of the various lines which are theoretically possible.

At the heart of the research and development is the task of finding the most appropriate film. The line which SG and AG decided to follow is defined in the Joint Venture Agreement and is characterized by the use of a certain type of polyurethane film.

Chemical manufacturers such as Du Pont and Monsanto are expected to be working on the development of film for bi-layer products. Furthermore, some leading automotive original equipment manufacturers and glass manufacturers are apparently involved in the development of bi-layer windshields.

The development of plastic panes (i.e. without glass) is ongoing and these plastic glazings present advantages which are comparable to those resulting from the bi-layer technology.

- (6) Laminated glass is used in the automobile industry and for architectural purposes as safety glass. Both parties are significantly active in the various markets for safety glass. As bi-layer products are primarily aimed at the automotive safety glass market where the conditions of competition are significantly different from those prevailing in the architectural glass market, it is considered to be the relevant market for the purpose of the present examination.

In Europe, the main producers of automotive safety glass are by order of importance SG, Pilkington and Glaverbel. World-wide the main producers of automotive safety glass are AG, SG, Pilkington, Ford glass, Società Italiana Vetro (hereinafter referred to as 'SIV'), PPG and Nippon Sheet Glass.

	Market share 1990	Market share 1993	Market share 1994
European Market:			
Saint-Gobain	[...]	[...]	[...]
Pilkington			Pilkington-Gp ⁽¹⁾
	[...]	[...]	[...]
SIV	[...]	[...]	[...]
PPG	[...]	[...]	[...]
Glaverbel-			
Splintex (Asahi)	[...]	[...]	[...]
Guardian		[...]	[...]
Soliver		[...]	[...]
World-wide:		1992	
Asahi Glass	[...]	[...]	
Saint-Gobain	[...]	[...]	
Pilkington	[...]	[...]	
SIV	[...]	[...]	
Ford Glass	[...]	[...]	
PPG	[...]	[...]	
Nippon Sheet Glass	[...]	[...]	
Guardian		[...]	
Others		[...]	

⁽¹⁾ Pilkington acquired a 50 % stake in SIV in 1993.

Source: [...] Blanks between square brackets indicate figures deleted as business secrets pursuant to Article 21 (2) of Regulation No 17.

- (7) The evolution of the market for safety glass is directly related to the evolution in the production of motor vehicles and the surface of safety glass needed for the production of cars (which may change over time with the designs of cars).

In 1990, 13 million cars were manufactured in Europe. If each car incorporates on average four square metres of safety glass, the size of the potential market is about 52 million square metres — with a value of about US\$ 1 040 million, the average cost per car of safety glass being taken as US\$ 80.

It is not easy to predict the eventual development of the market nor can it be said whether bi-layer glass will replace conventional safety glass. In the near future, it will most probably be offered alongside conventional glass and then only for new car models. The final product could be sold throughout the Community and indeed world-wide.

Taking into account the customer side on the safety glass market which is constituted by car, bus and truck manufacturers, and also manufacturers of railway carriages, the geographic market of reference is at least Community-wide. Vehicle manufacturers frequently purchase automotive glass from suppliers located in different Member States and the higher value added in automotive glass means that transport costs are a relatively low percentage of product cost.

E. The notified agreements

- (8) SG and AG have agreed to cooperate in the further development of bi-layer products and technology for commercial use and to promote the production, marketing and distribution of such bi-layer products. To this end the two parties have agreed to share their past and future research and development of bi-layer technology and to establish a JVC. The parties have licensed to the JVC on an exclusive basis all bi-layer technology possessed by them. The JVC will either own or be the exclusive licensee of bi-layer technology acquired or jointly developed by AG or SG, or firms controlled by them, under the research and development programme. If SG or AG or firms under their control develop or acquire bi-layer technology outside the scope of this programme, rights to such bi-layer technology will be retained by each individual partner, or its subsidiaries as the case may be, but will be licensed exclusively to the JVC to the extent that such bi-layer technology has applications for designing, producing, manufacturing or using bi-layer products. New bi-layer technology developed by AG or SG after this programme will be licensed exclusively to the JVC with the exception, however, the major innovations. The JVC is the world-wide licensor of such technology both to AG/SG and to interested third parties.

(a) *The Joint Venture Agreement*

- (9) This agreement set up the JVC, incorporated under the laws of the Netherlands and jointly owned, managed and controlled by SG and AG. The Joint Venture Agreement (hereinafter referred to as 'the JV Agreement') sets out the objectives of the JVC, namely:

- to promote collaboration between SG and AG in the development of bi-layer products and bi-layer technology,
- to receive exclusive licences from SG and AG of all bi-layer technology owned or used by them and to hold all rights to bi-layer technology developed or acquired by the parties,
- to serve as exclusive world-wide licensor and transferor of bi-layer technology to all persons, including SG and AG.

The JVC will not conduct any research or development itself, rather it will be the medium through which the two parties will coordinate their respective activities in research and development; neither will it manufacture or sell bi-layer products. The joint research and development involves the construction and operation of pilot plants to continue the development technology used to produce and to manufacture bi-layer film.

- (10) The cooperation will consist of two stages, namely (i) joint research and development and (ii) joint industrial exploitation of the results of the joint research and development.

The first stage consists of a joint research and development programme and the construction by the JVC of two pilot plants which will produce bi-layer film. The first pilot plant is intended for R&D and pre-marketing purposes and will be established in Japan. The second plant will be set up when a market of substantial size can be positively envisaged and will in all likelihood be located in Europe. A final decision as to the location of this second plant will depend on the development of the market.

The second stage will start as from the commencement of commercial production of bi-layer products within the common market which should normally correspond to the date when the second JVC plant becomes operational.

- (11) The JV Agreement states that nothing will prevent or restrict SG and AG from engaging in competition with each other in connection with the manufacture, marketing or sale of bi-layer products; however, it restricts the parties from constructing another plant for the production of bi-layer film prior to the construction of the first and second pilot plants and from expanding existing capacity without the prior consent of the other shareholder.
- (12) The parties amended the JV Agreement on 7 December 1992 so that it will expire at the end

of a five-year period beginning with the date on which the second JVC's pilot plants begins commercial production, and at the latest on 7 December 2005, whichever is sooner, and that the JVC will be dissolved at the same time. Upon the dissolution of the JVC, the parties will take all necessary measures to assure access for each of them to the technology possessed by the JVC and they will determine independently how related intellectual property rights or know-how are to be exploited in the future.

(b) *Related agreements*

(13) **Licence and Technical Assistance Agreement**

By virtue of the Licence and Technical Assistance Agreement, SG/AG (as Licensor) grants to the JVC (as Licensee) an exclusive non-transferable right to use and sublicense all their respective licensed patents and know-how ('the licensed technology') for all applications that involve designing, producing, manufacturing or using bi-layer products. The licensors are precluded from using the licensed technology for these applications except pursuant to a Licence Agreement granted to each of them by the JVC. These licensors, however, retain the right to use the licensed technology for all other applications.

(14) **Licence Agreements**

The Licence Agreements are made between the JVC (as Licensor) on the one hand, and SG/AG or a third party (as Licensee(s)) on the other hand. The licensor grants to a licensee a non-exclusive, non-transferable right to design, manufacture, use and sell bi-layer products and to use the licensed technology. The licensee may not use the licensed technology for applications other than for bi-layer products.

Only an example of the Licence Agreement granted by the JVC to SG or AG was provided in the notification made on 3 January 1991.

II. LEGAL ASSESSMENT

Article 85 (1)

Article 85 (1) of the EC Treaty prohibits as incompatible with the common market all agreements and concerted practices between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Agreements between undertakings which do not fulfil the market share conditions laid down in Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article

85 (3) of the Treaty to categories of research and development agreements⁽¹⁾ may however, in appropriate cases, benefit from an individual exemption, for the purpose of which the conditions of competition on the relevant product market and the specificity of the manufacture of high technology products are in particular taken into account.

A. *Agreement between undertakings*

- (15) SG and AG are undertakings within the meaning of Article 85 (1) and the JV Agreement, the Licence and Technical Assistance Agreement and the Licence Agreements are agreements within the meaning of Article 85 (1).

B. *Restrictions on competition*

- (16) Both parties are strongly positioned in the glass industry in general and in the automotive safety glass market in particular. Both compete in this market within the Community and world-wide.

As regards the products concerned by the research and development the parties contend that they are not competitors because (i) SG largely concentrated its research efforts in Europe, while AG limited itself to the Japanese market, and (ii) neither could enter independently the market of the other, this being particularly true of AG because of the patents SG possesses in Europe.

The Commission does not share this view. First, the parties are two major competitors in the relevant market, i.e. the market for automotive safety glass at which the research and development aims primarily. Secondly, as regards the notified research and development cooperation, it is considered that the parties could carry out the projects individually. AG and SG each have their own experimental pilot facility for the production of bi-layer film and an experimental assembly line for bi-layer products. Samples have been remitted by both AG and SG to their respective potential clients for preliminary technical evaluation even if substantial research and development is still necessary in order to make commercial sales of bi-layer product possible.

Bi-layer products, and in particular those aimed at the automobile safety glass sector, do not take the form of a homogeneous product. There are many ways of laminating the glass to the plastic and the process of film manufacturing and of glass assembly can vary enormously. Bi-layer film can come in many different forms and a polyurethane film is only one such technology. Given the research and development resources of both AG

⁽¹⁾ OJ No L 53, 22. 2. 1985, p. 5.

and SG, the Commission considers that either party could have developed independently its own form of plastic film or process for assembly.

- (17) Essentially both parties continue to work separately in research and development in the products in question but the joint research and development work is carried out within the framework of a programme defining annual goals and specific tasks and programmes through the medium of the JVC, allowing each partner to be kept informed of any developments made by the other, and permitting joint decisions in relation to the research and development. Neither party can independently construct a plant to produce, or to expand existing capacity for, bi-layer film prior to the construction of the second JVC pilot plant.
- (18) The collaboration between the parties has as its object research and development up to the stage of industrial application, and exploitation of the results.

Whereas the first pilot plant is intended to be used for research and development purposes, the second plant will be set up when a market of substantial size can be positively envisaged and will in all likelihood be located in Europe.

- (19) The collaboration between the parties also includes provisions regarding industrial property rights and confidential technical knowledge. Pursuant to the Licence and Technical Assistance Agreement, SG and AG licensed to the JVC on an exclusive basis all bi-layer technology possessed by them at the moment of its conclusion in the field of designing, producing, manufacturing or using of bi-layer products.

All rights to bi-layer technology developed or acquired by AG and SG during the joint research and development period, either within the framework of the research and development programme or outside it, to the extent that such bi-layer technology has applications for designing, producing, manufacturing or using bi-layer, will be owned by the JVC, each allowing the other to have knowledge of any developments it acquires.

Rights accruing to SG and AG after the research and development period will be retained by each AG and SG, as the case may be, and licensed to the JVC on an exclusive basis. Both parties will, therefore, be able to combine their knowledge and expertise in the improvement of bi-layer technology, during the period of the JV Agreement. Although the intellectual property rights to development are owned by each developing participant, the owner may not make free use of them as the JVC is the world-wide licensor of such technology both to AG/SG and to interested third parties, not only during the research and

development period, but also during the production stage covered by the JV Agreement.

- (20) Upon the dissolution of the JVC, the parties will take all necessary measures and, in particular, enter into cross-licenses allowing each party the right to continue to use on a royalty-free basis all bi-layer technology, with the exception of major innovations, possessed by the JVC, by the other party, or jointly owned at the time of dissolution.
- (21) Each has relinquished any possibility of individual initiative and of thereby gaining a competitive advantage over the other, and this for at least 10 years and at the most until 7 December 2005, even if the end product (a bi-layer safety glass) is to be freely and competitively manufactured, marketed and sold in any country and in any quantity by both parties separately. In the case of successful research and development, the new bi-layer product would have important commercial effects.
- (22) The JV Agreement provides for both joint research and development and joint exploitation of the results and the parties jointly determine how the product developed is to be manufactured and how related intellectual property rights and know-how are to be exploited. Taking into account the strong position of the parties on the relevant market, the agreement, therefore, has the effect of restricting competition within the meaning of Article 85 (1).

C. Effect on trade between Member States

- (23) The common research and development is being undertaken by two companies of size and importance who are active both within the Community and world-wide. The final product, which will only be manufactured, marketed and sold as a result of the successful outcome of the collaboration both in research and development and in the production of bi-layer film, is one which can be commercialized by both parties throughout the Community and indeed world-wide. It is also aimed at an end user which is present and of great economic importance throughout the Community and world-wide. Should consumers ultimately give preference to bi-layer products, trade in safety glass could shift significantly in favour of the two participants in the cooperation. The end product will therefore be the subject of trade between Member States (and beyond).

Therefore the restrictions covered in recitals 16 to 22 are likely appreciably to affect trade between Member States.

Article 85 (3)

Under Article 85 (3) the provisions of Article 85 (1) of the EC Treaty may be declared

inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not:

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

A. Improvement in the production of goods and promotion of technical progress

- (24) There is a demand from the side of the automotive glazing industry for safety glazing products which are more flexible in shape and lighter in weight than existing multi-layer products. Multi-layer products have already been introduced into the market as they are safer than laminated glass but, for several reasons, including their lesser flexibility in shape, their higher price and heavier weight, they have largely not been accepted by the market as a substitute for laminated glass.

As stated in recital 4 the polyurethane-based bi-layer product has significant advantages over conventional laminated glass in the manufacture of windshields. It could improve optical quality, reduce weight, provide greater opportunity for facilitating complex designs and could possibly be adapted to other additional purposes (e.g. anti-condensation). This product could have a significant impact on the design, safety and price of cars and other motor vehicles.

- (25) AG is a leading manufacturer both in the Japanese automotive safety glass and in the Japanese chemical markets. All development activities of AG concerning bi-layer technology and products before the creation of the JVC have been done in Japan. AG possesses 10 years of development experience in the current urethane-type bi-layer film and operates a pilot plant located in Japan which is a test scale facility, owned and operated by AG prior to the creation of the JVC, and employs a continuous production process. It is thus contributing to the JVC particularly its technical capabilities in the development of urethane-type bi-layer film, which include formulation and continuous production process.

It is thus expected that the cooperation in developing urethane-based bi-layer product will contribute to improving the production of goods and to promoting technical progress.

B. Share of consumers in the benefit resulting from the agreements

- (26) The benefits to the car industry have already been set out in recital 4 in terms of technical factors and cost efficiency.

Research has already been done with a view to covering laminated safety glass with a plastic layer in order to improve the safety of automotive glass. The aim of this research has been to prevent parts of the screen being projected towards the interior of the car in the event of the impact of an object on the exterior of the windscreen and to offer an anti-lacerative characteristic where a passenger is projected against the windscreen. The greater impact resistance of bi-layer glass could reduce personal injuries in the event of collision. Improved optical quality would contribute generally to driver safety. The lighter weight would reduce costs and help fuel efficiency.

The cooperation between AG and SG will further reduce the R&D costs for bi-layer products and thus also the price of such products to consumers and the entry of such products on the market will thus be accelerated.

C. Indispensability of the restrictions

- (27) Both AG and SG have since the 1970s invested considerable amounts in their independent development efforts in the field of safety windshields involving a combination of glass and plastic before entering into the agreement. AG has technical know-how and experience in the chemical field useful in the development of bi-layer film. SG has, on the other hand, technical know-how and experience in the assembly of bi-layer products and extensive know-how and experience in evaluation and durability tests for bi-layer products. The parties have reached a comparable level of knowledge and in the field of bi-layer technology this knowledge is largely complementary.

- (28) The new product will be a technically advanced and innovative one, the development of which will entail great financial risk for the parties, as its commercial viability is still uncertain. Substantial research and development still has to be done in order to make commercial sales of bi-layer products possible. Given the strength of the demand side (the automotive industry), considerable effort has to be made to minimize costs or, should costs prove to be above those of conventional windshields, to realize substantial advantages in quality and performance that will justify the higher price. The efforts and risks involved, if undertaken independently by the parties, would most certainly not lead to results as rapid, efficient and economic as those envisaged. The cooperation is indispensable as it enables the earlier introduction of the product into the Community, the advantages of which, for the car manufacturers and the security of vehicle users, are set out in recitals 4 and 26.

- (29) The non-competition clause, which relates to the production of bi-layer film and not to the final product, and the exclusive licence granted to the JVC are inherent to the creation of the JVC and ensure that neither party will start competing with the JVC. The JV Agreement provides that each party retains the right to use or transfer bi-layer technology for applications that do not involve the designing, producing, manufacturing or using of bi-layer products and that licensing agreements will be granted to third parties on a non-discriminatory basis. It is also specified in the JV Agreement that nothing will prevent SG and AG from engaging in competition with each other in connection with the manufacture, marketing or sale of bi-layer products. In particular, the JV Agreement does not contain any of the restrictions listed in Article 6 of Regulation (EEC) No 418/85.

In view of the above, the Commission is of the opinion that the relevant agreement contains no restrictions on competition which are not indispensable to the attainment of its objectives.

Duration of the cooperation

- (30) Previously, the JV Agreement provided for a duration of cooperation of 30 years and that the JVC would be the exclusive licensor of bi-layer technology for the duration of the patents. Although the Commission is prepared to favourably consider R&D joint ventures, even when they do not fulfil the conditions set out in Regulation (EEC) No 418/85, because of the global economic advantages they provide commensurate with the disadvantages for competition, it is not ready to allow such a long period of cooperation for undertakings having such a position on the market involved.
- (31) In examining this as a case of individual exemption, and in considering its obligation pursuant to Article 8 (1) of Regulation No 17 to specify the duration of any exemption, the Commission does not see any reason to depart from the period provided for in Regulation (EEC) No 418/85 and, in particular, the five-year exemption period specified in Article 3 (2), in conjunction with Article 3 (1) thereof, on the joint exploitation of the results. The parties have amended their agreement so that the second stage will expire at the end of a period of five years from the date the second JVC plant, which will in all likelihood be set up in Europe, becomes operational. As the second plant will be set up as soon as a market of substantial size can be positively envisaged, which cannot be precisely determined at the present time, it is also provided that this second stage, of a duration of five years, will expire at the latest on 7 December 2005. The JVC will be dissolved at the end of the second stage. Upon the dissolution of the JVC, the parties will take all necessary measures to allow each of them to continue to use all bi-layer technology

developed in common. Each of them will then be free to conduct its own independent licensing policy in bi-layer technology.

D. No elimination of competition

- (32) The JV Agreement states that nothing will prevent or restrict SG and AG from engaging in competition with each other in connection with the manufacture, marketing and sale of bi-layer products. The separate manufacturing, marketing and sale of the final product by the two parties means that end users still have a choice of supplier.

Furthermore, the Commission has ascertained that the market for bi-layer technology and products derived therefrom would not be exclusively reserved to the notifying parties, but opened up to new entrants. The Commission is satisfied that the JV Agreement also provides that licensing agreements will be granted to third parties on a non-discriminatory basis which will allow the opening up of the market to new entrants. This provision is further reinforced by the fact that the clients themselves will ask SG and AG to grant licences to other potential suppliers as explained in recital 34. However as no licensing agreements to third parties have yet been drafted they are not covered by this Decision.

- (33) Bi-layer products, and in particular those aimed at the automobile safety glass sector, do not take the form of a homogeneous product. There are many ways of laminating the glass to the plastic. The process of film manufacturing and of glass assembly can vary enormously. Likewise, bi-layer film can come in many different forms. The definition of bi-layer film is any plastic film used in bi-layer products. A polyurethane film is only one such technology. As the products can result from varying processes and the film can take many forms, competition is also expected between producers of bi-layer products aimed at the same end users.

In particular, it is believed that research and development are also being undertaken in fields related to bi-layer products by a number of other large and powerful companies in the chemical sector and that plastic panes, without glass, are also being developed which have advantages comparable to those resulting from the bi-layer technology.

Thus, the Commission considers that the parties are expected to be subjected to competition from competitors in the glass and chemical industries.

- (34) The market for bi-layer products in the automobile industry is characterized by the strong bargaining position of the clients and much will depend on the evolution of the car market. The car manufacturers for whom the products are destined may well prefer to continue using traditional

products rather than taking the risk of being dependent on a sole source of supply. No car manufacturer will agree to use a product from one or two manufacturers only and will require the supplier(s) to grant licences to other potential suppliers. It is not easy to predict the eventual development of the market nor can it be said whether bi-layer glass will replace conventional safety glass. The car market is constantly evolving in terms of design trends, customer preference, environmental considerations and government regulation. In the near future, it will most probably be offered alongside conventional glass and only then for new car models.

The Commission is of the opinion that the relevant agreement does not eliminate competition in respect of the products concerned.

Article 8 of Regulation No 17

In accordance with Article 8 (1) of Regulation No 17 a decision in application of Article 85 (3) shall be issued for a specified period and condition and obligations may be attached thereto. In addition, under Article 8 (2) of the said Regulation, the Commission has a duty to ensure that the requirements of Article 85 (3) continue to be satisfied.

- (35) The agreements, as notified and amended as to duration and the dissolution of the JVC, qualify for exemption. Accordingly, under Article 6 (1) of Regulation No 17, the exemption will take effect from 7 December 1992, the date on which the two companies amended the JV Agreement, in order to satisfy the tests of Article 85 (3).
- (36) The JV Agreement provides that Licensing Agreements will be granted to third parties but as no Licensing Agreements for third parties have yet been drafted, this Decision does not cover these future agreements,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Community are declared inapplicable pursuant to Article 85 (3), to the Joint Venture Agreement, as amended on 7 December 1992, and to the non-competition clause provided in this agreement, to the Licence and Technical Assistance Agreement between Saint-Gobain Vitrage International and Asahi Glass Company Ltd and to the Licence Agreement between the Joint Venture Company and Saint-Gobain Vitrage International/Asahi Glass Company Ltd, concluded on 30 March 1990 between Saint-Gobain Vitrage International and Asahi Glass Company Ltd.

Article 2

This Decision takes effect from 7 December 1992 and shall expire at the end of a five-year period beginning with the date on which the second Joint Venture Company's pilot plant begins commercial production, or on 7 December 2005, whichever is sooner.

Article 3

This Decision is addressed to:

1. Saint-Gobain Vitrage International,
18, avenue d'Alsace,
F-92400 Courbevoie;
2. Asahi Glass Company Ltd,
1-2 Marunouchi 2-Chome,
Chiyoda-ku,
Tokyo 100,
Japan.

Done at Brussels, 16 December 1994.

For the Commission

Karel VAN MIERT

Member of the Commission