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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 April 2003

declaring a merger to be compatible with the common market and the EEA Agreement

(Case COMP/M.2861 — Siemens/ Drägerwerk/ JV)

(notified under document number C(2003) 1385)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/777/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 (hereinafter referred to as the EEA Agreement), and in particular Article 57 thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings⁽¹⁾, as last amended by Regulation (EC) No 1310/97⁽²⁾, and in particular Article 8(2) thereof,

Having regard to the Commission's decision on 21 January 2003 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations⁽³⁾,

Whereas:

(1) On 6 December 2002, the Commission received notification of a proposed concentration pursuant to Article 4

of Council Regulation (EEC) No 4064/89 (the Merger Regulation). The proposed concentration consists of the following: the German undertakings Siemens AG (Siemens) and Drägerwerk AG (Dräger) are to acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, joint control of Dräger Medical AG & Co. KGaA, Germany (JV), currently controlled by Dräger alone, through the acquisition of equity interests.

(2) On 21 January 2003, having examined the notification, the Commission found that the notified operation fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market. The Commission accordingly initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

(3) Following an in-depth investigation of the case, the Commission takes the view that, although the notified proposal is liable in itself to lead to dominant positions as a result of which effective competition would be significantly impeded in a substantial part of the common market, the commitments given by the parties allow the doubts as to the compatibility of the concentration to be removed.

⁽¹⁾ OJ L 395, 30.12.1989, p. 1 (corrigendum OJ L 257, 21.9.1990, p. 13).

⁽²⁾ OJ L 180, 9.7.1997, p. 1.

⁽³⁾ OJ C 269, 8.11.2003.

- (4) This Decision is adopted pursuant to Article 10(2) of the Merger Regulation. That provision requires decisions taken pursuant to Article 8(2) to be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed. This applies in particular where the parties have offered commitments. When the commitments were submitted, the Commission's investigations in this case had been only partially completed. The investigations had confirmed the competition doubts raised by the initial market investigation as regards the markets for ventilators, anaesthesia equipment and patient monitors in numerous national markets. In all these cases, however, the commitments offered by the parties remove the serious doubts as to the compatibility of the concentration with the common market, so that a conditional Decision pursuant to Article 8(2) and Article 10(2) clearing the concentration may be adopted.

I. THE PARTIES

- (5) Siemens supplies products and services throughout the world, mainly in information and communications, automation and control, power supply, transportation, medical technology, lighting, financial services and real estate. Its 'Medical Solutions' division covers a wide range of products, services and integrated solutions for clinics and medical practices.
- (6) Dräger operates worldwide in the fields of medical technology, safety technology and aerospace. The JV covers the area of medical technology within the Dräger Group. Complete system solutions for hospitals and health care are developed, produced and marketed throughout the world. The main focus is on critical patient care, particularly anaesthesia and ventilation equipment and accessories.

II. THE PROPOSED TRANSACTION

- (7) Siemens and Dräger want to set up a full-function joint venture in the field of 'critical care'. Siemens is to transfer its 'Electromedical systems' division, covering essentially the product divisions 'Life-support systems' and 'Patient monitoring' together with the associated marketing, logistics, distribution, servicing and quality departments to the JV and will in return acquire 35 % of the JV's share capital.

III. CONCENTRATION

- (8) Siemens will acquire voting rights in the JV that go beyond the usual legal protection for minority shareholders and will thus acquire control of the JV jointly with Dräger. The JV will perform all the functions which are similarly performed by other independent

undertakings on the relevant markets. In particular, the JV will have its own management and sufficient financial and staffing resources and assets to cover its activities. The distribution of the products developed and manufactured by the JV will basically be carried out by its own distribution and servicing organisation. The JV will, however, also be able to make use of the distribution systems of Siemens and Dräger. Cooperation with the JV's parent companies will allow it to supply integrated medical and technological solutions to customers. This means that, in addition to the JV's products and services, Siemens's IT solutions (hospital IT systems, function-supporting IT) are also to be supplied. In addition, the JV will in certain instances act as an agent for Siemens, supplying certain medical products outside its own range.

- (9) The proposed transaction is a concentration within the meaning of Article 3(2) in conjunction with Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

- (10) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 billion⁽⁴⁾ (Siemens: EUR 87 000 million in the financial year from 1 October 2000 to 30 September 2001; Dräger: EUR 1 257 million in the financial year 2001). Siemens and Dräger each have an aggregate Community-wide turnover of more than EUR 250 million (Siemens: EUR [...]*) million in the financial year 2000/2001; Dräger: EUR 733 million in the financial year 2001). Neither undertaking achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State. The notified concentration therefore has a Community dimension.

V. COMPETITION ASSESSMENT OF THE PROPOSED MERGER IN THE FORM IN WHICH IT WAS NOTIFIED

- (11) The proposed concentration relates to the field of medical technology, the main market segments being imaging systems, hospital IT and critical care.

(*) Parts of the text have been omitted to ensure that no confidential information is published; they are indicated by square brackets and an asterisk.

(4) Turnover calculated in accordance with Article 5(1) of the Merger Regulation and with the Commission notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25).

A. THE RELEVANT PRODUCT MARKETS

(12) In the field of critical care the parties include, in a non-exhaustive list ⁽⁵⁾, supplies, liquid management (infusion pumps, etc.), patient monitors, anaesthesia equipment, ventilation equipment, data-management systems (IT) and cardiology. Critical care does not include products falling within the fields of 'home care' and primary care/transportation.

(13) The parties' activities overlap only in the field of critical care of patients in hospitals, so that the fields of 'home care' and primary care/transportation can be left to one side here. The following areas are listed as possible relevant markets affected by the concentration:

- ventilation equipment,
- anaesthesia equipment,
- patient monitors,
- ventilation equipment accessories,
- anaesthesia equipment accessories.

(14) The market investigation has shown that there do not appear to be any larger product markets than the market definition proposed by the parties.

1. VENTILATION EQUIPMENT

(15) Ventilation equipment (also referred to below as critical care ventilation equipment) supports or replaces the breathing activity of the patient. It consists of the following main components: ventilators, oxygen supply equipment, ventilation monitoring and functional accessories.

(16) Some market participants considered it appropriate to have a further subdivision on the basis of uses and/or performance of ventilation equipment. It would be possible to group products by performance capacity and use, grouping appliances produced by different manufacturers into high-performance, medium-performance and low-performance. In their replies to the Commission's request for information of 27 January 2003, the parties drew up lists of models of ventilation equipment (broken down by country) which, from their point of view, were in close competition with one another. It is evident from this that, on the basis of their performance, certain models in particular are in competition with one another.

(17) However, individual models of ventilation equipment are such highly differentiated products, designed and configured individually to meet customers' wishes, that, depending on the type of use and the requirement placed by a hospital on the appliances for certain patient groups, there would be clear overlaps in the models of ventilation equipment if they were divided into further product groups. This would also apply if one attempted to divide the equipment primarily designed for children, newborn babies and prematurely born babies into separate product groups.

(18) Moreover, each of the parties, like their main competitors on the national markets, offers a broad range of different models for the different capacities and uses of ventilation equipment required, with the result that, on the basis of an overall assessment of this information drawn from the market investigation, the Commission concludes that, in the case to be decided on here, a more detailed definition of the product market need not be undertaken. Any further product differentiation on the basis of different product models would not alter the competition assessment.

(19) The Commission's investigations confirm the market definition for ventilation equipment for critical care proposed by the parties as the relevant product market.

2. ANAESTHESIA EQUIPMENT

(20) Anaesthesia equipment is used to deliver anaesthetic gases to patients during operations, to supply them with oxygen during the operation, to provide artificial respiration if necessary and to monitor the patient during the entire period of narcosis.

(21) As in the case of ventilation equipment, different performance capacities can be distinguished here and products may be subdivided into groups on the basis of performance. However, the market investigation has shown that the products are highly differentiated products which, like ventilation equipment, are not manufactured for stock, but are configured in accordance with specific customer wishes. Customers determine for themselves what specifications the equipment must meet for their own specific types of patients. In the case of anaesthesia equipment too, any further subdivision would therefore lead to considerable overlaps if models were grouped by performance. This also applies if equipment primarily designed for children, newborn babies and premature babies is included.

(22) In assessing this information drawn from the market investigation, the Commission concludes that anaesthesia equipment as a whole constitutes a relevant product market.

⁽⁵⁾ Form CO notification, p. 20.

3. PATIENT MONITORS

- (23) Patient monitors measure patients' vital functions (blood pressure, heartbeat, breathing, etc.), which are displayed on the screen. They are used in various clinical departments such as OP, cardiology, intensive care units and paediatrics. Whenever anaesthesia equipment or critical-care ventilation equipment is used, patient monitoring is also required. The transaction covers critical-care patient monitors, which involve a broad spectrum of parameters.
- (24) Ventilation equipment and anaesthesia equipment (jointly referred to as therapy equipment) may be connected up with patient monitors via interfaces so as to allow data flow from the therapy equipment to the monitor. The data from the therapy equipment and the patient data can then be displayed on the monitor. So as to allow connection between the therapy equipment and the monitor, the communication protocol of the therapy equipment must be known to the monitor manufacturer and the communication protocol of the monitor must be known to the supplier of hospital IT (data-management systems) or to the manufacturer of third-party equipment. Customers increasingly wish to have the possibility of transferring data to other equipment and data-management systems in the hospital. If system compatibility is assured, following successful completion of tests, a certificate is issued by the relevant manufacturers. In addition to this electronic compatibility, the mechanical compatibility of the connection between the monitor and the therapy equipment must also be assured. For reasons of liability (e.g. as regards resistance to tilting/stability of the monitor design), customers demand that the mechanical compatibility be tested and similarly certified.
- (25) Anaesthesia and ventilation equipment on the one hand and patient monitors on the other are thus complementary products. In so far as the appliances are connected for data transfer purposes, it can also be said that there is a vertical link, though this distinction is of only subsidiary importance for the competition assessment.
- (26) Patient monitors have, on average, a shorter life than therapy equipment. Customers stated that they replace their monitors in the critical care sphere every eight to 10 years or so, while therapy equipment has an average life of 10 to 15 years. Despite these differences in lifespan, therapy equipment is often put up for tender and purchased at the same time as patient monitors.
- (27) The parties start from the assumption of an overall product market for patient monitors. Some market participants think it necessary to have a further subdivision into further product markets on the basis of performance, type of use and/or underlying technology.
- (28) The parties' activities do not overlap at production level in the case of patient monitors. Only Siemens produces patient monitors. Dräger used to sell GE/Marquette patient monitors together with its own therapy equipment to its own customers solely on the basis of a distribution agreement concluded with General Electrics (GE). [...]*. Furthermore, Dräger manufactures only integrated monitors which are a component part of the anaesthesia and ventilation equipment. Dräger has no other activities in this area. For the purposes of the competition assessment of the transaction, therefore, only the complementary and vertical connection of the patient monitors with the therapy equipment is relevant.
- (29) The market investigation had not yet been completed as regards the precise product market definition for patient monitors at the time when the commitments were submitted (see recital 4). However, the question of the precise product market definition can be left open, since, even if a product market comprising all patient monitors, as suggested by the parties, were applied, the notified concentration raises serious doubts as to its compatibility with the common market.

4. ACCESSORIES FOR VENTILATION EQUIPMENT AND ACCESSORIES FOR ANAESTHESIA EQUIPMENT

- (30) Accessories are, on the one hand, parts that are necessary for the operation of the therapy equipment and, on the other, parts which may be used in the application of the main equipment. Accessories include one-off parts and reusable parts.
- (31) The accessory parts supplied by the parties are distributed as by-products of the therapy equipment business proper, though for the most part they are not manufactured by the parties themselves, but procured from other suppliers. Accessories for therapy equipment distributed by the parties are functionally related to the sale of such equipment.
- (32) As is the case with other manufacturers of therapy equipment, accessories are supplied as original equipment as part of ready-to-operate therapy equipment and may also be supplied at a subsequent stage at the customer's request. The Commission's market investigation showed that the parties are not perceived as independent suppliers of accessories for equipment of third-party manufacturers, but operate as suppliers of accessories in connection with the acquisition of new therapy equipment. The parties understand this as a kind of necessary service related to their main business.

- (33) It follows from this that a separate competition analysis of the respective activities of the parties on the markets for accessories for ventilation and anaesthesia equipment can be dispensed with. The position of the parties on the markets for accessories is linked to their competitive position in respect of therapy equipment.

5. SUMMARY OF THE DEFINITION OF THE PRODUCT MARKET

- (34) The market investigation confirmed the view taken by the parties on the definition of the product market for anaesthesia equipment and ventilation equipment. The Commission therefore starts from the assumption that there is one relevant product market for ventilation equipment and another relevant product market for anaesthesia equipment. In the case of patient monitors, the precise market definition can be left open. The distribution of accessories for ventilation equipment on the one hand and anaesthesia equipment on the other is linked here to the distribution of the main equipment, and the competition assessment is therefore dependent on the competitive position of the parties as regards the main equipment. The definition of the market for accessories for ventilation equipment and for accessories for anaesthesia equipment can therefore be left open.

B. THE RELEVANT GEOGRAPHIC MARKETS

- (35) The parties take the view that the geographic markets for ventilation equipment, anaesthesia equipment and patient monitors are at least EEA-wide. However, the Commission's market investigation has shown that the markets for anaesthesia and ventilation equipment are national. The definition of the geographic market for patient monitors can be left open. It is EEA-wide at most, with some indicators suggesting national markets.

1. THERAPY EQUIPMENT

Market shares of therapy equipment manufacturers and their presence in the individual EEA Member States

- (36) In the case of ventilation equipment, according to their own figures, the parties' market penetration differs very widely from one Member State to another. For example, Siemens has very high market shares in Portugal [55 to 65]* %, Ireland [55 to 65]* %, Sweden [45 to 55]* % and Italy [35 to 45]* %, while in other Member States it has relatively low market shares, for example France [5 to 15]* %, Germany [5 to 15]* %, Austria [5 to 15]* % and the United Kingdom [5 to 15]* %. Dräger's market shares vary in the individual Member States, according to its own figures, between [65 to 75]* % in Austria, [35 to 45]* % in Belgium, [35 to 45]* % in Denmark and [35 to 45]* % in Germany on the one hand and [5 to

15]* % in Greece and [15 to 25]* % to [15 to 25]* % in Ireland, Portugal and Norway on the other. If the parties' market shares in ventilation equipment are combined, the picture varies widely from high market shares of almost [85 to 95]* % in some Member States to barely [25 to 35]* % in others.

- (37) Furthermore, the parties face different competitors in ventilation equipment in individual Member States. Although the competitors Tyco/Puritan Bennett, Viasys and Hamilton are broadly represented throughout the EEA (though with widely different market presence in individual Member States), all the other competitors, such as Stephan, Respironics, Taema, Kontron, Siare and Datex Ohmeda, operate in only one or a few Member States ⁽⁶⁾.
- (38) The market structure is also very heterogeneous in the case of anaesthesia equipment. According to the parties' own figures, Siemens' market shares in the individual Member States range from [45 to 55]* % in Sweden and [25 to 35]* % in Portugal to [0 to 5]* % in the United Kingdom, [0 to 5]* % in Spain and [0 to 5]* % in Germany. Dräger's market shares in individual Member States vary from [55 to 65]* % in Germany, [25 to 35]* % in Belgium and [25 to 35]* % in Austria to [0 to 5]* % in Ireland and [5 to 15]* % in Sweden. If the parties' market shares are combined, national market shares within the EEA range from [5 to 15]* % to [55 to 65]* %.
- (39) The only competitor operating throughout the EEA as a supplier of anaesthesia equipment is Datex Ohmeda. All the other manufacturers are for the most part present in only one or two countries ⁽⁷⁾.
- (40) The fact that the market presence of ventilation and anaesthesia equipment manufacturers is not homogeneous and, in most cases, not EEA-wide, is due to the market structures and mechanisms analysed below, which taken as a whole point to the conclusion that the relevant geographic markets must be assumed to be national.

Distribution and servicing structure for therapy equipment

- (41) The parties submit that, although the main market participants have their own distribution channels in all the EEA countries, this does not preclude the assumption of a single European market. Indeed, the main suppliers distribute their equipment throughout the world.
- (42) The Commission's market investigation showed that the successful distribution and servicing of therapy equipment depends quite decisively on the distribution and servicing staff of the therapy equipment manufacturers being available to hospitals, immediately access-

⁽⁶⁾ Siemens's reply to the Commission's request for information of 18 February 2003.

⁽⁷⁾ Footnote 7, loc. cit.

ible and ready to provide assistance. Ongoing, local customer and maintenance services are provided by the manufacturers and are usually agreed on as part of the purchase of the equipment. A particular relationship of trust thus develops between the therapy equipment manufacturer's distribution and servicing staff and the hospital staff.

(43) When it comes to purchasing decisions in hospitals and decisions on tender specifications, the familiarity and reputation of the therapy equipment manufacturer are of primary importance to decision-makers within a hospital⁽⁸⁾. The purchase decision is taken in most Member States by the hospital administration's commercial department in coordination with the critical-care medical staff familiar with the equipment. Doctors' specifications, needs and application priorities are crucial and ultimately the key factor in purchase decisions⁽⁹⁾. This is why manufacturers present their therapy equipment at fairs and medical congresses and pursue customer contacts with doctors. Dräger states that it is usual market practice to involve doctors in the therapy equipment development process as specialists and advisors⁽¹⁰⁾. Siemens states that new products are presented to hospital evaluation teams. These are usually composed of critical-care medical staff, nurses, technicians and purchasing managers and have a significant influence on a hospital's purchasing decisions⁽¹¹⁾. [...]*

(44) The results of the investigation correspond to the information provided by the parties⁽¹²⁾, namely that customers are requiring ever-more expert knowledge on the part of distribution and servicing staff and that the shift from mechanical to software-based solutions is making considerable demands both on the manufacturers and on hospital staff, which require additional outside training. The parties confirm in this connection that the manufacturers' distribution costs have risen.

(45) A look at the parties' turnover in the servicing area shows that, alongside sales of therapy equipment, after-sales service represents a major item. Siemens estimates its worldwide turnover in 'after-sales service' in the critical-care area (Electromedical Systems) for 2001 at EUR [...]*, which is considerable in relation to the turnover of EUR [...]* in ventilation equipment and

EUR [...]* in anaesthesia equipment⁽¹³⁾. Dräger had a worldwide turnover in 2001 in the 'service' area of EUR [...]* compared with EUR [...]* in anaesthesia equipment and EUR [...]* in ventilation equipment. [...]*also shows that a large part [...]* of the relevant unit costs is accounted for by, on the one hand, research and development and, on the other, distribution and servicing.

(46) Dräger's description of the distribution organisations in the individual Member States shows that a clearly structured presence throughout the country is necessary for the distribution and servicing of therapy equipment. A separate distribution and servicing structure exists within each Member State. Within highly differentiated hierarchies, managers, account managers, engineers, technicians, sales representatives and distributors look after a specific geographical area or a specific number of hospitals within the country. Dräger's distribution and servicing structure differs from country to country, depending on the size or specific national features of the Member State, with differing degrees of organisational subdivision and specialisation. In most of the Member States, the servicing and maintenance contracts, mostly for one year, agreed on when new equipment is purchased, account for the bulk of servicing work. In other countries, however, such as Sweden, servicing contracts are not customary. In most countries, the distribution and servicing staff belongs to Dräger, and in only a few instances, for example in Italy, is distribution also handled by third-party distributors⁽¹⁴⁾.

(47) All in all, the Commission's investigations into the role of the distribution and servicing structure have shown that a local network with skilled staff on the spot working for the therapy equipment manufacturer is an essential aspect of market presence in a Member State, both prior to the purchase decision and in terms of support, training and servicing after the equipment has been purchased.

Tendering market, EEA-wide standards and low transport costs

(48) The parties submit that some 75 to 80 % of the ventilation equipment sold by them is procured through invitations to tender and that demand behaviour is geared to Europe-wide supply. They also submit that price comparability is increased for customers by the fact that the results of tenders are frequently published. The equipment has to meet uniform EEA-wide standards, and any small adjustment requirements, such as the software for operation in the national language, do not impose any major conversion costs. Transport costs, the parties argue, are irrelevant since the equipment is relatively expensive, and barriers to international trade are non-existent.

⁽⁸⁾ Information from the market investigation and Siemens's reply to the Commission's request for information of 13 February 2003.

⁽⁹⁾ Information from the Commission's market investigation, and information from T for G Market Report 2000: Monitors and Ventilators, section 3.2.

⁽¹⁰⁾ Reply to the Commission's request for information of 20 February 2003.

⁽¹¹⁾ Siemens's reply to the Commission's request for information of 20 February 2003.

⁽¹²⁾ Notification, Form CO, p. 27.

⁽¹³⁾ Siemens's reply to the Commission's request for information of 27 January 2003, Annex 1.

⁽¹⁴⁾ Dräger's reply to the Commission's request for information of 20 February 2003.

(49) The market investigation has confirmed that the bulk of the therapy equipment is procured by hospitals in the EEA through invitations to tender. Since, as explained at recital 43, the doctors who work with the therapy equipment play a quite fundamental role in determining the invitations to tender, the doctors' preferences are a major factor in the ultimate purchase decision. Doctors mostly prefer equipment which they know and are familiar with when procuring new appliances. They do so in order to minimise the re-adjustment resulting from the fact that therapy equipment from different manufacturers has to be operated differently and hence involves a greater risk of operating errors by hospital staff. Since the therapy equipment being examined here is used in spheres in which safety is an extremely critical factor (literally a matter of life and death), user preferences play a key role in choosing the equipment, and willingness to use equipment which is not familiar is extremely limited. In fact, doctors are very unwilling to accept therapy equipment that they have had no experience with and whose manufacturer is not known to them at least in some adjacent clinical sphere. It was also reported to the Commission that what people regard as the 'correct' way therapy equipment should function is in the nature of a doctrinal question or 'question of faith' (or just a matter of established habits), partly reflecting different medical doctrines.

(50) Where nevertheless, perhaps in response to a low-priced offer, other equipment is acquired than that with which staff have hitherto been familiar, adequate training must (as described at recitals 43 and 44) be provided at all events and appropriate servicing must be available from a local representative of the manufacturer.

(51) Lastly, the publication of the results of the tender, legally required in some EEA countries and cited by the parties, is in principle likely to create more transparency for customers, but it quite clearly cannot significantly influence the purchasing decision criteria of hospitals described here. Consequently, according to the information supplied by the parties themselves, the published tender data are not compiled and evaluated either in Siemens's distribution or in that of Dräger⁽¹⁵⁾. The results of tenders are thus, from the manufacturers' point of view as well, not significant for the purchase decisions of customers and accordingly do not play any role in the distribution strategy of therapy equipment manufacturers.

(52) The assumption of national markets is not called into question by the fact that transport costs and national medical or technical standards do not pose any major obstacles to supplying therapy equipment internationally from one or more central production sites, as Siemens and Dräger do. Dräger has production sites in Lübeck, Germany, in Telford, the United States of

America, and in Shanghai, China. Siemens produces its therapy equipment in Solna, Sweden, and its patient monitors in Danvers, the United States of America. Nor are there any significant barriers to international trade.

(53) The overall conclusion which emerges from the above is that the bulk of invitations to tender and purchase decisions relate to equipment which represents a familiar application philosophy for the doctors who will use it and which enjoys a good reputation and is well-known on the market in relation to that application philosophy.

Price differences in individual Member States

(54) The parties submit that price levels in the European Community are relatively uniform and that uniform euro price lists are used throughout the EEA for Dräger and Siemens ventilation equipment. Any price differences, they argue, are attributable to customer product specifications and differences in order volumes. Siemens acknowledges, however, that the final customer prices are determined on the spot by its regional companies or its sales staff⁽¹⁶⁾.

(55) The Commission's market investigation showed that therapy equipment is indeed produced to individual customer specifications and wishes and that price lists consequently play only a subordinate role overall.

(56) However, some of the competitors surveyed stated that, in so far as they operate in several countries, price differences exist in respect of their products. Some stated that, with the introduction of the euro, there was a perceptible tendency towards more uniform prices.

(57) Most of the hospitals surveyed had no knowledge of prices in other countries and purchase equipment through their national distribution organisation. Some Dutch hospitals stated that they knew that prices for therapy equipment were appreciably cheaper in Germany than in the Netherlands. There were also indications that, in larger countries as a whole, prices were lower. It was also reported that hospitals were asked to make their purchases through the manufacturers' national branches and not abroad.

(58) It is clear from the results of the survey that customers purchase ventilation and anaesthesia equipment locally or through a branch established in their country. Even the uniform euro price lists, which have to some extent been introduced within the EEA, do not result in buyers purchasing internationally.

⁽¹⁵⁾ Parties' replies to the Commission's request for information of 27 January 2003.

⁽¹⁶⁾ Siemens's reply to the Commission's request for information of 20 March 2003.

Differing customer preferences

- (59) The parties submit that the supply of the relevant products by the main market participants is comparable in terms of type and characteristics at least throughout the EEA.
- (60) The market investigation has shown, however, that there are differing customer preferences and differing national approaches in anaesthesia and ventilation and that there is a demand for therapy equipment designed to meet these preferences and approaches.
- (61) Narcosis can in principle be carried out using a rebreathing system or a non-rebreathing system. In a rebreathing system, the expired air is fed back to the patient, without carbon dioxide and with added fresh oxygen. In non-rebreathing systems, the expired air is eliminated, and fresh gas must be used to prolong the narcosis. In the latter method, gas consumption is considerably higher than in the case of rebreathing systems.
- (62) The market investigation showed, and this was confirmed by the information provided by the parties⁽¹⁷⁾, that national preferences still exist for one or other of the systems. Use of the non-rebreathing system is insignificant in France, the United Kingdom and the Netherlands.
- (63) In the case of ventilation too, preferences as to ventilation modes differ between countries, though ventilation equipment has in recent years increasingly become convertible for use with differing ventilation modes.
- (64) According to the information provided by the parties, volume-controlled ventilation is preferred in Spain, Portugal, Ireland and Greece, whereas pressure-controlled ventilation is preferred in Belgium, Denmark, Germany, Italy, Austria and Sweden. Volume-controlled ventilation with support of spontaneous breathing also has its adherents with some overlaps in individual Member States.
- (65) The overall conclusion, therefore, is that, because of its technical design and application philosophy, therapy equipment cannot automatically be distributed successfully in one Member State by suppliers operating in another Member State.

2. PATIENT MONITORS

- (66) The parties start from the assumption that the geographic market for patient monitors is EEA-wide. In the case of monitors too, however, Siemens' market shares

vary considerably between EEA members. The parties put their market share EEA-wide at [15 to 25]* %. In individual EEA members, according to its own figures, Siemens has market shares of up to [35 to 45]* %.

- (67) The market investigation showed, furthermore, that prices for patient monitors differ in the individual Member States and that the distribution and servicing structure is comparable with the distribution and servicing structure for therapy equipment described at recitals 41 to 47 above. This also applies to the launch of products and to the role of doctors in purchasing decisions. There is clear evidence from the market investigation that smaller, i.e. national geographic markets apply.
- (68) In this instance, the precise definition of the geographic market for patient monitors can be left open, since the competition assessment leads to the same conclusion both for an EEA-wide market and for national markets.

3. SUMMARY OF THE DEFINITION OF THE RELEVANT GEOGRAPHIC MARKETS

- (69) The Commission's market investigation showed that the geographic markets for ventilation equipment and anaesthesia equipment are national. Key arguments supporting this view are the fact that the parties have very different market shares in the individual EEA countries and that they have different competitors in them. Most of the competitors in therapy equipment operate in only one or two member countries. The investigations showed that a local distribution and servicing structure is of crucial importance to market success. Therapy equipment is distributed predominantly through invitations to tender, with customer preferences playing an important role. Critical-care medical staff working with therapy equipment mostly opt for equipment that is known to them and uses the application philosophy with which they are familiar. The trend towards the introduction of uniform euro price lists and the publication of the results of invitations to tender, like the existing EEA standards and the low transport costs for therapy equipment, do not have any significant influence on the demand behaviour of customers. Rather, the conservative nature of customer preferences is reinforced by the specific national approaches that continue to exist as regards the preferred ventilation modes in the case of ventilation equipment and the way in which narcotic gases are delivered in the case of anaesthesia equipment.
- (70) In the case of patient monitors, the precise market definition can be left open. It is EEA-wide at most, with some indicators suggesting that here too the markets are national.

⁽¹⁷⁾ Replies to the Commission's request for information of 27 January 2003.

C. COMPATIBILITY OF THE CONCENTRATION WITH THE COMMON MARKET

C1. HORIZONTAL EFFECTS

- (71) The concentration leads to significant additions of market shares in most national markets for ventilation equipment and in those for anaesthesia equipment.
- (72) The items of critical care equipment affected by the merger are highly differentiated products. Customers have as a rule a preference for a specific item of equipment and would consider switching to a competing product only in the event of a fairly hefty price increase (compared with the competition). The relative 'closeness' of the various products on the market as regards their substitutability from the customer's point of view is therefore an essential factor of competition in the relevant markets and basically determines each supplier's market strength. This is also the case where hospitals meet their critical care equipment needs through calls for tenders, because here, too, product preferences are expressed via detailed technical specifications and thus restrict the range of the products in question according to customer preferences. The Commission's enquiries have established that, in general, owing to the extremely critical role played by apparatus from a safety point of view, anaesthetists and critical care specialists play a key role in choosing a clinic's therapy equipment.

(73) Capacity restrictions are, on the other hand, of only minor importance to suppliers' decisions on prices and volumes.

(74) Market shares provide a starting point from which to determine the relative market positions of the various competitors from the customer's point of view.

(75) Siemens/Dräger assert that there are no 'official statistics' on the relevant markets. They claim to base their market share calculations on 'analytical databanks, business reports, information on the Internet and their own research and estimates' ⁽¹⁸⁾. For EU markets, external market studies by Frost & Sullivan (F & S) and T for G are taken as a basis. Other sources mentioned by the parties are three reports by IHS on various United States markets, The World Medical Market Fact File 1997 by MDIS, Respiratory Devices: The world markets (1998) by Clinica Reports and a study by the United States investment bank Bear Stearns on Viasys (February 2002).

1. Ventilation equipment

Market shares

(76) According to the information provided by the parties on Form CO, in the case of ventilation equipment the concentration would result in the following market shares:

Ventilation equipment: parties' data on Form CO

(%)																
2001	EEA	B	DK	D	FI	F	GR	UK	IRL	I	NL	A	P	E	S	N
Siemens	[15-25]*	[15-25]*	[35-45]*	[5-15]*	[5-15]*	[5-15]*	[15-25]*	[15-25]*	[55-65]*	[35-45]*	[25-35]*	[5-15]*	[55-65]*	[15-25]*	[45-55]*	[25-35]*
Dräger	[25-35]*	[35-45]*	[35-45]*	[35-45]*	[15-25]*	[25-35]*	[5-15]*	[25-35]*	[15-25]*	[25-35]*	[15-25]*	[65-75]*	[15-25]*	[15-25]*	[15-25]*	[15-25]*
Combined	[45-55]*	[65-75]*	[75-85]*	[45-55]*	[35-45]*	[35-45]*	[25-35]*	[45-55]*	[65-75]*	[65-75]*	[45-55]*	[85-95]*	[75-85]*	[35-45]*	[65-75]*	[45-55]*
Tyco/Puritan Bennett	[5-15]*	[0-5]*	[0-5]*	[15-25]*	[15-25]*	[5-15]*	[15-25]*	[15-25]*	[0-5]*	[5-15]*	[5-15]*	[0-5]*	[5-15]*	[15-25]*	[5-15]*	[15-25]*
Viasys	[5-15]*	[5-15]*	[0-5]*	[5-15]*	[15-25]*	[5-15]*	[5-15]*	[5-15]*	[0-5]*	[0-5]*	[5-15]*	[0-5]*	[5-15]*	[5-15]*	[0-5]*	[0-5]*
Hamilton	[5-15]*	[5-15]*	[5-15]*	[5-15]*	[15-25]*	[5-15]*	[15-25]*	[5-15]*	[5-15]*	[5-15]*	[5-15]*	[0-5]*	[0-5]*	[5-15]*	[5-15]*	[5-15]*
Others				[5-15]*		[25-35]*		[15-25]*		[15-25]*		[0-5]*	[0-5]*			
Residual	[15-25]*	[5-15]*	[15-25]*	[5-15]*	[25-35]*	[5-15]*	[25-35]*	[0-5]*	[5-15]*	[0-5]*	[15-25]*	[0-5]*	[0-5]*	[25-35]*	[15-25]*	[25-35]*

⁽¹⁸⁾ Form CO, p. 57.

Siemens/Dräger thus estimate their combined EEA market share in 2001 at [45 to 55]* %, after [45 to 55]* % in 2000 and [45 to 55]* % in 1999, with no competitor being identified for a substantial part of the market [15 to 25]* %. In the individual Member States, market shares are, according to these data, in some instances significantly higher, although in the smaller EEA countries market shares (but not the identity of the main competitors) fluctuate considerably from year to year.

- (77) In the course of the in-depth market investigation the parties were asked, in respect of the as yet unattributed market shares, to name the corresponding competitors or to explain how the residual value was arrived at. Dräger stated in answer to the question on the subject that 'the residual value is obtained by trying to portray

competitors' turnovers in the individual Member States. The estimated market volume often turns out to be smaller (sic) than competitors' combined turnovers.' It would therefore appear to be in fact an unaccounted for residual value.

- (78) The competitors listed, but not further quantified, by Siemens (Pulmonetic Systems, Bunell, Chirana-Prema, Cardiopulmonary Corp., Sechrist Industries, VersaMed, Takaoka, Tim Göttingen, e-vent, MÜFA AG and Medec) were, however, identified in the course of the market investigation neither by any customer nor by any competitor as operators on the relevant market, the market for critical care ventilation equipment. The following table therefore indicates the market shares presented by the parties, less any unidentified market shares.

Ventilation equipment: parties' data, as adjusted

(%)

2001	EEA	B	DK	D	FI	F	GR	UK	IRL	I	NL	A	P	E	S	N
Siemens	[15-25]*	[15-25]*	[35-45]*	[5-15]*	[15-25]*	[5-15]*	[15-25]*	[15-25]*	[65-75]*	[35-45]*	[25-35]*	[5-15]*	[55-65]*	[15-25]*	[55-65]*	[35-45]*
Dräger	[35-45]*	[35-45]*	[45-55]*	[35-45]*	[25-35]*	[25-35]*	[15-25]*	[25-35]*	[15-25]*	[25-35]*	[25-35]*	[65-75]*	[15-25]*	[25-35]*	[25-35]*	[15-25]*
Combined	[55-65]*	[65-75]*	[85-95]*	[45-55]*	[45-55]*	[35-45]*	[35-45]*	[45-55]*	[75-85]*	[65-75]*	[55-65]*	[85-95]*	[75-85]*	[45-55]*	[75-85]*	[55-65]*
Tyco/Puritan Bennett	[15-25]*	[0-5]*	[0-5]*	[15-25]*	[15-25]*	[5-15]*	[25-35]*	[15-25]*	[5-15]*	[5-15]*	[5-15]*	[0-5]*	[5-15]*	[25-35]*	[5-15]*	[15-25]*
Viasys	[5-15]*	[15-25]*	[0-5]*	[5-15]*	[15-25]*	[5-15]*	[5-15]*	[5-15]*	[0-5]*	[0-5]*	[5-15]*	[0-5]*	[5-15]*	[5-15]*	[5-15]*	[0-5]*
Hamilton	[5-15]*	[5-15]*	[5-15]*	[5-15]*	[5-15]*	[5-15]*	[15-25]*	[5-15]*	[5-15]*	[5-15]*	[5-15]*	[0-5]*	[0-5]*	[5-15]*	[5-15]*	[5-15]*
Others	[0-5]*	[0-5]*	[0-5]*	[15-25]*	[0-5]*	[25-35]*	[0-5]*	[15-25]*	[0-5]*	[15-25]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*

- (79) Of the external studies cited by the parties, F & S⁽¹⁹⁾ estimate the combined Europe-wide market share of Siemens/Dräger at 54 % (2000). The parties claim, however, that the F & S figures are based on a market definition that is not comparable, as ventilation components of anaesthesia equipment were included in the market for ventilation equipment. F & S do admittedly list Datex-Ohmeda (Instrumentarium) as a competitor in relation to ventilation equipment, despite the fact that,

although the firm does manufacture anaesthesia equipment, it does not engage to any appreciable extent in the manufacture of critical care ventilation equipment.

- (80) T for G⁽²⁰⁾ estimate the parties' combined Europe-wide market share for ventilation equipment at 70 %. The next largest competitor is in their view Tyco/Puritan Bennett with 13 %. T for G have also produced market share data for the following national markets:

⁽¹⁹⁾ European Anaesthesia and Respiratory Equipment Markets Report, 2001.

⁽²⁰⁾ T for G market report: Monitors and Ventilators (December 2000); [...]*.

[illegible]

	(%)															
2001	EEA	B	DK	D	FI	F	GR	UK	IRL	I	NL	A	P	E	S	N
Kontron	[0-5]*					[5-15]*										
Newport	[0-5]*							[5-15]*								
Siare	[0-5]*									[15-25]*						

^(a) The turnover figures for competitors obtained in the course of the market investigation are business secrets of the undertakings concerned.

^(b) Contains, according to the undertaking, a 'small' proportion of accessories.

(84) The JV would bring together the largest and second-largest suppliers of ventilation equipment in the EEA. The combined market share would be much higher than that of any of the next largest competitors in the respective national markets. Tyco would then be the only competitor with a broad portfolio of medical technology products, although the main focus of its business is on technically less sophisticated and capital-intensive products (e.g. accessories and supplies). According to information provided by market participants, after it was taken over by Tyco, Puritan Bennett lost a number of key staff, adversely affecting its innovative capacity in ventilation equipment. This is also reflected in its, according to the parties' estimate, declining market share (EEA, 2001: [5 to 15]* %, 2000: [15 to 25]* %, 1999: [15 to 25]* %). Siemens likewise states in the Business Plan 2001 of its Electromedical Systems division: [...] Hamilton, Viasys and Taema are active in several national markets, but they have small market shares.

(85) There are, in addition, a number of local fringe competitors, but these achieve market shares in only one or two Member States and they are virtually unknown in other national markets. They include the family firm Stephan (Germany), Respironics (Germany), Kontron (France) Newport (United Kingdom) and Siare (Italy). Some of these competitors occupy market niches with equipment which does not represent a direct substitute for the parties' equipment. These include Stephan (neonatal ventilators) and Kontron (sleep therapy). In the parties' in-house market analyses concerning critical care ventilation equipment, these fringe competitors are simply ignored.

(86) If, therefore, the market shares of Siemens/Dräger and those of leading competitors were to reflect their relative market positions and substitutability from the customer's point of view, there would result from the market shares alone a strong presumption of a dominant position on the markets for ventilation equipment in Belgium, Denmark, Germany, Ireland, Italy, the Netherlands, Austria, Portugal, Spain, Sweden, the United Kingdom and Norway.

(87) The market investigation has shown, moreover, that from the customer's point of view Dräger and Siemens

produce the closest substitutes as regards product quality, market positioning and corporate reputation on the market for ventilation equipment, a factor which increases the parties' market strength even further. The market investigation relied on the following: (i) a survey of customers and competitors; (ii) internal documents of the parties; and (iii) tender documents submitted by the parties.

(i) Survey of customers and competitors

(88) Customers and competitors were asked in the course of the market investigation to name three substitutes (1st/2nd/3rd alternative) for Dräger, Siemens and Tyco/Puritan Bennett ventilation equipment. Customers were asked to take as a basis the models then in use, while competitors were shown a list of the parties' main items of equipment (Dräger: Evita XL, Evita 4, Evita 2 dura, Savina; Siemens: Servo 300, Servo 300A, Servo 900c, Servo-i Basic, Servo-i Universal). Most customers in all national markets and almost all customers in the German-speaking area and in Denmark, Sweden and Portugal judged Dräger to be the best alternative to each particular Siemens product and vice versa. Similarly, Dräger and Siemens were named as the best substitute for Tyco (models PB 840 and PB 760). The question on the subject was, however, not answered by the majority of customers canvassed, possibly because they were unfamiliar with Tyco equipment. In the opinion of the customers covered by the market investigation, the parties' equipment therefore represents the closest substitute in every case in each market segment.

(89) Customers were asked further what sort of price increase would induce them to switch to an alternative item of equipment. Numerous customers either did not reply or else stated that price was only a minor consideration (compared with, say, quality and customer service) when it came to choosing products. Otherwise the figure lay somewhere between 10 and 30 %. One Austrian hospital indicated that only a 50 % price increase would induce it to change supplier.

(90) No clear pattern emerges from competitors' answers to the substitution question. Some competitors are of the same opinion as customers (Dräger/Siemens as closest substitute), whereas others regard their own products as the closest substitutes for the parties', while in other answers still, the competitors' own products are not even listed among the three best alternatives.

(ii) Internal documents of the parties

(91) Both parties analyse in their business plans and in the analyses produced in the run-up to the transaction the market positioning of the various items of ventilation equipment marketed by Siemens, Dräger and their competitors. The general feeling that emerges from these documents is that the parties' equipment should be classified in the upper price/performance segment, while competitors' covers mainly the lower market segments.

(92) Siemens [...]*

(93) Dräger [...]*

(iii) Tender documents

(94) At the Commission's request, Siemens and Dräger each submitted with the notification a list of tender procedures in the area of ventilation equipment in which they had taken part. The parties point out in this connection that they have no day-to-day reporting mechanism by which the data requested by the Commission are gathered on a regular basis and, if necessary, fed into a database. Instead, they say, the data submitted have had to be reconstituted for each tender procedure by the sales staff concerned and hence may be incomplete, giving a distorted picture of the competitive situation (to their detriment, so they claim).

(95) The requested lists contain, among other things, information about the customer, the number of items, the order size, the names of competitors, and the names of the successful tenderers and, where known, of previous successful tenderers.

(96) In the course of the in-depth market investigation, the parties were asked to submit further tender documents so as to increase the proportion of tender procedures covered. The data submitted in response to this request were, however, largely unusable as no competitors were identified. The analysis that follows accordingly relates to the data submitted with the notification.

(97) The analysis below relates to EEA-wide data. Because of the smallness of the sample and the possibility that the selection may be unrepresentative, a separate analysis has not been carried out for each Member State.

(98) With respect to ventilation equipment, Siemens submitted with the notification [...]* tender procedures in which it had participated and in relation to which competitors taking part in the bidding process were identified. Dräger was a competitor in [...]* of these tender procedures. Of the [...]* procedures in which Dräger did not participate, in [...]* there was no competition. The other tenderers whose names occur most often are Tyco/Puritan Bennett ([...]* times), Hamilton ([...]*), Taema ([...]*) and Viasys/Bird ([...]*).

(99) In the case of [...]* tender procedures, both the successful tenderer and the previous successful tenderer are identified. In [...]* cases, either the new contract was awarded once more to the previous supplier or a newly built hospital was involved. Of the [...]* tender procedures in which a (partial or complete) change of supplier occurred, the customer switched most often ([...]* times) from Siemens to Dräger or vice versa.

(100) In the tender procedures submitted by Siemens, Siemens was thus more often than not in competition with Dräger, and where the customer changed suppliers, in [...]* of cases the switch was between Siemens and Dräger. Bearing in mind that a tenderer will be more inclined to take part in a tender procedure if he thinks he has a realistic chance of success, both observations support the conclusion already drawn from the customer survey and the internal documents that Siemens and Dräger represent the closest substitutes in the market for ventilation equipment.

(101) The same analysis as for Siemens was carried out in respect of the tender procedures submitted by Dräger. Dräger submitted [...]* tender procedures for ventilation equipment in the different EEA countries where competitors are identified. Siemens was a competitor in [...]* of these. In three instances, there was no competition. Chief among the remaining competitors were Hamilton ([...]* occurrences), Tyco/Puritan Bennett ([...]*), Taema ([...]*) and Viasys/Bird ([...]*).

(102) Both the new and the previous successful tenderer are identified in [...]* of the tender procedures submitted by Dräger. In [...]* instances, the previous supplier was reappointed or else a new clinic was involved ([...]* tender procedures). Of the [...]* tender procedures in which a (partial or complete) change of supplier occurred, the customer switched most often ([...]* times) from Siemens to Dräger or vice versa. Analysis of the Dräger data therefore produces the same result as above, i.e. the information concerning tender procedures supports the finding that the items of ventilation equipment marketed by Siemens and Dräger represent the closest substitutes for each other.

Conclusion

- (103) The customer survey, the parties' internal documents and the data on tender procedures confirm the view formed on the basis of market shares that Siemens and Dräger produce the closest substitutes from the customer's point of view. The merging of the two product ranges within the joint venture would enable the parties to charge higher prices inasmuch as a large part of the customers lost as a result of a price increase by one of the parties would switch to products made by the other party. The elimination, due to the concentration, of by far the most important competitor would thus enable Siemens/Dräger to behave, when setting prices, to a considerable extent independently of customers and competitors.
- (104) Market entry barriers are deemed by market participants to be high inasmuch as customers have a strong preference for products and manufacturers that have stood the test of time. According to the Commission's information, a well-developed distribution and servicing network is also a prerequisite for successful market entry. An installed base, in neighbouring clinical fields at least, likewise makes for substantially easier market entry. Market entry requires considerable sunk costs in the form of R & D expenditure and expenditure on setting up a distribution and customer service network.
- (105) A repositioning of existing competitors into a market position comparable to that of the JV is likewise unrealistic. The next largest competitor after Siemens/Dräger, Tyco, currently achieves only a fraction of the parties' combined market share and would have to

improve the positioning of its products from the customer's point of view as well as its distribution and servicing network dramatically in order to attain this end. Over the one- to two-year time horizon relevant for the competition assessment, this is not likely to occur, at least not on the basis of market developments so far. On the contrary, Tyco's market position has been eroded in recent years. Several of the remaining fringe competitors fear that their market position will deteriorate in the years ahead owing to the JV's broad product range, given in particular its presence in the vertically adjacent market for patient monitors. The JV would consequently lead to higher, rather than lower, barriers to expansion by fringe competitors.

- (106) In view of the very high combined market share of Dräger and Siemens in the market for ventilation equipment in Austria, Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden, the United Kingdom and Norway, the absence of comparable competitors and the fact that the parties to the concentration produce the closest substitutes from the customer's point of view, the market investigation confirms the serious concerns that the concentration would lead to the creation of a dominant position on the part of the JV in these national markets.

2. Anaesthesia equipment

Market shares

- (107) According to the information provided by the parties on Form CO, in the case of anaesthesia equipment the concentration would result in the following market shares:

Anaesthesia equipment: parties' data on Form CO

(%)																
2001	EEA	B	DK	D	FI	F	GR	UK	IRL	I	NL	A	P	E	S	N
Siemens	[5-15]*	[5-15]*	[0-5]*	[0-5]*	[0-5]*	[5-15]*	[0-5]*	[0-5]*	[5-15]*	[15-25]*	[0-5]*	[5-15]*	[25-35]*	[15-25]*	[45-55]*	[0-5]*
Dräger	[25-35]*	[25-35]*	[25-35]*	[55-65]*	[35-45]*	[25-35]*	[15-25]*	[5-15]*	[0-5]*	[15-25]*	[15-25]*	[25-35]*	[15-25]*	[25-35]*	[5-15]*	[25-35]*
Combined	[35-45]*	[35-45]*	[25-35]*	[55-65]*	[35-45]*	[35-45]*	[25-35]*	[5-15]*	[5-15]*	[35-45]*	[25-35]*	[35-45]*	[45-55]*	[25-35]*	[55-65]*	[25-35]*
Datex-Ohmeda	[35-45]*	[35-45]*	[35-45]*	[25-35]*	[55-65]*	[25-35]*	[45-55]*	[45-55]*	[45-55]*	[35-45]*	[45-55]*	[25-35]*	[35-45]*	[35-45]*	[15-25]*	[45-55]*
Others		[5-15]*	[5-15]*		[0-5]*	[5-15]*	[5-15]*	[15-25]*	[25-35]*	[15-25]*	[5-15]*	[5-15]*	[5-15]*	[15-25]*	[15-25]*	[5-15]*
Residual	[15-25]*	[5-15]*	[5-15]*	[5-15]*		[5-15]*	[25-35]*	[15-25]*	[15-25]*	[5-15]*	[15-25]*	[25-35]*	[0-5]*	[15-25]*	[0-5]*	[5-15]*

Siemens/Dräger thus estimate their combined EEA market share at [35 to 45]* %, virtually on a par with Datex Ohmeda.

(108) Dräger, Siemens and Datex Ohmeda are the only suppliers with significant EEA-wide activities. The parties have also identified a number of suppliers (Others) which have market shares in only one Member State or in adjacent Member States (e.g. United Kingdom/Ireland, Spain/Portugal). These niche suppliers include Dameca and Anmedic (Scandinavia), Taema (France), AMS (Greece), Penlon and Blease (United Kingdom/Ireland), Siare (Italy, Austria), Medec (Belgium, the Netherlands) and Hersill and Temel (Spain, Portugal). According to an estimate by Frost & Sullivan (F & S), at European level the largest of these niche suppliers have market shares of 3 % or less. The parties do not identify any competitors in connection with the 'residual' market share, which differs in size from country to country.

(109) In the course of the in-depth market investigation the parties were asked, in respect of the as yet unattributed market shares, to name the corresponding competitors or to explain how the residual value was arrived at. Dräger stated in answer to the question on the subject that 'the residual value is obtained by trying to portray competitors' turnovers in the individual Member States. The estimated market volume often turns out to be smaller (sic) than competitors' combined turnovers.' It would therefore appear to be in fact an unaccounted for residual value.

(110) Siemens, on the other hand, identifies the following competitors which, according to its estimates, achieve

in the Member States, indicated in brackets, market shares of 1 to 2 %: Heyer (Austria, Germany), Heinen & Löwenstein (Austria, Germany), EKU (Austria, Germany), Stephan (Germany), Smith Industries (Ireland, United Kingdom), Samed (Italy) and Normeca (Norway). Some of these firms at least were mentioned by customers in their contacts with the Commission as being market participants, albeit as qualitatively much less highly positioned, and hence not direct, competitors of the parties. According to a T for G study, equipment made by these, newly adduced, firms is used, not in the operating theatre itself, but in the recovery room. When the commitments were submitted, the examination of the question whether competitors newly adduced in evidence may be assigned to the relevant product market had not yet been completed. In the absence of definitive proof to the contrary, the newly adduced suppliers will be taken into consideration for the purposes of this Decision (see recital 4).

(111) In the following table, as in the one above concerning ventilation equipment, the parties' market share figures are accordingly adjusted only for any unattributed residual turnover. Additional competitors listed, but not further quantified, by Siemens (Acoma, Kontron, B. Braun, Chenwei, Chirana-Prema, Megamed, Royal Medical and Tacoma) were identified in the course of the market investigation neither by any customer nor by any competitor as operators on the market for anaesthesia equipment and are not included in the table. The following table therefore indicates the market shares presented by the parties, less any unidentified market shares.

Anaesthesia equipment: parties' data, as adjusted

																(%)
2001	EEA	B	DK	D	FI	F	GR	UK	IRL	I	NL	A	P	E	S	N
Siemens	[5-15]*	[5-15]*	[0-5]*	[0-5]*	[0-5]*	[5-15]*	[5-15]*	[0-5]*	[5-15]*	[15-25]*	[5-15]*	[5-15]*	[25-35]*	[0-5]*	[45-55]*	[0-5]*
Dräger	[25-35]*	[35-45]*	[25-35]*	[55-65]*	[35-45]*	[35-45]*	[25-35]*	[5-15]*	[0-5]*	[15-25]*	[25-35]*	[25-35]*	[15-25]*	[25-35]*	[5-15]*	[25-35]*
Combined	[35-45]*	[45-55]*	[35-45]*	[55-65]*	[35-45]*	[45-55]*	[25-35]*	[15-25]*	[5-15]*	[35-45]*	[25-35]*	[45-55]*	[45-55]*	[25-35]*	[65-75]*	[25-35]*
Datex-Ohmeda	[35-45]*	[45-55]*	[45-55]*	[25-35]*	[55-65]*	[35-45]*	[45-55]*	[55-65]*	[55-65]*	[35-45]*	[55-65]*	[35-45]*	[35-45]*	[45-55]*	[15-25]*	[55-65]*
Penlon	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[5-15]*	[15-25]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*
Siare	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[15-25]*	[0-5]*	[5-15]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*
Taema	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[5-15]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*
Blease	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[5-15]*	[5-15]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*
Others (< 1 % EEA)	[5-15]*	[5-15]*	[15-25]*	[5-15]*	[0-5]*	[0-5]*	[5-15]*	[0-5]*	[0-5]*	[0-5]*	[5-15]*	[5-15]*	[5-15]*	[15-25]*	[15-25]*	[5-15]*

(112) Of the external studies cited by the parties, F & S⁽²¹⁾ estimate, however, the parties' combined Europe-wide market share (2000) at 49 % (Dräger 39 %, Siemens 10 %), while Datex Ohmeda's market share is put at only 38 %. The parties' objection that the F & S figures are not based on a comparable market definition in that ventilation components of anaesthesia equipment are assigned to the market for critical care ventilation equipment should, on the face of it, not affect the market share calculations for anaesthesia equipment as the distortion in this market has a proportional impact on all competitors. (Anaesthesia equipment consists

basically of a ventilator and a gas mixer, although the ventilator is not directly comparable to an item of critical care ventilation equipment).

(113) The abovementioned T for G report is also a source of market share figures for anaesthesia equipment. T for G put the parties' combined Europe-wide market share for anaesthesia equipment at 65 % (Dräger 56 %, Siemens 9 %). According to the report, Datex Ohmeda achieves a 22 % market share. T for G estimate the various market shares as follows:

Anaesthesia equipment: T for G

	Europe	D	F	UK	I	E	NL
Siemens	9	9	17	4	N/A	N/A	32
Dräger	56	56	38	12	N/A	N/A	30
Combined	65	65	55	16	N/A	N/A	62
Datex-Ohmeda	22	22	23	48	N/A	N/A	32
Taema	5	5	15		N/A	N/A	
Blease	3	3		21	N/A	N/A	
Penlon	3	3		15	N/A	N/A	
Others	2	2	7	< 1	N/A	N/A	6

(114) Siemens's Electromedical Systems division estimates in its own internal documents [...] the parties' and competitors' market shares as follows: [...]*.

of external studies known to the Commission and identified by the parties as being authoritative. [...]*

(115) The parties' market share estimates on Form CO therefore portray their own market position as being significantly weaker than the position portrayed by the authors

(116) As a result, the Commission has done its own market share calculations based on the turnover data of leading competitors. The table below relies on figures communicated by Siemens, Dräger, Datex-Ohmeda, Taema, Stephan and Penlon concerning their own turnover. The market shares of the remaining competitors are based on the market share data communicated by the parties in the course of the in-depth market investigation; at the time when the commitments were submitted, it was not yet possible to check these figures (see recital 4).

⁽²¹⁾ European Anaesthesia and Respiratory Equipment Markets Report, 2001.

Anaesthesia equipment: Commission's findings ^(a)

(%)

2001	EEA	B	DK	D	FI	F	GR	UK	IRL	I	NL	A	P	E	S	N
Siemens	[5-15]*	[5-15]*	[15-25]*	[0-5]*	[0-5]*	[15-25]*	[5-15]*	[0-5]*	[5-15]*	[25-35]*	[5-15]*	[5-15]*	[35-45]*	[0-5]*	[35-45]*	[0-5]*
Dräger	[45-55]*	[35-45]*	[55-65]*	[75-85]*	[65-75]*	[45-55]*	[35-45]*	[15-25]*	[0-5]*	[25-35]*	[45-55]*	[25-35]*	[25-35]*	[35-45]*	[5-15]*	[75-85]*
Combined	[55-65]*	[45-55]*	[75-85]*	[75-85]*	[65-75]*	[65-75]*	[45-55]*	[15-25]*	[5-15]*	[45-55]*	[45-55]*	[35-45]*	[55-65]*	[35-45]*	[45-55]*	[75-85]*
Datex-Ohmeda																
Taema																
Stephan																
Penlon																
Medec	[0-5]*	[5-15]*									[5-15]*					
Heyer	[0-5]*			[0-5]*								[0-5]*				
H&L	[0-5]*			[0-5]*								[0-5]*				
EKU	[0-5]*			[0-5]*								[0-5]*				
AMS	[0-5]*						[5-15]*									
Blease	[0-5]*							[5-15]*	[5-15]*							
Dameca	[0-5]*		[5-15]*		[0-5]*										[5-15]*	
Anmedic	[5-15]*		[5-15]*		[0-5]*						[5-15]*				[5-15]*	
Siare	[0-5]*									[15-25]*		[5-15]*				
Hersill	[0-5]*												[5-15]*	[5-15]*		
Smith Industries	[0-5]*						[0-5]*		[0-5]*							
Samed	[0-5]*									[0-5]*						
Temel	[0-5]*												[5-15]*	[5-15]*		
Normeca	[0-5]*															[0-5]*

^(a) The turnover figures for competitors obtained in the course of the market investigation are business secrets of the undertakings concerned.

- (117) In most national markets Dräger and Datex-Ohmeda are the two leading suppliers of anaesthesia equipment. According to the Commission's calculations and to F & S, T for G and Siemens EM, Europe-wide Dräger is the larger of the two suppliers. Both firms have significant market shares in all national markets except Ireland and Sweden, where Dräger achieves only small market shares.
- (118) Europe-wide, Siemens is the third-largest supplier, albeit far behind the two market leaders, although its market position varies considerably from country to country. In Sweden, where the headquarters of Siemens Electromedical Systems are situated, the undertaking is the market leader. Siemens entered the anaesthesia equipment market only in 1997, with the Kion model. This is an integrated workstation with a built-in patient monitor. This innovative design was, according to market participants [...]*, beset with considerable technical problems during the first few years. Among other things, it was initially considered cumbersome and complex to operate. Problems subsequently arose with technical reliability. These have, so the Commission has been told, now been resolved, but the equipment's reputation with many customers has reportedly never recovered and, [...]*, the equipment has not been a success financially. T for G confirms this when it states with regard to therapy equipment that 'Siemens is perceived very differently in different countries and different departments. [...]* Dräger has a high image all over Europe' ⁽²²⁾.
- (119) In contrast to the niche suppliers, Siemens has a well-developed distribution network throughout Europe and, because of its broad range of medical technology products, enjoys a strong reputation in neighbouring clinical areas, two factors which enable it to place new anaesthesia products on the market. In the five years since it entered the market, Siemens has already established itself in most EEA countries as a significant, and in Sweden as even the leading, supplier of anaesthesia equipment.
- (120) The notified JV would therefore combine in several national markets the market leader (Dräger or, in Sweden, Siemens) with the third-largest competitor (Siemens or, in Sweden, Dräger). In Belgium, Denmark, France, Germany, Italy and the Netherlands, the high combined market shares and the horizontal overlaps alone lead to a presumption of a dominant market position.
- (121) As in the case of ventilation equipment, it will be considered below to what extent Dräger's anaesthesia equipment is a close substitute for Siemens's equipment and hence restricts the price-setting freedom of Siemens in particular. As above, the analysis is based on: (i) a survey of customers and competitors; (ii) internal documents of the parties; and (iii) tender documents submitted by the parties.
- (122) Owing to its currently smaller market share, Siemens may also have a stronger financial incentive than Dräger and Datex-Ohmeda to pursue as an independent supplier an aggressive, market-share-winning strategy in order to achieve economies of scale and build up an installed base. The notified JV would thus potentially eliminate a particularly aggressive competitor. This theory will be examined in the light of Siemens's business plans and strategy papers.
- (i) Survey of customers and competitors
- (123) As with ventilation equipment, customers and competitors were asked in the context of the market investigation to name three substitutes (first, second and third alternative) to Dräger, Siemens and Datex-Ohmeda anaesthesia equipment. Customers were asked to take the currently used models as a basis, while competitors were supplied with a list of the parties' main equipment (Dräger: Cicero, Cato, Primus; Siemens: Kion). A clear majority of the customers surveyed, particularly in Germany, Denmark, Belgium, France, Italy and the Netherlands, but also, for example, in Austria and Sweden, regarded Dräger products as being the best alternative to the Siemens Kion, although it should be pointed out that Siemens's product range for anaesthesia equipment is limited to this one model. The answers to the question concerning substitutes for Dräger are less clear-cut in this respect. Both Datex-Ohmeda and Siemens are named as the best alternatives. In the opinion of the customers participating in the market investigation, therefore, Dräger's product range is the nearest substitute for Siemens customers, but this is not entirely the case the other way round.
- (124) The results of the market investigation show that customers generally rank the equipment of the niche suppliers as being of lower quality than that of the three market leaders. Several hospitals indicated that their equipment manufactured by niche suppliers tended to be technically antiquated and used, for example, as back-up or replacement equipment.
- (125) Customers were also asked what price increases would lead them to change to the alternative equipment in question. Many of them either did not reply or indicated that price played only a minor role (compared, for example, with quality and customer service) in their selection of products. Otherwise, the answers given ranged between 10 % and 30 %. One Austrian hospital stated that there would have to be a 50 % increase before it would change its supplier. There were therefore no significant differences between ventilation and anaesthesia equipment as far as this question was concerned.
- (126) Only a few competitors gave detailed answers to the question concerning substitutes for anaesthesia equipment. Their answers do not indicate any clear pattern.

⁽²²⁾ T for G market report: Monitors and Ventilators, December 2000, p. 28.

(ii) Internal documents of the parties

(127) In their business plans and the analyses conducted prior to the transaction, both parties analyse the market positioning of the different ventilation equipment marketed by Siemens, Dräger and their competitors. In this respect, the Siemens Kion model was unanimously classified together with several Dräger products in the upper price/performance segment. Datex-Ohmeda also covers a broad product range.

(128) Siemens [...]*.

(129) Dräger [...]*.

(130) In its business plans for 1999 to 2002, Siemens also discusses the business strategy of its Electromedical System Division [...]*.

(131) [...]* The JV thus eliminates a relatively aggressive challenger to Dräger (and the second largest supplier Datex-Ohmeda).

(iii) Tender documents

(132) With their notification, Siemens and Dräger also submitted, at the Commission's request, a list of the tender procedures for anaesthesia equipment in which they had taken part. Here too, the parties point out that they do not operate an ongoing reporting system covering the data requested whereby such data are entered into a databank. The data submitted had had to be reconstructed by the sales personnel responsible for each tender and might therefore be incomplete and provide a distorted view of the competitive situation (in the parties' view, to Siemens' and Dräger's detriment).

(133) The requested lists contain information on the customer, the number of units, the contract volume, the name of competitors, the name of the company winning the contract and, if available, the previous winner.

(134) In the context of the detailed market investigation, the parties were asked to submit further tender documents in order to increase the number of tender procedures covered. However, the data submitted were largely unusable because no competitors were identified. The following evaluation is thus based on the data submitted with the notification.

(135) The data in question are for the EEA as a whole. Because of the small and possibly unrepresentative sample, no separate evaluation by Member State was carried out.

(136) With its notification, Siemens submitted documents for [...]* tender procedures in which it had participated and for which the competitors also taking part are identified. In [...]* of them, Dräger was a competitor. Of the [...]* procedures not involving Dräger, there were [...]* in which there was no competitor at all. In [...]* cases, only Datex-Ohmeda submitted a tender (in P, IRL [...]*, GR and E), in [...]* only Taema (in F) and in [...]* only Iberdata (in P). More than [...]*, Datex-Ohmeda [...]*, Dameca ([...]*, exclusively in Sweden), Taema/Air Liquide ([...]*, [...]*) and Themel ([...]* in Spain) took part in addition to Dräger. Dräger and Datex are thus by far the most important rivals to Siemens for anaesthesia equipment.

(137) In [...]* cases, both the successful bidder and the previously successful bidder are identified. In [...]* of them, the new contract was awarded to the previous supplier. On the [...]* tender procedures in which there was a (partial or complete) change of supplier, the customer most frequently ([...]* times) changed from Dräger to Datex-Ohmeda, or vice versa. [...]* changes occurred between Siemens and Datex-Ohmeda and [...]* between Dräger and Siemens (NB: some contracts were awarded to several suppliers). These changes roughly reflect the market position of the different manufacturers, although the small (and possibly unrepresentative) sample restricts the reliability of the data.

(138) The same analysis as for Siemens was carried out on the tender documents submitted by Dräger. Dräger submitted documents for [...]* tenders for anaesthesia equipment in the various EEA countries for which competitors are identified. In [...]* cases, there was no competitor at all. In those cases in which there were competitors, Datex-Ohmeda [...]* and Siemens [...]* submitted the most bids. There is a pronounced geographic segmentation between the remaining competitors: Penlon [...]*, Taema [...]* and Anmedic [...]*. All other bidders submitted fewer than [...]* bids.

(139) In [...]* of the cases submitted by Dräger, both the successful bidder and the previously successful bidder are identified. In [...]* cases, the previous supplier was again successful or the case involved a new hospital (one case). On the [...]* tender procedures in which there was a (partial or complete) change of supplier, the customer most frequently ([...]* times) changed from Dräger to Datex-Ohmeda, or vice versa. [...]* changes occurred between Siemens and Datex-Ohmeda and [...]* between Dräger and Siemens (NB: some contracts were awarded to several suppliers). These changes roughly reflect the market position of the different manufacturers, although the small (and possibly unrepresentative) sample restricts the reliability of the data.

- (140) The tender data submitted by Siemens and Dräger confirm that Dräger, Datex-Ohmeda and Siemens are by far the most important suppliers in their respective market segment. The niche suppliers identified by the parties in the course of the procedure for the purposes of calculating market shares are thus not effective competitors in practice.

Conclusion

- (141) The customer survey, the parties' internal documents and the tender data thus confirm the assumption made on the basis of market shares that, from the customer's point of view, Siemens and Dräger manufacture close substitutes in the market for technically sophisticated anaesthesia equipment. In this respect, Siemens covers, with its Kion model, only part of the customer segment covered by Dräger's broader product range. In particular for a large proportion of Siemens' existing customers, Dräger would thus be the main alternative if, for example, Siemens tried to impose higher prices on the market. The merger of both product ranges within the JV would thus put the parties in a position to impose higher prices, particularly on those customers for which Dräger and Siemens are the first and second choice for procurement purposes, since many of the customers lost as a result of the price increase of one or other of the parties would change to products of the other party.

- (142) As is apparent from the business plans, the JV would also eliminate a competitor (Siemens) which, on the basis of its currently smaller market share, has an incentive to pursue a relatively aggressive strategy targeted at winning market shares. The elimination of Siemens as an independent competitor on the market in anaesthesia equipment which would result from the merger would place the JV in a position to set prices largely independently of its customers and competitors.

- (143) According to the findings of the market investigation, market entry barriers for anaesthesia equipment are regarded as high by market participants since customers have a strong preference for proven products and manufacturers. Moreover, as the Commission has found, a well-developed distribution and service network is a prerequisite for successful market entry. An installed base, at least in adjacent clinical segments, also makes market entry much easier. Market entry requires considerable sunk costs in R & D and the development of a marketing and customer-service network. Siemens' significant position, from the customer viewpoint, as an effective competitor in anaesthesia equipment is,

according to the market investigation, largely based on its strong presence in other areas of medical technology, including ventilation equipment and patient monitors, and probably contributed to the relative ease of its market entry.

- (144) It also seems unrealistic to believe that existing competitors can establish a market position comparable to Siemens, Dräger or Datex-Ohmeda. Each of the next largest competitors is active in only one, small geographical area. An expansion into new markets would require the establishment of a marketing and service network and the gradual development of a reputation among customers, and would therefore be equivalent in practical terms to a new market entry. This is unlikely to occur in the timeframe of one to two years relevant to the competitive assessment, at least on the basis of current market developments. Several of the fringe competitors fear that their market position is more likely to worsen in coming years given the JV's broad product range, particularly since it would be present on the vertical market in patient monitors. The JV would thus lead to higher rather than lower barriers to expansion for fringe competitors.

- (145) Given Dräger's and Siemens' high combined market share on the market in anaesthesia equipment in Belgium, Denmark, Germany, France, Italy and the Netherlands, the fact that the parties offer two close substitutes, and the fact that Siemens has a considerably greater incentive than Dräger and Datex-Ohmeda to pursue an aggressive strategy aimed at gaining market share, the market investigation thus confirms the serious concerns that the concentration would lead to the emergence of a dominant position on the part of the JV on those national markets.

- (146) At the time when the commitments were offered, the market investigation had not yet been completed for the other national markets (see recital 4). However, the commitments offered would eliminate any dominant position which might be created by the JV on those markets too.

C2. VERTICAL/CONGLOMERATE EFFECTS

3. *Patient monitors*

Market shares

- (147) According to the information they themselves have provided, the parties have the following combined market shares for patient monitors:

Patient monitors: Information provided by the parties in Form CO

(%)

2001	EEA	B	DK	D	FI	F	GR	UK	IRL	I	NL	A	P	E	S	N
Siemens	[15-25]*	[35-45]*	[35-45]*	[15-25]*	[0-5]*	[5-15]*	[5-15]*	[5-15]*	[25-35]*	[15-25]*	[15-25]*	[25-35]*	[15-25]*	[15-25]*	[15-25]*	[0-5]*
Dräger (via GE)	[5-15]*	[5-15]*	[5-15]*	[5-15]*	[0-5]*	[0-5]*	—	[5-15]*	[0-5]*	[0-5]*	[0-5]*	[5-15]*	—	[5-15]*	—	—
Combined	[25-35]*	[45-55]*	[35-45]*	[35-45]*	[0-5]*	[5-15]*	[5-15]*	[5-15]*	[25-35]*	[15-25]*	[15-25]*	[45-55]*	[15-25]*	[25-35]*	[15-25]*	[0-5]*
Philips/Agilent	[15-25]*	[15-25]*	[5-15]*	[15-25]*	[15-25]*	[25-35]*	[25-35]*	[15-25]*	[25-35]*	[15-25]*	[25-35]*	[15-25]*	[15-25]*	[25-35]*	[15-25]*	[25-35]*
GE/Marquette	[5-15]*	[5-15]*	[0-5]*	[5-15]*	[15-25]*	[15-25]*	[15-25]*	[5-15]*	[5-15]*	[5-15]*	[5-15]*	[0-5]*	[5-15]*	[5-15]*	[15-25]*	[15-25]*
GE incl. Dräger?	[15-25]*	[15-25]*	[5-15]*	[15-25]*	[15-25]*	[15-25]*	[15-25]*	[15-25]*	[5-15]*	[5-15]*	[5-15]*	[15-25]*	[5-15]*	[15-25]*	[5-15]*	[15-25]*
Datex-Ohmeda/Spacelabs	[15-25]*	[15-25]*	[15-25]*	[15-25]*	[35-45]*	[15-25]*	[25-35]*	[25-35]*	[15-25]*	[15-25]*	[25-35]*	[25-35]*	[15-25]*	[15-25]*	[15-25]*	[15-25]*
Nihon Kohden	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[5-15]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*	[0-5]*
Residual	[15-25]*	[0-5]*	[15-25]*	[5-15]*	[15-25]*	[15-25]*	[15-25]*	[15-25]*	[15-25]*	[25-35]*	[5-15]*	[0-5]*	[25-35]*	[5-15]*	[15-25]*	[25-35]*

(148) According to information they have themselves provided, the parties achieve an average market share of [25 to 35]* % in the EEA. They are market leaders in several Member States, with in some cases considerably higher market shares. A significant portion of the market ([15 to 25]* % at the level of the EEA, and more than [15 to 25]* % in several countries) is not assigned to any competitor. Nevertheless, there are three competitors in each Member State with significant market shares and a extensive presence in the area of medical technology: Philips, General Electric (GE) and Datex-Ohmeda. Dräger does not itself manufacture monitors but, under a cooperation agreement, procures equipment mainly manufactured by GE, which is then combined to form integrated anaesthesia and ventilation work stations. [...] It is to be assumed that the JV would then use mainly Siemens products instead of GE equipment. The number of effective competitors on the market for patient monitors would not, however, change as a result, since Dräger is at present not active at production level on the market for patient monitors. From a horizontal point of view, the JV would thus not, according to the Commission's investigations, lead to the creation or reinforcement of a dominant position on the market for patient monitors.

(149) Apart from the horizontal effects described at recitals 71 to 146, the JV would significantly broaden the product range which Siemens can supply as integrated solutions for hospitals. In addition to the anaesthesia equipment, ventilation equipment and patient monitors included in the notified JV, Siemens is also active on other medical-technology markets, in particular capital-intensive imag-

ing systems (ultrasound, computed tomography, radiography, magnetic resonance, etc.) and IT systems for hospitals. GE and Philips in particular seem to be pursuing a similar strategy, but Siemens together with the JV would have access to the broadest product portfolio of all competitors on the market and would thus be in a position to offer the most comprehensive 'one-stop-shop' solutions. In view of the parties' strong market positions and the close complementarity of their equipment, vertical aspects in particular between anaesthesia equipment and ventilation equipment on the one hand and patient monitors on the other are of relevance to the competitive assessment of the notified joint venture.

(150) Technical cooperation between manufacturers is essential to the necessary process of integrating anaesthesia and ventilation equipment on the one hand and patient monitors on the other so that the data streams generated by the equipment and the corresponding patient data can be displayed on the monitor and/or can be stored in the hospital's IT system. This is because, on the one hand, according to market participants, the interfaces are not standardised and consequently require cooperation and information exchange between the relevant manufacturers if efficient interface solutions are to be developed. Moreover, competitors point out that the innovation cycle for monitors is shorter than for anaesthesia and ventilation equipment, so that a flexible exchange of individual components should remain possible in order to produce in all cases the best equipment combinations available on the market (best-in-class).

- (151) While closer integration of various equipment components is thus welcomed by many customers, the dominant positions in the case of anaesthesia and ventilation equipment resulting from the horizontal effects described at recitals 71 to 146 would enable the JV to prevent competing manufacturers of patient monitors from having effective access to anaesthesia and ventilation equipment (foreclosure), for example by making access to interfaces more difficult or by designing anaesthesia and ventilation equipment in such a way that it can be combined only with Siemens monitors. Hospitals would then no longer be able (or only with greater difficulty) to combine the best components of different manufacturers available on the market with one another for the relevant area of application.
- (152) Even though the market investigation had not been terminated at the time when the commitments were entered into, there are still serious concerns, as expressed when the proceedings were initiated, that, as a result of the abovementioned market-foreclosure effect, the JV would achieve a dominant position for patient monitors both at EEA level and, more particularly, in those member countries in which the JV would achieve a dominant position for anaesthesia or ventilation equipment. Moreover, it cannot be ruled out that the dominant position for anaesthesia and ventilation equipment arising as a result of the creation of the JV would be strengthened by its market position for patient monitors.
- (153) The commitments entered into by the parties, as described in detail at recitals 154, 155 and 156, eliminate the horizontal overlaps for ventilation and anaesthesia equipment. Only the Dräger therapy equipment is included in the JV. However, Dräger alone achieves market shares in several Member States which already in themselves give grounds for serious doubts as to the possibility of a dominant position emerging. In the case of ventilation equipment, this is particularly true for Belgium (market share of [55 to 65]* %), Denmark ([45 to 55]* %), Germany ([55 to 65]* %) and Austria ([75 to 85]* %). For anaesthesia equipment, the countries concerned are Denmark ([55 to 65]* %), Germany ([75 to 85]* %), Finland ([65 to 75]* %), France ([45 to 55]* %), the Netherlands ([45 to 55]* %) and Norway ([75 to 85]* %). The serious doubts as to compatibility with the common market are thus not entirely removed by the elimination of horizontal effects.
- (154) By letter of 6 March 2003, the notifying parties submitted commitments pursuant to Article 8(2) of the Merger Regulation with a view to removing the Commission's abovementioned competition-related doubts. The commitments were slightly amended by letter of 14 March 2003.
- (155) The commitments are essentially as follows: the parties undertake to ensure that Siemens sells its entire Life Support Systems (LSS) Division, i.e. all of its activities worldwide in the area of ventilation and anaesthesia equipment for hospitals and clinics, to a buyer which is independent of the parties. These activities include R & D, production, marketing, distribution and maintenance/servicing in respect of ventilation and anaesthesia equipment. These business activities are at present pursued at Siemens Elema AB at Solna in Sweden and within several regional companies belonging to Siemens and are to be sold as a going concern, i.e. including all tangible and intangible assets existing at the time the commitment was entered into and the entire workforce. Siemens undertakes to maintain fully the viability and competitiveness of the business to be sold. The parties further undertake to operate the business separately up to the time at which it is sold.
- (156) In order to dispel the Commission's doubts concerning the vertical aspects of the concentration, i.e. the interoperability between anaesthesia and ventilation equipment on the one hand and patient monitors on the other, and their interoperability with data-management systems in hospitals, the parties have, in addition to the abovementioned sale, also offered to enter into commitments concerning the continued interoperability of their equipment. These commitments include an undertaking to maintain and make available all existing and future interfaces and communications protocols of all existing and future equipment for the patient monitors of third-party suppliers in the area of critical care and for connecting them to the data-management systems of third-party suppliers in hospitals. All information concerning interfaces and communications protocols will be made available on request and, in the event of modifications, automatically to third parties. In either case, this will occur without delay, on a non-discriminatory basis and free of charge (or with a charge to cover documentation costs). Any reasonable technical explanations regarding this information will, on request, be provided without delay. Moreover, the parties will cooperate regarding certification of the mechanical and electrical interoperability of their equipment with the patient monitors (and data-management systems) of third-party suppliers at the request of such suppliers or a customer.

VII. COMPETITION ASSESSMENT OF THE NOTIFIED CONCENTRATION TAKING ACCOUNT OF THE COMMITMENTS ENTERED INTO

- (157) The commitments were presented to customers and competitors in the context of a market survey. Of these commitments, the sale of Siemens LSS Division was consistently seen as an effective means of preventing Dräger's market position from being strengthened as a result of the JV. Customers and competitors also identified interoperability as being an essential element of the

VI. COMMITMENTS

commitments and confirmed that the availability of information on interfaces and communications protocols and cooperation regarding certification of equipment combinations or systems would be an appropriate means of maintaining interoperability. However, one competitor also expressed the doubt that the commitments might continue to give the JV a competitive edge in the development of patient monitors and their conformity with the new interfaces, particularly since the JV might not make information available early enough.

(158) The commitments entered into require the parties to provide information on interfaces and communications protocols without delay either on request or, in the event of modifications, automatically before this information is made available to the market. Particularly in view of the relatively long product cycles of therapy equipment and patient monitors and the duration of tender procedures, the Commission has, after examining the continuing doubts concerning the early availability of information on interfaces, come to the conclusion that the commitments give adequate guarantees that competitors will receive such information in good time.

(159) The commitments described at recitals 154, 155 and 156 are sufficient in the Commission's view to dispel in an appropriate fashion the competition-related doubts concerning the market in ventilation and anaesthesia equipment and the competition-related doubts concerning the vertical aspects of the case. In particular, the commitments concerning the sale prevent the JV from resulting in additions of market shares on the markets in ventilation and anaesthesia equipment. The commitments concerning interoperability ensure that it will continue to be possible in future to connect the patient monitors of third-party manufacturers without problems to the JV's ventilation and anaesthesia equipment. The same applies to the connection of equipment and monitors to hospitals' data-management systems.

VIII. CONDITIONS AND OBLIGATIONS

(160) Under the first sentence of the second paragraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

(161) Measures that give rise to a structural change of the market must be made subject to conditions, while the implementing steps which are necessary to achieve this result constitute obligations on the parties. Where a condition is not fulfilled, the Commission decision

declaring the merger to be compatible with the common market is void. Where the parties commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5)(b) of the Merger Regulation; the parties may also be subject to fines and periodic penalty payments under Articles 14(2)(a) and 15(2)(a) of the Merger Regulation.

(162) In accordance with the basic distinction described at recitals 160 and 161, the Commission makes its decision subject to the condition of full compliance with the following commitments:

- (a) the commitment concerning the sale as a going concern within the extended time limit laid down in paragraph 1 of the Annex;
- (b) the commitment entered into by Siemens to the effect that it will sell its entire Life Support Systems (LSS) Division, i.e. all of the activities in the area of ventilation and anaesthesia in hospitals and clinics described in paragraph 4 of the Annex, to a suitable buyer;
- (c) the commitments to preserve the viability, competitiveness and marketability of the business in accordance with paragraph 5 of the Annex, to continue operating the business separately, and to ensure a flow of information in accordance with paragraphs 6, 7 and 8 of the Annex;
- (d) the commitment concerning non-solicitation of key personnel in accordance with paragraph 9 of the Annex;
- (e) the commitment concerning a suitable buyer in accordance with paragraphs 13, 14 and 15 of the Annex;
- (f) the commitment to implement any measures imposed by the monitoring trustee which are deemed necessary by the latter to ensure compliance with the above commitments in accordance with paragraph 23(c) of the Annex;
- (g) the commitments concerning the maintenance of interoperability in accordance with paragraphs 35, 36, 37, 38 and 39 of the Annex.

(163) By contrast, all of the remaining commitments, in particular the commitment to maintain temporarily and administer separately the business that is to be sold, and the details regarding the trustee to be appointed by the parties, should constitute obligations, since they serve merely to support the implementation of the above conditions.

IX. CONCLUSION

(164) For the abovementioned reasons, it can be assumed, provided that the commitments entered into by the parties are complied with in full, that the planned concentration will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Provided that the commitments set out in Annex II are complied with in full, the concentration should thus be declared compatible with the common market and the EEA Agreement pursuant to Article 2(2) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement,

HAS ADOPTED THE FOLLOWING DECISION:

Article 1

The notified concentration by which Siemens AG and Drägerwerk AG are to acquire joint control of Dräger Medical AG & Co. KgaA (the joint venture) within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the common market and with the EEA Agreement.

Article 2

Article 1 shall apply on condition that the commitments offered by Siemens AG and Drägerwerk AG and set out in paragraphs 1, 4, 5 to 9, 13, 14, 15, 23(c) and 35 to 39 of Annex II are complied with in full.

Article 3

This Decision is issued subject to the obligation on Siemens AG and Drägerwerk AG to comply in full with the commitments entered into in paragraphs 2, 3, 10, 11, 12, 16 to 22, 23(a), 23(b), 23(d) to (f), 24 to 34 and 40 to 43 of Annex II.

Article 4

This Decision is addressed to:

Siemens AG
CFL
Wittelsbacherplatz 2
D-80333 Munich

Drägerwerk AG
Moislinger Allee 53-55
D-23542 Lübeck

Done at Brussels, 30 April 2003.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

The original text of the conditions and obligations under Articles 2 and 3 can be consulted on the following Commission website:
http://europa.eu.int/comm/competition/index_en.html

COMMISSION DECISION**of 23 July 2003****relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement****(COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League)***(notified under document number C(2003) 2627)***(Only the English text is authentic)****(Text with EEA relevance)****(2003/778/EC)****CONTENTS**

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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 Regulation (EC) No 1/2003⁽²⁾, and in particular Articles 6 and 8 thereof,

Having regard to the application for negative clearance submitted by UEFA on 1 February 1999 pursuant to Article 2 of Regulation No 17 and the notification with a view to obtaining an exemption submitted by UEFA on 1 February 1999 on 1 February 1999 and as amended on 13 May 2002 pursuant to Article 4 of Regulation No 17,

Having regard to the Commission decision of 18 July 2001 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity⁽³⁾ to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the Treaty⁽⁴⁾,

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

Having regard to the final report of the Hearing Officer in this case⁽⁵⁾,

Whereas:

1. INTRODUCTION

- (1) This Decision relates to the rules, regulations and all implementing decisions taken by Union des Associations Européennes de Football (UEFA) and its members concerning the joint selling arrangement regarding the sale of the commercial rights⁽⁶⁾ of the UEFA Champions League, a pan-European club football competition. The Regulations of the UEFA Champions League provide UEFA, as a joint selling body, with the exclusive right to sell certain commercial rights of the UEFA Champions League on behalf of the participating football clubs. The joint selling arrangement restricts competition among the football clubs in the sense that it has the effect of coordinating the pricing policy and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. However, the Commission considers that such restrictive rules can be exempted in the specific circumstances of this case. UEFA's joint selling arrangement provides the consumer with the benefit of league focused media products from this pan-European football club competition that is sold via a single point of sale and which could not otherwise be produced and distributed equally efficiently.

⁽¹⁾ OJ 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 1, 4.1.2003, p. 1.

⁽³⁾ OJ C 196, 17.8.2002, p. 3.

⁽⁴⁾ OJ L 354, 30.12.1998, p. 18.

⁽⁵⁾ OJ C 269, 8.11.2003.

⁽⁶⁾ Media rights (radio, television, Internet and UMTS), sponsorship, suppliership, licensing and IPRs.

2. PARTIES

- (2) UEFA is a company, registered in the register of companies under the terms of the Swiss civil code, with its headquarters located in Nyon, Switzerland ⁽⁷⁾. UEFA is an association of national football associations. Its membership comprises national football associations situated in the European continent ⁽⁸⁾. Currently, UEFA has 51 members; 21 of these member associations are located in the EEA ⁽⁹⁾.
- (3) UEFA is the regulatory authority of European football. UEFA has the sole jurisdiction to organise or abolish international competitions in Europe in which member associations and/or their football clubs participate. Other international competitions or tournaments require the approval of UEFA ⁽¹⁰⁾ except for those organised by Fédération internationale de football association (FIFA). UEFA organises a number of European football tournaments in addition to the UEFA Champions League.
- (4) UEFA's congress is the supreme controlling organ of UEFA. Each national football association has one vote at the congress ⁽¹¹⁾. The congress adopts UEFA's statutes. It elects the president ⁽¹²⁾ and the Executive Committee ⁽¹³⁾. The Executive Committee consists of the president and 13 members who must hold office within a national member association ⁽¹⁴⁾. The Executive Committee manages UEFA, except to the extent it has delegated responsibility to the Chief Executive Officer ⁽¹⁵⁾ whom it also appoints ⁽¹⁶⁾. The Executive Committee draws up the regulations governing the conditions for participation in and the staging of UEFA competitions, including the Regulations of the UEFA Champions League. It is a condition for entry into the UEFA Champions League competition that each member association and/or football club affiliated to a Member Association agrees to comply with the statutes and regulations and decisions of the competent UEFA organs ⁽¹⁷⁾.

3. THE NOTIFIED AGREEMENT

3.1. The UEFA Champions League

3.1.1. The origins of the UEFA Champions League

- (5) The UEFA Champions League is UEFA's most prestigious club competition. Originally created as the European

Champion Clubs' Cup prior to the 1955/1956 season, the competition changed format and name in time for the 1992/1993 season. The UEFA Champions League is open to each national football association's domestic club champions, as well as the clubs, which finish just behind them in the domestic championship table. The number of clubs that can be entered by an association depends on the football association's position in UEFA's coefficient ranking list. Including the qualifying stages, a total of 96 football clubs participate in the UEFA Champions League.

3.1.2. The UEFA Champions League format

- (6) The UEFA Champions League format applicable at the time of the notification ⁽¹⁸⁾ consisted of two qualifying phases prior to the UEFA Champions League. The UEFA Champions League itself consisted of the group matches and a final knockout phase of quarter-finals, semi-finals and a final. The UEFA Executive Committee decided on 10 and 11 July 2002 to replace the second group stage with a knockout phase as from the 2003/2004 season. With the elimination of the second group stage, there will be a total of 125 matches and a total of 13 match days in the 2003/2004 UEFA Champions League format.
- (7) In the 2003/2004 season the competition consists of the following phases. 80 football clubs participate in three initial qualifying rounds playing a total of 160 matches, which is required to find 16 qualifiers to join the top 16 automatic qualifiers playing in the UEFA Champions League. The UEFA Administration seeds football clubs for the qualifying rounds and the group stage in accordance with the club rankings established at the beginning of the season. These rankings are drawn up on the basis of a combination of the national associations' coefficient and the football clubs' individual performance in the UEFA club competitions during the same period. For the qualifying rounds, a draw between the same number of seeded and unseeded football clubs determines the pairings. For the third qualifying round the UEFA administration is empowered to form groups in accordance with set principles. For the purpose of the draw, the 32 football clubs involved in the UEFA Champions League group stage are seeded into eight groups of four in accordance with the aforementioned rankings. All matches are played according to UEFA's match calendar. The venues, dates and kick-off times of all qualifying matches must be confirmed and communicated to the UEFA administration by the national associations of the football clubs concerned.

⁽⁷⁾ Article 1 of UEFA's Statutes (Edition 2000).

⁽⁸⁾ Article 5 of UEFA's Statutes.

⁽⁹⁾ In the United Kingdom, there are four UEFA member associations: England, Wales, Scotland and Northern Ireland.

⁽¹⁰⁾ Article 48 of UEFA's Statutes.

⁽¹¹⁾ Article 18 of UEFA's Statutes.

⁽¹²⁾ Article 13(1)(f) of UEFA's Statutes.

⁽¹³⁾ Article 13(1)(g) of UEFA's Statutes.

⁽¹⁴⁾ Article 21 of UEFA's Statutes.

⁽¹⁵⁾ Article 23(2) of UEFA's Statutes.

⁽¹⁶⁾ Article 24(1)(e) of UEFA's Statutes.

⁽¹⁷⁾ Article 49 of UEFA's Statutes.

⁽¹⁸⁾ Regulations for the UEFA Champions League 1998/1999.

- (8) Member associations and their affiliated organisations or football clubs sell the media rights of these three qualifying rounds themselves. UEFA does not participate in the selling of these rights and UEFA consequently does not undertake organisational and administrative responsibilities other than conducting the draw procedure and appointing referees and a 'match delegate' to oversee sporting/disciplinary standards. UEFA is not involved in the selection or appointment of third party service providers to provide services that are required in connection with a match. Nor is UEFA involved in production of full audio visual match coverage for each match or appointment of commercial partners: sponsors, suppliers, or licensees.
- (9) The football clubs have not extended the joint selling arrangement to these three qualifying rounds and the manner in which these rights are sold are therefore not relevant for the purposes of this decision. It would appear that the UEFA and football clubs have decided not to extend the joint selling arrangement to these matches as demand for such early stage qualifying matches is rather low and of a local nature. The matches that will take place between small and big clubs due to UEFA's seeding system are without pan-European cross-border appeal. Demand is typically from broadcasters of the two countries of the football clubs. It would moreover greatly increase the costs for UEFA to maintain the consistency of branding and presentation of the UEFA Champions League if it were to include all the qualifying matches in the joint selling concept (more than 100 matches). UEFA would have to make site surveys and visits to all the additional match venues. It would have to ensure compliance with all standard UEFA Champions League broadcaster facilities. It would have to make sure 'clean' stadia would be provided for the UEFA Champions League commercial partners and so forth. UEFA would have to monitor all the other obligations, which clubs must meet for participation in the UEFA Champions League. This would explain the fact that UEFA and the football clubs do not find it efficient to sell those media rights jointly or indispensable to restrict football clubs in their individual marketing.
- (10) The qualifying-phase matches are played according to a knockout system with each club playing each opponent twice in home and away matches. The team which scores the greater aggregate of goals in the two matches qualifies for the next stage (second qualifying round, third qualifying round or the UEFA Champions League group stage, as applicable). The football clubs defeated in the first and second qualifying rounds are eliminated from the competition. The 16 clubs defeated in the third qualifying round are entitled to play in the first round of the current UEFA Cup.
- (11) Beginning in September these 32 football clubs then contest the group stage, comprising eight groups of four clubs. The winners and runners-up from these eight groups, in total 16 football clubs, then advance to a second knockout phase on a home and away basis. The surviving football clubs contest the quarter-finals. For the quarter-final (8 clubs) and semi-final stage (4 clubs), the clubs play two matches against each other on a home and away basis, with the team scoring the greater aggregate of goals qualifying for the next round. The two winners of the two semi-finals play in the final, which is staged as a single match.
- (12) The games are played on Tuesday or Wednesday nights from September with the final played in May. As a rule, matches in the UEFA Champions League kick off at 20.45 hours central European time. The UEFA Champions League therefore avoids clashing with the fixtures of domestic leagues, which are mostly played weekends, and the UEFA Cup, which is mostly played on Thursdays.
- 3.1.3. *UEFA's role in the UEFA Champions League*
- (13) UEFA has the organisational and administrative responsibility for the UEFA Champions League. UEFA conducts the draw procedure and approves the participants. UEFA appoints referees, match delegates and referee observers and covers their expenses. It is the disciplinary body supervising and enforcing all aspects of the competition. UEFA selects and appoints a wide range of third party service providers to provide services that are required in connection with a match ⁽¹⁹⁾.
- (14) Television Event and Media Marketing AG (TEAM), an independent marketing company, assists UEFA in the implementation and follow-up of the commercial aspects of the UEFA Champions League. As an agent under UEFA's control and responsibility, TEAM conducts negotiations with the commercial partners. The agreements are signed and executed by UEFA, which assumes all legal responsibilities.
- ⁽¹⁹⁾ The range of services that UEFA arranges include: product development, sales, after sales services and client relations with broadcasters, sponsors, suppliers, licensees and participating clubs, media services (booking of commercial spots and broadcast sponsorship throughout the world), legal services, television production services, auditing and monitoring of UEFA Champions League television programs throughout the world, research services, operational implementation of the commercial concept, hospitality services, financial and administrative services, and statistical and information services (competition analysis).

- (15) UEFA arranges for the production of full audio visual match coverage for each match. UEFA's broadcast partners act as host-broadcaster for the matches within their territory. UEFA assumes the responsibility towards the broadcasters if any match should be cancelled or postponed.
- (16) In addition to media operators, UEFA has three types of commercial partners: sponsors, suppliers⁽²⁰⁾, and licensees⁽²¹⁾.

3.1.4. *The football clubs' role in the UEFA Champions League*

- (17) The participating football clubs provide a team of football players and the stadium. UEFA has no direct contacts with the stadium owners. The football clubs are obliged to follow the guidelines set out by UEFA and act under UEFA's supervision. They are responsible for fulfilling safety and security requirements. The football clubs also provide facilities for the press, hospitality areas, offices, working areas and seats for UEFA's commercial partners. UEFA appoints a 'Venue Team' that carries out a 'site survey' to ensure that the stadium is equipped to stage an UEFA Champions League match.

3.2. The notification

- (18) UEFA notified the rules, regulations and implementing decisions regarding its joint selling arrangement to the Commission on 19 February 1999. The notification included standard rights agreements for conclusion with television broadcasters, sponsors and suppliers. The Commission issued a statement of objections on 18 July 2001, which stated that the notified joint selling arrangement relating to the sale of the television broadcasting rights infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. It also stated that the joint selling arrangement was not eligible for exemption under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement.

⁽²⁰⁾ For example there is a computer and telecommunications supplier, which provides technical support to the broadcast graphics service and, in return, receives on-screen credits in all the European live match broadcasts and during the highlights programme.

⁽²¹⁾ The UEFA Champions League licensing concept allows for selected companies to produce high-quality products related to the UEFA Champions League, for example, UEFA Champions League video games, UEFA Champions League videos or UEFA Champions League CD-ROM football encyclopaedias.

- (19) The statement of objections concluded that the notified joint selling arrangement prevented the individual football clubs participating in the UEFA Champions League from taking independent commercial action in respect of the TV rights and excluded competition between them in individually supplying TV rights to interested buyers. The effect of such joint selling arrangement was the restriction of competition. The implication for third parties is that they only have a single source of supply. The statement of objections moreover found that the possible efficiencies and benefits that the joint selling arrangement could provide for the TV broadcasting market were negated by the commercial policy pursued by UEFA. The reason was that UEFA sold the free-TV and pay-TV rights on an exclusive basis in a single bundle to a single TV broadcaster per territory for several years in a row. Since the broadcasting rights agreements covered all TV rights of the UEFA Champions League, it made it possible for a single large broadcaster per territory to acquire all TV rights of the UEFA Champions League to the exclusion of all other broadcasters. It also left a number of rights effectively unexploited. Such a broad exclusivity did not have any beneficial effects on the TV broadcasting market and was not in line with the Helsinki Report on Sport⁽²²⁾.

- (20) In most countries football is not only the driving force for the development of pay-TV services but is also an essential programme item for free-TV broadcasters. Joint selling of free-TV and pay-TV rights combined with wide exclusive terms therefore has significant effects on the structure of the TV broadcasting markets as it can enhance media concentration and hamper competition between broadcasters. If one broadcaster holds all or most of the relevant football TV rights in a Member State, it is extremely difficult for competing broadcasters to establish themselves successfully in that market.

⁽²²⁾ See also point 4.2.1.3 of the Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework — *The Helsinki Report on Sport* — of 10 December 1999:

'Any exemptions granted in the case of the joint sale of broadcasting rights must take account of the benefits for consumers and of the proportional nature of the restriction on competition in relation to the legitimate objective pursued. In this context, there is also a need to examine the extent to which a link can be established between the joint sale of rights and financial solidarity between professional and amateur sport, the objectives of the training of young sportsmen and women and those of promoting sporting activities among the population. However, with regard to the sale of exclusive rights to broadcast sporting events, it is likely that any exclusivity which, by its duration and/or scope, resulted in the closing of the market, would be prohibited.'

3.3. UEFA's amendment of the notification

- (21) UEFA replied to the statement of objections on 16 November 2001. On 8 January 2002 UEFA submitted an outline of a new joint selling arrangement. Subsequently, on 12 March 2002, UEFA presented a rights segmentation table for the exploitation of not only the TV broadcasting rights but, also, all the other media rights of the UEFA Champions League. These include rights for radio, television, Internet, universal mobile telecommunications system (UMTS) and physical media such as DVD, VHS, CD-ROM, etc.
- (22) UEFA's proposal for a new joint selling arrangement means a reduction of UEFA's exclusive right to sell the UEFA Champions League media rights. The new joint selling arrangement would allow also the football clubs to sell on a non-exclusive basis in parallel with UEFA certain media rights relating to action in which they are participating. UEFA's proposal also implies an unbundling of the media rights by splitting them up into several different rights packages that would be offered for sale in separate packages to different third parties.
- (23) UEFA's proposal for a new joint selling arrangement was the subject of several meetings between UEFA and the Commission and it was modified in a number of points at the request of the Commission. Subsequent to the introduction of these modifications, the Commission's preliminary view was that the competition concerns as expressed in the statement of objections would be remedied by UEFA's proposal. The Commission therefore intended to take a favourable view in respect of UEFA's proposal, which UEFA notified to the Commission on 13 May 2002. However, the Commission's preliminary approval was subject to giving third parties the opportunity to comment on the proposal following the publication of a notice pursuant to Article 19(3) of Regulation No 17.
- (24) That notice was published in the *Official Journal of the European Communities* on 17 August 2002 and prompted reactions from a number of interested third parties. The third party comments, which are summarised below in section 5, resulted in the Commission requesting UEFA to make further amendments in its joint selling arrangement. UEFA agreed to amend its joint selling arrangement in most respects, but not all. At a meeting on 4 April 2003 UEFA was informed that the Commission intended to attach conditions to the exemption decision. It was subsequently notified thereof by letter dated 5 May 2003, in which UEFA was invited to communicate its position on the Commission's intention to impose a condition. UEFA indicated in its reply of 15 May 2003 that it could accept the Commission's intention.

3.4. UEFA's amended joint selling arrangement

- (25) UEFA proposes, as a general principle, that media rights contracts be concluded for a period not exceeding three UEFA Champions League seasons.

3.4.1. TV broadcasting rights

3.4.1.1. Football matches subject to joint selling

- (26) As already explained in recital 9, UEFA's joint selling arrangement does not apply to the three initial qualifying rounds prior to the UEFA Champions League. The individual football clubs sell the TV broadcasting rights of those matches individually. This involves 80 football clubs playing 160 matches. UEFA's joint selling arrangement applies only to the UEFA Champions League group stage and final knockout phases. The joint selling arrangement therefore applies to a total of 32 football clubs playing a total of 125 matches during a total of 13 match days from September to May. In UEFA's terminology, a match day consists of two calendar days (currently Tuesday and Wednesday).

3.4.1.2. Tendering procedure

- (27) The award of the rights contracts follows an 'invitation to tender' giving all qualified broadcasters an equal opportunity to bid for the rights in the full knowledge of the key terms and conditions.
- (28) UEFA will, from time to time, publish criteria on the standards which broadcasters must satisfy for televising the UEFA Champions League. A 'qualified broadcaster' is a television broadcast organisation that holds a television broadcast licence for the relevant territory and that has the appropriate infrastructure, resources and standing to broadcast UEFA Champions League programming. Contracts for the award of the rights are advertised on the UEFA website (www.uefa.com) at appropriate times and all qualified broadcasters in the contract territory are entitled to request the invitation to bid documentation. All rights packages are, in principle, put on the market at the same time.
- (29) The invitation to bid documentation contains relevant details of all rights packages together with key terms and conditions and an explanation of the information which interested parties must provide with their bid. All qualified broadcasters are entitled to request a presentation to explain the various rights packages on offer and the sales process. All qualified broadcasters must be given a reasonable time limit in which to submit their bids.

(30) UEFA has indicated that it will evaluate the bids in accordance with a number of objective criteria, including in particular the following:

- (a) price offered for the rights package or packages;
- (b) acceptance by the bidder of all relevant broadcast obligations;
- (c) level of audience penetration of the bidder in the contract territory;
- (d) proposed method of delivery or transmission;
- (e) proposed promotional support offered for the UEFA Champions League;
- (f) production capability and host broadcast expertise;
- (g) combination of rights packages offered in the contract territory;
- (h) balance between free and pay television.

(31) Negotiations may take place with individual bidders on the basis of offers received. The content of all offers remains confidential.

3.4.1.3. Rights packaging

(32) UEFA will offer its TV rights in several smaller packages on a market-by-market basis. The precise format may vary depending on the structure of the TV market in the Member State in which the rights are being offered.

(33) UEFA will have the exclusive right to sell two main live rights packages for free-TV or pay-TV each comprising two matches per match night⁽²³⁾. UEFA Champions League matches are currently played Tuesdays and Wednesdays. The packages will usually include two picks per match day. These two packages would cover 47 matches out of a total of 125. Consequently, when the competition has reached the final stages the two main live packages will absorb all TV rights of the UEFA Champions League.

(34) UEFA will likewise initially have the exclusive right to sell the remaining matches⁽²⁴⁾. UEFA has decided to sell them for live pay-TV/pay-per-view exploitation. However, if UEFA has not managed to sell the rights within one week after the draw for the group stage of the UEFA Champions League, UEFA will lose its exclusive right to sell these TV rights. Thereafter, UEFA will have a non-exclusive right to sell these TV rights in

parallel with the individual home clubs participating in the match⁽²⁵⁾. UEFA's rights segmentation means that the football clubs selling the live TV rights comprised by package 5 individually are restricted to sell these only to pay-TV or pay-per-view exploitation.

(35) The right of UEFA and the individual football clubs to sell these remaining matches will be subject to picks made by the broadcasters having bought the main live packages 1 and 2.

(36) UEFA will moreover have the exclusive right to sell a highlight package covering all matches of the UEFA Champions League available as of 22.45 on each match night⁽²⁶⁾.

(37) Football clubs exploiting UEFA Champions League footage individually must present the footage in a club-focused manner and relating only to matches in which they are participating. Broadcasters who exploit the TV rights which are sold by the individual clubs are not allowed to package such rights into a single product which would appear as an UEFA Champions League branded product. In particular regarding live TV rights, UEFA defines an UEFA Champions League branded programme as one consisting of more than two live UEFA Champions League matches per day.

(38) As of Thursday midnight, that is to say, one day after the last matches of the match week the football clubs can exploit the deferred TV rights in parallel with UEFA. UEFA exploitation must be related to action from the whole UEFA Champions League competition. The individual football clubs' exploitation must be related only to matches in which they participate. The individually sold matches must be 'club branded' and must not be bundled with rights of other clubs to create an alternative UEFA Champions League branded product. In this context UEFA accepts programmes with delayed TV rights on club channels containing 100 % UEFA Champions League content. Regarding club magazine programmes, UEFA defines a programme as UEFA Champions League branded, when it contains more than 50 % UEFA Champions League content. In general programming, a programme should not contain more than 30 % UEFA Champions League content to avoid being defined as UEFA Champions League branded. Where an entire match is shown on a delayed basis (that is to say, the full 90 minutes) on a club magazine programme or in general programming then the respective 50 % and 30 % rule would not apply and the programme could consist mostly or entirely of that single match.

⁽²³⁾ Referred to as package 1 and 2 and also as the Gold and Silver packages in UEFA's rights segmentation table.

⁽²⁴⁾ Referred to as package 4 in UEFA's rights segmentation table.

⁽²⁵⁾ Referred to as package 5 in UEFA's rights segmentation table.

⁽²⁶⁾ Referred to as package 3 in UEFA's rights segmentation table.

- (39) UEFA will have the exclusive right to sell live TV rights outside the EEA. Deferred rights available to clubs are subject to the same rules both inside and outside the EEA.

3.4.2. Internet rights

- (40) Both UEFA (in respect of all matches) and the football clubs (in respect of matches in which they participate) will have a right to provide video content on the Internet one and a half hours after the match finishes, that is to say, as from midnight on the night of the match. Live streaming will not be made possible because of the technical development of the Internet at this stage, which does not permit the maintenance of a satisfactorily high quality. This will of course change over time, making it necessary to revisit the embargo in the foreseeable future.
- (41) UEFA will offer 'competition specific' or 'UEFA branded' products whereas the football clubs will offer 'club specific' or 'club branded' products. For Internet rights UEFA accepts club channel programmes containing 100 % UEFA Champions League content. Club magazine programmes may contain no more than 50 % UEFA Champions League content without being defined as a UEFA Champions League branded product. In general programming the maximum permissible UEFA Champions League content is 30 % of the programme. Where an entire match is shown on a delayed basis (that is to say, the full 90 minutes) on a club magazine programme or in general programming then the respective 50 % and 30 % rule would not apply and the programme could consist mostly or entirely of that single match.
- (42) Both UEFA and the football clubs may choose to provide their services themselves or via Internet service providers. The content will be based on the raw feed produced for television. UEFA intends to build a service that will produce UEFA Champions League content for streaming of moving pictures on the Internet. This service can be exploited both via 'www.uefa.com' and via the football clubs' websites. UEFA will offer technical expertise and know-how in the new media area to clubs.
- (43) Clubs may acquire the raw feed from UEFA or they may participate in the UEFA service. Clubs may customise and edit the content for the purposes of creating a club focused and club branded product. UEFA will apply its principle of financial solidarity by redistributing the revenues from new media. However, for the initial three-year period (seasons 2003/2004 to 2005/2006), football clubs will not pay any solidarity fee for the raw feed but only technical costs, a situation, which will be reviewed at the end of the second season (2004/2005). Any fee

must be transparent and fair, reasonable and non-discriminatory and submitted to an arbitration system to solve possible disputes. UEFA will establish a revenue sharing mechanism from the income generated from 'www.uefa.com'.

3.4.3. Wireless 3G/UMTS rights

- (44) Both UEFA (in respect of all matches) and the clubs (in respect of matches in which they participate) will have a right to provide audio/video content via UMTS services available maximum 5 minutes after the action has taken place (technical transformation delay). This content will be based on the raw feed produced for television. UEFA will apply a revenue sharing system in respect of the income generated from the raw feed or the UMTS content.
- (45) UEFA intends to build a 3G/UMTS wireless product that will be based on an extensive video database to be developed by UEFA. UEFA will offer the rights on an exclusive or non-exclusive basis to operator(s) with an UMTS licence, initially and exceptionally for a period of four years and subsequently for periods of three years.
- (46) Clubs may acquire the raw feed from UEFA or they may participate in the UEFA service. The clubs may customise and edit the content for the purposes of creating a club focused and club branded product. This product may not consist solely or mostly of UEFA Champions League content and must include other club-related multimedia content as well. Clubs will pay a fee for the UEFA wireless service and/or the raw feed. This fee must be transparent and fair, reasonable, and non-discriminatory and submitted to an arbitration system to solve possible disputes.

3.4.4. Physical media rights

- (47) Both UEFA and the football clubs are entitled to exploit the physical media rights of DVD, VHS, CD-ROM, and so forth to archive material from the previous UEFA Champions League season with an embargo of 48 hours after the final. While UEFA's rights extend to all action in the UEFA Champions League, the rights of the football clubs include only action in which they participate.

3.4.5. Audio rights

- (48) Both UEFA (in respect of all matches) and the football clubs (in respect of matches in which they participate) may sell licences to live radio broadcasting of UEFA Champions League football matches on a non-exclusive basis.

3.4.6. Other commercial rights

- (49) UEFA also jointly sells other commercial rights relating to the UEFA Champions League which associate third parties with the UEFA Champions League brand such as sponsorship rights, suppliership rights, licensing rights and other intellectual property rights.

3.4.6.1. Sponsorship rights

- (50) UEFA has a UEFA Champions League sponsorship package, which comprises traditional elements of event sponsorship with programme sponsorship and commercial airtime in the event broadcasts. Sponsors purchase a defined package of event rights including, among others, elements such as perimeter boards, sponsor logo identification on backdrops, tickets, advertisement in each match day programme, sponsor identification on tickets, use of official designations and the UEFA Champions League logo.

- (51) In addition, media rights are available to sponsors, which consist, among others, of the broadcast sponsorship rights for up to two sponsors per programme, billboards in the opening and closing sequences of the UEFA Champions League programmes as well as 'break-bumpers' ⁽²⁷⁾. They also get an option to purchase commercial airtime in and around UEFA Champions League programmes through UEFA.

3.4.6.2. Suppliership rights

- (52) In addition to the sponsorship rights, the UEFA Champions League concept allows for four supplier packages. For example there is a computer and telecommunications supplier, which provides technical support to the broadcast graphics service and, in return, receives on-screen credits in all the European live match broadcasts and during the highlights programme.

3.4.6.3. Licensing rights

- (53) The UEFA Champions League licensing concept allows for selected companies to produce high quality products related to the UEFA Champions League, for example, UEFA Champions League video games, UEFA Champions League videos or UEFA Champions League CD-ROM football encyclopaedias.

⁽²⁷⁾ A 'break-bumper' is an editorial graphic element at the beginning and end of a commercial break, which is used to separate the match programme from commercial spots. It normally includes UEFA Champions League and sponsor identification.

3.4.6.4. Other intellectual property rights

- (54) UEFA is the registered holder of various categories of intellectual property right such as trademark and design rights for example, the UEFA Champions League 'Star-ball' logo, which is the recognised trademark of the UEFA Champions League along with the UEFA Champions League music. The UEFA Champions League logo, name, and the trophy have been protected as trademarks. The official music, which was commissioned by UEFA, forms part of the UEFA Champions League competition. This anthem is always played with the television opening and closing sequences as well as during the countdown to kick-off in all UEFA Champions League stadiums around Europe. UEFA holds the copyright in the music. Clubs, which qualify for the UEFA Champions League, may use the orthographic, musical and artistic forms developed in connection with the UEFA Champions League logo for non-commercial promotional purposes for the duration of the competition.

4. THE RELEVANT MARKET

4.1. Product markets

4.1.1. UEFA's submission

- (55) UEFA submits that although the UEFA Champions League is a very important sport event, it does not constitute a separate relevant product market. UEFA argues that it is part of a much wider market with a large number of sports events in addition to the UEFA Champions League, which allow broadcasters, sponsors and suppliers to achieve the same commercial objective, such as the national club football leagues. In addition, there are other prestigious and quality sports events on the market. Furthermore, non-sport content, in particular, popular films, soap operas and comedy shows can also attract very sizeable audiences. UEFA moreover argues that the Commission should differentiate between UEFA Champions League matches involving domestic clubs and UEFA Champions League matches not involving domestic clubs. UEFA also submits that the free-TV market and the pay-TV market constitute distinct relevant product markets.

4.1.2. The markets

- (56) The Commission considers that the following markets are relevant to an assessment of the effects of the joint selling arrangements:
- (a) the upstream markets for the sale and acquisition of free-TV, pay-TV and pay-per-view rights;

- (b) the downstream markets on which TV broadcasters compete for advertising revenue depending on audience rates, and for pay-TV/pay-per-view subscribers;
- (c) the upstream markets for wireless/3G/UMTS rights, Internet rights and video-on-demand rights, which are emerging new media markets at both the upstream and downstream levels that parallel the development of the markets in the pay-TV sector;
- (d) the markets for the other commercial rights namely sponsorship, suppliership and licensing.

4.1.3. *The upstream market for the acquisition of TV broadcasting rights of football events played regularly throughout every year*

- (57) Viewer preferences are decisive for all types of broadcasters in their content acquisition policy as they determine the value of programmes to broadcasters⁽²⁸⁾. All broadcasters are actual or potential buyers of TV broadcasting rights of football events and football is equally important to all broadcasters whichever the market they operate in⁽²⁹⁾. Broadcasters acquire programmes in order to attract large audiences whether they are financed fully or partially by advertising revenues (to sell the opportunity to advertisers to get exposure to the audience) or not (to comply with their public service obligations). Pay-TV operators buy programmes to entice people to subscribe to their services.
- (58) The characteristics of programmes that can achieve a desired purpose can delimit the ambit of the market for the acquisition of TV broadcasting rights. Substitutability can therefore be tested by analysing the extent to which other programmes achieve this desired purpose. If a specific type of content can regularly attract high audience numbers, specific audiences or provide a certain brand image, which cannot be achieved by means

of other content, it may be considered that such content constitutes a separate relevant product market. Consequently, there are no other programmes which place a competitive restraint on the rights holders' ability to determine the price of these TV broadcasting rights.

- (59) The Commission's investigation of the situation throughout the Community has gathered evidence suggesting the existence of a separate market for the acquisition of TV broadcasting rights of football events that are played regularly throughout every year. That conclusion represents an expansion of the conclusions reached in previous cases.
- (60) In the TPS case⁽³⁰⁾ the Commission found that it is universally acknowledged that films and sporting events are the two most popular pay-TV products and it suggested that a separate market might exist for rights to broadcast sports events. The Commission found that sports programmes have particular characteristics; they are able to achieve high viewing figures and reach an identifiable audience, which is especially targeted by certain advertisers. However, the Commission did not adopt a precise definition of the market in that case.
- (61) In the case regarding UEFA's Broadcasting Regulations⁽³¹⁾, the Commission's investigation suggested the likelihood of the existence of a separate market for the acquisition of TV broadcasting rights of football events played regularly throughout every year. This definition would, in practice, mainly involve national first and second league and cup events as well as the UEFA Champions League and the UEFA Cup. It was suggested that a distinction could be made between football events that do not take place on a regular basis throughout the year. The reason is that the latter do not constitute an equally regular source of programming for broadcasters. Although the decision found that all elements were present for the definition of a separate market for the TV broadcasting rights of football events played regularly throughout every year, the Commission did not actually define the relevant product market in that case.
- (62) The Commission's market investigation in the case regarding the merger of the sports rights trading subsidiaries, Sport+ SNC and UFA Sports GmbH with the Groupe Jean-Claude Darmon SA⁽³²⁾ demonstrated that although sports broadcasting rights may constitute a distinct field from other television programming, that market ought to be further subdivided into other separate product markets and that, at least within the

⁽²⁸⁾ In a similar way as the customer substitutability determines the upstream market for the supply of digital interactive TV services by service providers to content providers, see Commission Decision 1999/781/EC in Case IV/36.539 British Interactive Broadcasting/Open (OJ L 312, 6.12.1999, p. 1).

⁽²⁹⁾ Commission Decision IV/M.553 — RTL/Veronica/Endemol (OJ L 134, 5.6.1996, p. 32) and Commission Decision 1999/242/EC — TPS (OJ L 90, 2.4.1999, p. 6).

⁽³⁰⁾ Commission Decision 1999/242/EC — TPS (OJ L 90, 2.4.1999, p. 6).

⁽³¹⁾ Commission Decision 2001/478/EC — UEFA Broadcasting Regulations (OJ L 171, 26.6.2001, p. 12).

⁽³²⁾ Commission Decision COMP/M.2483 — Canal+/RTL/GJCD/JV (IP 01/1579).

EEA, football broadcasting rights may not be regarded as substitutes to other sports broadcasting rights. The Commission therefore concluded that there is a separate market for the acquisition and resale of football broadcasting rights to events that are played regularly throughout every year. In practice this involves matches in the national leagues (primarily the first division) and cups, the UEFA Champions League and the UEFA Cup. It was concluded that events that take place more intermittently are not part of that market definition ⁽³³⁾.

- (63) In the present case, the Commission also considers that the relevant product market can appropriately be defined as the market for the acquisition of TV broadcasting rights of football events played regularly throughout every year. This definition would in practice mainly include national First and second division and cup events as well as the UEFA Champions League and UEFA Cup. The TV rights of football events create a particular brand image for a TV channel and allow the broadcaster to reach a particular audience at the retail level that cannot be reached by other programmes. In pay-TV football is a main driver of the sale of subscriptions. As regards free TV, football attracts a particular consumer demographic and hence advertising, which cannot be attracted with other types of programming.

4.1.3.1. Channel brand image

- (64) Football is important to broadcasters due to its ability to act as a developer of a brand image of a channel. Football has a distinct high profile among desirable viewers. Football generally provides high audience figures and produces events which take place regularly throughout most of the year ⁽³⁴⁾. Viewers are attracted not only to one match but also to the tournament as a whole. Football tournaments, not least those that are branded such as the UEFA Champions League, therefore guaran-

tee viewership for long periods and induce viewers regularly to make an appointment to view a particular channel, which they associate with football. This contributes to developing the brand image of a channel.

- (65) The development of a brand image is increasingly important in a TV industry where the number of channels among which the viewers can choose increases rapidly and where products are generally homogenised ⁽³⁵⁾. With a wider choice available to viewers, it becomes increasingly difficult for a TV channel to attract and maintain audience loyalty. Branding therefore encourages audiences to schedule their viewing habits to make appointments to view a particular channel. However, such loyalty may be achieved only by offering a 'differentiated' product including eye-catching programmes and by strongly associating the channel with those programmes. If a channel usually broadcasts certain programmes, such as the UEFA Champions League, which is in itself a strongly branded event, viewers may develop a habit of screening that channel as their first port of call in determining their viewing choices. The creation of a brand loyalty to a channel encourages viewers to use the channel as a 'point of reference' for their viewing. This has beneficial effects on other programmes broadcast by the channel.
- (66) While the ability to build up brand loyalty to a particular channel is important to all types of channels, it is especially important for advertising-funded TV channels. They must be able to present audiences to advertisers for all their broadcasts otherwise they will not be able to sell their advertising space. Football is particularly attractive in that respect, because it has a wide following with continuously high audience figures. Viewers wanting to watch a particular match may often switch to that channel well in advance of the match and some of them may 'hang on' after the match to see whether the following broadcast is interesting. In some cases this is reflected in the advertising rates that are high not only in the advertising slots immediately before and after the match but also in respect of the programmes that are broadcast before and after the match.
- (67) The Commission's investigation has confirmed that the development of a brand image is of particular importance for broadcasters when determining whether or not

⁽³³⁾ In the same manner the Commission stated in the *Newscorp/Telepiù* case, that there exists a separate market for the acquisition of exclusive broadcasting rights for football events played every year where national teams participate (the national league, primarily first division and cups, the UEFA Champions League and the UEFA Cup). Commission Decision COMP/M.2876 — *Newscorp/Telepiù*, (IP/03/478).

⁽³⁴⁾ For example, in Germany the Bundesliga commences in August and ends in May. There are 306 games played in the tournament, which are all broadcast live throughout the season.

⁽³⁵⁾ *Vlaamse Media Maatschappij* state in an answer of 26 November 1999 to the Commission's request for information that: 'The acquisition (and broadcasting) of sports rights (programmes) is, in general not a profitable investment as such. However, the broadcasting of sports programmes, especially popular sports such as football and cycling, are important for the image and the branding of the channel.'

to acquire football rights⁽³⁶⁾. Broadcasters consider that football enables them to create a brand image without which their channels would not be able to develop. The availability of alternative programming does not alter their interest in or demand for broadcasting rights of football events⁽³⁷⁾.

(68) One of the particular values of football for broadcasters in brand building is its regularity. Unlike many other sport events, football is characterised by national and European tournaments which are played regularly throughout most of the year. The UEFA Champions League is one of the most recognised among those tournaments with a strongly developed own brand. Football, unlike other sports, therefore allows broadcasters to achieve high viewing figures on a regular, sustained and continuous basis if they can get access to these rights. Although there are league events for other sports and whilst such sports may produce large audience figures, they do not achieve the same continued viewing figures as football. This is of significant value for the branding of a channel, since it can only be achieved over a sustained period.

(69) The quest for a brand image is so strong that broadcasters in certain circumstances do not mind losing money on individual programmes if they are of such a quality that they can pull viewers to the channel. For some broadcasters football could be considered as a kind of loss leader, because they may be willing to invest more

in acquiring the TV rights than they can, strictly speaking, hope to recuperate looking at the possible revenues that they can make from the individual broadcasts in isolation⁽³⁸⁾.

(70) These features of the TV rights of football have the consequence that the prices which broadcasters are willing to pay for those rights exceed all other prices, including events such as Formula One⁽³⁹⁾. ONdigital states that 'Football rights are the most expensive of any sport (...)'⁽⁴⁰⁾. The total expenditure on sports as a whole has recently seen substantial increases. Football accounted for the single highest proportion of TV channels' total sports expenditure⁽⁴¹⁾. The European average was 44,6 % in 1998⁽⁴²⁾. The high percentage dedicated to the acquisition of TV rights of football represents the importance which broadcasters attach to football compared to the acquisition of the broadcasting rights to other sporting events.

4.1.3.2. A particular audience

(71) In order to attract the widest possible audiences, broadcasters will seek to have a balanced schedule with a range of different programmes. Catering to a wide audience is part of the public service remit for public service broadcasters. Pay-TV broadcasters wish to cater to the tastes of as many people as possible in order to sell subscriptions. For commercial free-TV broadcasters

⁽³⁶⁾ RTL considers in its answer of 15 November 1999 to the Commission's request for information that 'The actual prices for football rights are so high that (...) they cannot be covered by the revenues generated with football programming.' If such rights are still acquired anyway, it is reasonable to think that this is because of branding purposes.

⁽³⁷⁾ NOS in its reply of 16 November 1999 to the Commission's request for information of 21 September 1999 considers that: 'Only to a limited extent NOS' interest in football is affected by the availability of TV rights for other sports (...) because it is the No 1 sports in the Netherlands (...) football plays a key role in NOS' sports programming (...) providing other sports broadcasts by NOS with an audience they would not normally attract.' NOS also states that: '(...) football is a unique product in "a league of its own". No other sport has audience figures/market share that come close to those of football (...) enhance the image of NOS.' ONdigital in its reply of 23 November 1999 to the Commission's request for information of 20 September 1999: 'Our interest in football is not affected by the availability of other film, series, game shows or other content again, because of the unique market position football holds in the United Kingdom and partly because football is likely to appeal to a different market segment.' Richard Russell Associates have described sport as a 'driver' for BSkyB's 10-year old business in 'Sports Television: The ever changing face', 16 February 1999, pp. 10 and 12.

⁽³⁸⁾ In its reply of 26 November 1999 to the Commission's request for information of 21 September 1999 Vlaamse Media Maatschappij states that 'Actually, acquisition of TV rights for sport (especially football) is not a profitable operation as such (...). However...the branding of VMM's channels will be the decisive parameter for deciding the acquisition of TV rights for football games.' For instance ONdigital, which has acquired the pay-TV rights to the UEFA Champions League and provided these rights on a promotional basis free to subscribers, states in its reply of 23 November 1999 to the Commission's request for information of 20 September 1999 that 'In the early stages of platform growth building the subscriber base is considered to be more important than pure profit.' Further in its reply ONdigital states that 'ONdigital believes that the brand image and value attached to its consumer offer is directly affected by the sports content available on the platform.'

⁽³⁹⁾ Kagan Euro TV Sports, 26 July 1996.

⁽⁴⁰⁾ ONdigital's reply of 23 November 1999.

⁽⁴¹⁾ According to Kagan's 'European media sports rights', April 1999, football took the major share of the total rights expenditure in most Member States in 1998 (the share of the nearest rival is in brackets): Austria 32,4 % (skiing 11,3 %); Belgium 53,6 % (cycling 9,5 %); Denmark 45,4 % (handball 13,2 %); Finland 32,1 % (ice hockey 16,9 %); France 37,8 % (motor racing 9,3 %); Germany 42 % (tennis 6,6 %); Greece 43,3 % (basketball 41,4 %); Ireland 47 % (horse racing 13,1 %); Italy 65,2 % (motor racing 7,4 %); Netherlands 54,5 % (motor racing 9,3 %); Portugal 44,3 % (motor racing 11,8 %); Spain 51,6 % (basketball 10,1 %); Sweden 39,5 % (ice hockey 19,1 %); United Kingdom 51,6 % (rugby 11,7 %).

⁽⁴²⁾ Kagan's 'European media sports rights' April 1999.

the reason for having a balanced schedule is that they generally sell 'packages' of advertising slots spread across various programmes instead of individual slots during particular programmes⁽⁴³⁾. Producers wishing to advertise during for example, the UEFA Champions League will also purchase slots during other types of programmes. This reflects the optimum strategy for an advertiser whose aim is to reach as large a proportion of its potential customers as possible. Showing adverts across a range of carefully selected programmes, each one of which will be watched by different potential customer groups, is the best way to do this⁽⁴⁴⁾. The fact that football is a regular and frequent event, which attracts high viewing figures, enhances the value of football programmes as part of an advertising package, because it allows the advertiser to make frequent contacts with a potential customer with a distinct profile.

(72) In deciding on a 'package', advertisers will not randomly pick programmes during which to show their adverts. The profile of the audience, which a programme attracts, will be a crucial factor to be taken into account. This reflects the *'raison d'être'* of advertising: companies essentially advertise in order to attract new customers or to keep the existing ones. In order for an advert to fulfil this purpose those who have at least a potential interest in the product being shown must see it⁽⁴⁵⁾.

(73) Not all types of viewers are of equal value to broadcasters (and advertisers). Some people watch more TV than others do. People have different spending powers and patterns. Amongst the most sought-after viewers are men with an above-average spending power and who are in the age groups of 16 to 20 and 35 to 40, because those groups are generally considered to have a less fixed spending pattern compared to older people. They are therefore more likely to try new products and services. The problem for broadcasters and advertisers is that these groups contain a high proportion of 'light

viewers' of television⁽⁴⁶⁾, who do not, as a rule, watch much television. It is therefore much harder for advertisers to get their message through to these target groups via television advertising compared to other groups of the population, for example, women aged 55 or over, who on average watch a great deal more television. The attractiveness, and elusiveness, of the target group make programmes watched by them of significant value to broadcasters that are keen to have programmes that attract this audience.

(74) The Commission's investigation of the situation in the Member States has shown that football, which is a mass attractive sport with high viewing figures, is the programme, which seems to be the most effective tool to address this particular group of the population. Two-thirds of the viewers are male and in the appropriate age groups⁽⁴⁷⁾.

(75) A result of football being a tool to reach a hard-to-get-to audience is that broadcasters are able to charge higher rates for advertising in connection with football compared to other programmes. The price of advertising slots during the transmission of football is higher than during the transmission of other sports, for example, the UEFA Champions League allows broadcasters to charge premiums of between 10 to 50 % depending on the teams involved and the stage of the tournament⁽⁴⁸⁾.

(76) The attraction of programmes and hence the level of competition for the TV rights to them varies according to the type of sport and the type of event. Mass sports like football generally attract large audiences. By contrast, minority sports achieve very low ratings. In most Member States football constantly achieves the

⁽⁴³⁾ ITV's reply of 12 November 1999 to a request for information of 10 September 1999.

⁽⁴⁴⁾ Thus a football boot producer will, for example, reach a larger number of potential buyers by showing one advert during the final of a football tournament, when 'aficionados' are likely to be watching, and another during a feature film, when the weekend player may be watching, than showing two adverts during the football final. In this way a larger number of potential buyers will be contacted.

⁽⁴⁵⁾ For example, whilst a producer of breakfast cereals may have a broader target group, a meat producer is unlikely to wish to place an advert during a programme dedicated to vegetarian issues, even if this programme is very popular. Thus if broadcasters wish to have the business of meat producers, they can not only show programmes about vegetarianism, they must also televise programmes which are watched by people who are at least willing to eat meat (even if the programmes attract fewer viewers).

⁽⁴⁶⁾ Channel 5's reply of 19 November 1999.

⁽⁴⁷⁾ RTL considers in its reply of 15 November 1999 to the Commission's request for information of 20 September 1999 that it 'would lose advertising revenue if it substituted the UEFA Champions League by other football events or other sports events. Even if the viewer profile would be the same, the viewing times for these events would be much less because these sports events are less attractive.' Young & Rubicam Europe states in its reply of 21 October 1999 to the Commission's request for information of 8 October 1999: product 'categories targeting female consumers are unlikely to advertise in sports programmes.' Channel 5's reply: 'These (football) audiences are more male in profile than the average, younger than the average, and more upmarket than the average.' ITV stated in its reply of 12 November 1999 to the Commission's request for information of 10 September 1999 that the audiences to the UEFA Champions League 'are more male in profile than the average, younger than the average and more upmarket than the average.' McCann-Erikson's reply of 3 November 1999 to the Commission's request for information of 8 October 1999 supports this.

⁽⁴⁸⁾ McCann-Erikson's reply of 3 November 1999 to a Commission request for information of 8 October 1999.

highest audience figures. In 1997, football accounted for 21 of the top 25 European sports broadcasts. The popularity of football for viewers is also expressed in the number of hours dedicated to the broadcast of sport. Between 1996 and 1997, the number of hours dedicated to football transmission was 13 939. The second most transmitted sport was tennis which achieved less than half this at 5 115 hours⁽⁴⁹⁾. These figures led the authors of Kagan to comment that 'the TV sports hours breakdown illustrates soccer's position as the most valuable sport to cover'⁽⁵⁰⁾. Kagan confirms its findings in its 2002 report, where it states that: 'Soccer is by far the most popular programming on TV in Western Europe, where it made up a massive 79 % of total sports programming in 2000'⁽⁵¹⁾.

4.1.3.3. Conclusion regarding the upstream market

- (77) The Commission's investigation shows that there are no programmes which place a competitive restraint on the ability of the holder of the TV rights to football events being played regularly throughout every year to determine the price of these TV rights. TV rights to other sports events or other types of programmes such as feature films do not put a competitive restraint on the holder of the TV rights to such football events. Including such rights in the market definition would make the definition too wide. In other words, there is no substitutability between the TV rights to football and the TV rights to other types of programmes.
- (78) Some have suggested that narrower market definitions may exist, such as for matches involving only national clubs. Assuming that such market definitions were correct, they would nevertheless not substantially alter the market share of UEFA. As such it is not necessary to consider such alternative market definitions for the purposes of this case.
- (79) The Commission therefore concludes that there is a separate market for the acquisition of TV broadcasting rights to football which is played regularly throughout every year. This definition would, in practice, mainly involve matches in national league and cup events as well as the UEFA Champions League and UEFA Cup.

4.1.4. *The downstream markets on which broadcasters compete for advertising revenue depending on audience rates and pay-TV subscribers*

- (80) The acquisition of TV broadcasting rights of football events is closely linked with the downstream television markets in which the football events are broadcast as an important element of the TV broadcasters' competition for advertisers on free-TV, which depends on viewer interest/ratings and/or pay-TV subscribers, who may in particular be enticed into subscribing to a TV channel by means of football.

4.1.5. *The upstream and downstream markets for the acquisition of media rights for new media (wireless 3G/UMTS and Internet) of football*

- (81) UEFA's joint selling arrangement is not limited to TV rights, but also covers all other forms of media rights to the UEFA Champions League. Although not addressed in the Commission's statement of objections, they were included in UEFA's amendments to the notified new joint selling arrangement.
- (82) Regarding the new media rights such as wireless and Internet content rights, these markets are very much in their infancy. This is largely due to the fact that these technologies are currently at an early stage of development and also to the lack of infrastructure, which is presently available to deliver those services to the consumers. Therefore, there is no clear empirical evidence on which to base market definitions. It is nevertheless possible to draw some conclusions, however broad, which would permit a realistic appraisal of the restrictive effect of UEFA's joint selling arrangement on those new media markets.
- (83) First, content rights will be necessary for the development of the new services, in the same way as content rights are necessary for TV broadcasting services, where football content is being used to entice consumers to take up pay-TV subscriptions and to attract advertisers to TV channels. As these new services allow increasingly narrowly targeted forms of content delivery, it will be possible to identify and supply narrower customer demands than is the case with current media delivery systems. As such, it is likely that relatively narrow upstream content markets will emerge, given the ability to supply narrow downstream markets. It is therefore likely that football content rights, in relation to TV broadcasting, will also constitute a separate relevant product market in relation to new media and that football content will have a similar function. It is likely that new media operators will wish to acquire football content to attract advertisers and subscribers.

⁽⁴⁹⁾ Kagan Euro TV Sports, 26 July 1996, page 8.

⁽⁵⁰⁾ Kagan Euro TV Sports, 26 July 1996, page 163.

⁽⁵¹⁾ Kagan World Media, 2002, page 3.

(84) Secondly, it is likely that each different form of exploitation will provide a specific service to specific consumers. On-demand services delivered via wireless mobile devices or via the Internet will not compete with live TV broadcasting. Likewise mobile clip services will not compete with television highlights packages ⁽⁵²⁾.

(85) It is therefore likely that new media markets will emerge at both the upstream and downstream levels, which parallel the development of markets in the pay-TV sector.

4.1.6. *The upstream and downstream markets for the other commercial rights — sponsorship, suppliership and product licensing*

(86) UEFA jointly sells a number of other commercial rights related to the UEFA Champions League such as sponsorship, suppliership and product licensing. These commercial rights are likely to form part of wider product markets for commercial advertising. However, since it is not likely that UEFA's sale of these commercial rights would appreciably restrict competition, it is not necessary for the purposes of this case to exactly define the scope of the relevant product markets.

4.2. The geographic markets

(87) UEFA submits that the geographic scope of the affected markets is essentially national in character because of cultural factors and national audience preferences.

4.2.1. *The geographic scope of the upstream market*

(88) Media rights to football events like the UEFA Champions League are normally sold on a national basis. This is due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors. The Commission therefore considers the geographic scope of the upstream markets for the media rights to be national.

(89) The geographic scope of the relevant product markets for the other commercial rights could be wider than national as the sponsors, etc., associate themselves with the UEFA Champions League as such and not with individual football clubs. However, since it is not likely that UEFA's joint selling arrangement regarding these

commercial rights would appreciably restrict competition, it is not necessary for the purposes of this case to define exactly the geographic scope of the relevant product markets.

4.2.2. *The geographic scope of the downstream market*

(90) The reasons for defining the geographic scope of the upstream markets as national, such as varying regulatory regimes, language barriers, and cultural factors, are also decisive in the downstream market. A pay-TV broadcaster normally only sells subscriptions to viewers in a certain territory. TV advertising is normally adapted to fit the tastes and languages of a certain territory. The same would seem to apply to new media services. The Commission therefore considers the geographic scope of the downstream markets to be national or at least confined to linguistic regions.

5. THIRD-PARTY OBSERVATIONS

(91) The Commission published a notice in the *Official Journal of the European Communities* pursuant to Article 19(3) of Regulation No 17, which prompted reactions from a number of interested third parties.

(92) The football associations welcome the compromise. G14, a European economic interest grouping whose 18 founding members are leading European football clubs, in particular considers that the achievement of a segmentation of media rights in separate windows addresses in a satisfactory manner the objections raised by the Commission. G14 moreover considers that the mix of joint and individual sales strikes the right balance between solidarity and protection of the consumer and the freedom of individual clubs. G14 therefore supports the compromise solution and the new marketing model while emphasising that the implementation should involve active participation of the parties concerned within the decision-making bodies of UEFA.

(93) Some pay-TV broadcasters are concerned that the reorganisation of the UEFA Champions League media rights sales system will increase competition in the TV broadcasting markets and that it therefore does not take account of the current economic reality for pay-TV in Europe. The reduction of exclusivity through the splitting up into several packages and short embargoes reduce the value for broadcasters. They consider that a sport event only has value when it is held in exclusivity by one broadcaster. The segmentation of rights, which the Commission strives for, risks reducing the value of the event and could lead to more (too much) football on TV and viewers having to buy several subscriptions. They also fear competition from Internet/UMTS and

⁽⁵²⁾ See Commission Decision Comp/JV.48 — Vodafone/Vivendi/Canal+ (Vizzavi).

wish for more restrictions imposed on new media rights, *inter alia*, with longer embargoes, which would hold back the development of these new media.

cial value. Only UEFA can market a wireless and Internet service covering the whole UEFA Champions League. In addition, football clubs are restricted in marketing club branded and related services. They are therefore concerned that clubs may not create a product competing with the UEFA Champions League. Finally, they point out that clubs must pay a fee for the raw feed and that Internet rights are available only at midnight.

- (94) Other free-TV broadcasters are positive to the opportunities created by the new solution and note, *inter alia*, that whether the package solution will further the opportunity for more than one free-TV broadcaster to broadcast UEFA competitions will have to be proved in practice. They note that the UEFA Cup already allows more than one free-TV broadcaster to broadcast UEFA competitions. A free-TV broadcaster states that it is unable to determine on the basis of the facts provided whether the new system would, in practice, alleviate the concerns risen in the statement of objections. It is however, concerned about the reduced level of exclusivity created by the packaging. The third package of live rights is of no real value to broadcasters as the national games by definition will be included in the Gold and Silver packages.
- (95) One sport rights agency congratulates UEFA and the Commission for having agreed on a compromise that generally accepts the principle of joint selling. It considers that this principle guarantees the attraction of the product and the 'UEFA Champions League' brand as being in the consumers' interest and is best fitted to reconcile all the different interests at stake. However, it regrets the deviation from the joint selling principle created by package 5, as this may negatively influence the UEFA Champions League brand.
- (96) Other sport rights agencies are not convinced that the compromise solves the issues objected to by the Commission regarding the TV broadcasting rights to football events, which represent 15 to 40 % of the value of broadcasting rights to regular football events. They argue that a joint selling arrangement is not necessary to establish the UEFA Champions League as a brand. Nor do they consider that solidarity or that a single point of sale are relevant arguments under Article 81(3). They further argue that the compromise is likely to serve as a model for other football competitions, including for the UEFA Cup. They consider that packages 1 and 2 will contain all commercially valuable matches whereas matches contained in package 5 have very little commercial value. Only UEFA can market a wireless and Internet service covering the whole UEFA Champions League. In addition, football clubs are restricted in marketing club branded and related services. They are therefore concerned that clubs may not create a product competing with the UEFA Champions League. Finally, they point out that clubs must pay a fee for the raw feed and that Internet rights are available only at midnight.
- (97) A telecommunications operator that has interests in free-TV, Internet and wireless welcomes the Commission's initiative of opening the market for the sale of the UEFA Champions League media rights. It considers that packages 1 and 2 should be unbundled allowing broadcasters to bid for single matches and that, at least, a broadcaster should be prevented from bundling the two packages. It also argues that the same package should be sold to both a free-TV and a pay-TV broadcaster. It furthermore considers that TV broadcasters should be allowed to resell the rights to ISPs and wireless providers.
- (98) Internet services providers would like to have live rights. They consider that the embargo is too long for deferred exploitation and that Internet and TV are two distinct markets. They regret that deferred rights are reserved for UEFA and the football clubs and that Internet service providers are excluded from competing for the rights.
- (99) Only one national competition authority has submitted comments to the Commission. It considers that the compromise does not resolve the problems identified in the statement of objections and as such does not qualify for exemption. It considers that on the horizontal level the UEFA arrangement remains restrictive of competition as UEFA continues to maintain the exclusive right to sell all matches. In respect of the vertical level the new commercial model does not alleviate competition concerns, as the two main packages are still effectively only within the reach of large broadcasters. It moreover considers that the football clubs' sale of package 5 to pay-TV/pay-per-view is an illusion as in Germany there is only one pay-per-view broadcaster.
- (100) Finally, radio broadcasters query how UEFA is able to sell radio rights in view of the right of information of the public. They argue that the right of the public to have access to information cannot be considered as a market like TV.

(101) UEFA was informed that, on the basis of the third party comments, the Commission had identified certain issues where a modification of the compromise would be required. The issues raised by the third party comments were discussed with UEFA in a number of meetings and gave rise to an exchange of correspondence following which UEFA agreed to amend its joint selling arrangement to accommodate those comments. The modifications relate, in particular, to restrictions imposed on football clubs' individual sale of media rights (for example, bundling, field of use restrictions) and achieving a more equitable balance between and mix of joint and individual selling. Also Internet service providers are granted better access to content.

6. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

6.1. Jurisdiction

(102) In this case, the Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since UEFA's joint selling arrangement has an appreciable effect on competition in the common market as well as on trade between Member States.

6.2. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

(103) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

(104) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to 'trade between Member States' is replaced by a reference to 'trade between contracting Parties' and the reference to competition 'within the common market' is replaced by a reference to competition 'within the territory covered by the ... (EEA) Agreement'.

6.3. Agreements or decisions between undertakings and associations of undertakings

(105) The Court of Justice has ruled that, having regard to the objectives of the Community, sport is subject to Community law to the extent it constitutes an economic activity within the meaning of Article 2 of the Treaty ⁽⁵³⁾.

(106) Football clubs engage in economic activities ⁽⁵⁴⁾ and they are undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The membership of the national football associations consists of those football clubs. The national football associations are therefore associations of undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The national football associations are also undertakings themselves in so far as they engage in economic activities ⁽⁵⁵⁾. The members of UEFA are the national football associations. UEFA is therefore both an association of associations of undertakings as well as an association of undertakings. UEFA is moreover an undertaking in its own right as it also engages directly in economic activities.

⁽⁵³⁾ See judgments of the Court of Justice in Case 36/74, *Walrave v Union Cycliste Internationale*, [1974] ECR 1405, paragraph 4; Case 13/76, *Donà v Mantero*, [1976] ECR 1333, paragraph 12; Case C-415/93, *URBSF v Bosman*, [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97, *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union Européenne de judo (C-51/96) and François Pacquée (C-191/97)* [2000] ECR 2549, paragraphs 41 and 42; Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, [2000] ECR 2681 paragraphs 32 and 33.

⁽⁵⁴⁾ For example, selling tickets, transferring players, distributing merchandising articles, concluding advertising and sponsorship contracts, selling broadcasting rights, etc. The size of the undertaking does not matter and the concept does not presuppose a profit-making intention. See opinion of Advocate General Lenz in Case C-415/93, *URBSF v Bosman*, [1995] ECR I-4921, paragraph 255 referring to the judgment in Joined Cases 209 to 215 and 218/78, *Van Landewyck v Commission* [1980] ECR 3125, paragraph 88.

⁽⁵⁵⁾ Opinion of Advocate General Lenz in Case C-415/93, *URBSF v Bosman*, [1995] ECR I-4921, paragraph 256. Commission Decision 92/521/EEC — Distribution of package tours during the 1990 World Cup, OJ L 326, 12.11.1992, p. 31, paragraph 49: '(...) FIFA is an entity carrying on activities of an economic nature and constitutes an undertaking within the meaning of Article 85 of the EEC Treaty' and paragraph 53: 'The (Federazione Italiana Gioco Calcio = the national Italian football association) also carries on activities of an economic nature and is consequently an undertaking within the meaning of Article 85 of the EEC Treaty'. Judgment in Case T-46/92, *Scottish Football Association v Commission*, [1994] ECR II-1039, from where it can be concluded that the Scottish Football Association is an undertaking or an association of undertakings within the meaning of Article 81 and 82. See also joined Cases C-51/96 and C-191/97, *Christelle Delière v Ligue Francophone de Judo et Disciplines ASBL and Others*, [2000] ECR 2681 paragraphs 52-57, Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali v Commission of the European Communities* ECR [2000] II-1807.

(107) Notwithstanding the fact that some of these entities are non-profit making bodies, UEFA, the national football associations and the football clubs are all undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(108) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are applicable to associations of undertakings in so far as:

- the activities of the association or of the undertakings belonging to the association are calculated to produce the results which Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement aim to suppress⁽⁵⁶⁾, and/or
- the association intended to and did coordinate the conduct of its members on the market⁽⁵⁷⁾.

(109) The Regulations of the UEFA Champions League constitute a decision taken by an association of associations of undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement⁽⁵⁸⁾.

(110) The Regulations of the UEFA Champions League provide the regulatory basis for the manner in which the commercial rights of the UEFA Champions League are sold. UEFA's Executive Committee adopts the Regulations of the UEFA Champions League. UEFA's Congress, the membership of which consists of the national football associations of which the football clubs are members, appoints the Executive Committee. The Regulations of the UEFA Champions League are binding on the national football associations and on the football clubs. The football clubs playing in the UEFA Champions League, which are co-owners of the commercial rights of the UEFA Champions League, confirm the binding nature of the UEFA Statutes, the Regulations of the UEFA Champions League and other decisions relevant to the competition taken by the competent bodies of UEFA, referred to in the entry form, which they sign when they sign up for participation in the UEFA Champions League.

(111) In agreement with the aforementioned competent bodies of UEFA, associations and football clubs, UEFA adopted a new joint selling arrangement regarding the UEFA Champions League media rights, the content of which is summarised above under sections 1.4 to 1.6.

(112) UEFA will, in the future, conclude rights contracts with third parties on the basis of the principles enshrined in the notified joint selling arrangement. The vertical rights agreements with television broadcasters that were

originally notified are no longer applicable following the introduction of the new joint selling arrangement and will therefore not be addressed in this Decision.

6.4. Restriction of competition

(113) The notified joint selling arrangement grants UEFA the exclusive right to sell jointly certain commercial rights on behalf of the football clubs participating in the UEFA Champions League. This includes media rights that relate to the UEFA Champions League as a whole and involving action from all matches of the UEFA Champions League. Those media rights, which are listed in section 1.6 above, relate to all types of media rights and are not restricted to the rights for specific markets. As such, the restrictive effects of UEFA's joint selling arrangement are capable of manifesting themselves on any of the markets where the rights could be used.

(114) UEFA's joint selling arrangement has the effect that through the agreement to jointly exploit the commercial rights of the UEFA Champions League on an exclusive basis through a joint selling body, UEFA, prevents the individual football clubs from individually marketing such rights. This prevents competition between the football clubs and also between UEFA and the football clubs in supplying in parallel media rights to the UEFA Champions League to interested buyers in the upstream markets. This means that third parties only have one single source of supply. Third-party commercial operators are therefore forced to purchase the relevant rights under the conditions jointly determined in the context of the invitation to bid, which is issued by the joint selling body. This means that the joint selling body restricts competition in the sense that it determines prices and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. In the absence of the joint selling agreement the football clubs would set such prices and conditions independently of one another and in competition with one another. The reduction in competition caused by the joint selling arrangement therefore leads to uniform prices compared to a situation with individual selling.

(115) UEFA's joint selling arrangement also has the effect that certain restrictions are imposed on football clubs in respect of the exploitation of those commercial rights that they have not granted to UEFA for joint selling, but which are exploited by themselves individually. The restrictions imposed on individual football clubs concern in particular:

- (a) a restriction on football clubs' individual selling of live TV rights, which restricts them to selling such live rights only to pay TV/pay-per-view broadcasters and prevents the sale of such rights to free-TV broadcasters (package 5 of the rights segmentation table);

⁽⁵⁶⁾ Joined Cases 209 to 215 and 218/78 *Fedetab*, 1980 [ECR] 3125 at paragraph 88.

⁽⁵⁷⁾ Case 45/85 *Sachversicherer* at paragraph 32.

⁽⁵⁸⁾ If the Statutes were categorised as an agreement between undertakings, this would not change the situation since Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply in the same way to both categories. See Case C-415/93, *URBSF v Bosman*, [1995] ECR I-4921 at paragraph 46.

- (b) embargoes on the exploitation of deferred media rights, in particular TV and Internet rights, (packages 6, 7 and 12 of the rights segmentation table);
- (c) a limitation on the bundling of individually sold live and deferred media rights restricting the football clubs from selling their individually sold media rights to end-users (broadcasters) which would exploit those rights as a UEFA Champions League focused product (packages 5, 6, 11 and 12 of the rights segmentation table).

(116) UEFA's joint selling arrangement therefore restricts competition in the upstream markets not only between football clubs but also between UEFA and the football clubs in supplying commercial rights to interested buyers. In addition, the notified joint selling arrangement has an impact on the downstream broadcasting markets as football events are an important element of TV broadcasters' competition for advertisers or for subscribers for pay-TV and pay-per-view services. Such an arrangement has as its effect the restriction of competition. It is therefore also caught by the prohibition in Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement ⁽⁵⁹⁾.

6.4.1. *Scope of the present procedure*

(117) Under the new sales policy the media rights are no longer all offered to a single operator but are split up into a large number of smaller rights packages. It is not the object of the present procedure to ascertain whether individual rights contracts between UEFA and a broadcaster would restrict competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. Nor is it possible to ascertain in the context of the present procedure whether competition would be restricted if a single operator acquired several packages of rights. This decision will therefore not deal with the individual rights contracts concluded by UEFA with third parties and does not in any way prejudice their evaluation under Community competition law.

6.5. **Applicability of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement**

6.5.1. *League rights and individual football clubs' rights*

(118) For each individual football match played in the UEFA Champions League, the two participating football clubs may claim ownership to the commercial rights. This is

because it would be difficult to deny that an individual home club, as user of the football ground, has the right to deny admission to media operators wishing to record those matches. Likewise, it would be difficult to deny that the visiting club, as a necessary participant in the football match, should have some influence as to whether the match should be recorded and, if so, how and by whom.

(119) Looking at a whole football tournament, it would seem that each football club would have a stake in the rights in the different constellations in which they play but their ownership could not be considered to extend beyond that. Therefore, there are in a football tournament a large number of individual ownership constellations that are independent of one another. The fact that football clubs play in a football tournament does not mean that ownership extends to involve all matches in the tournament. Nor does it mean that ownership is inter-linked to an extent where it must be held that all clubs have an ownership share in the whole league as such and in each individual match.

(120) UEFA argues that it is UEFA's intellectual efforts and organisational responsibility that have created a football league with its own brand image distinct from that of the participating football clubs. Therefore, without any joint selling arrangement, no commercial rights would be available at all. UEFA argues that it is the owner of the UEFA Champions League property rights due to the tasks it undertakes. To the extent UEFA is selling its own property, Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are inapplicable. According to UEFA, the case therefore does not concern the joint selling arrangement but the terms on which the rights are sold to third parties. UEFA consequently argues that as long as these terms do not restrict competition, there is no infringement of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement.

⁽⁵⁹⁾ See chapter 5 (in particular chapter 5.3.1.2) of the Commission's guidelines on the applicability of Article 81 to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2).

(121) UEFA moreover argues that if UEFA cannot be considered as the sole owner of the property rights, it should be considered a 'co-owner' of the rights. Therefore, according to UEFA, the notified joint selling arrangement is fundamentally different from any conventional joint selling arrangement in which the individual undertakings pool individually owned rights which they sell jointly, as UEFA, in this case, also exploits its own property

rights. UEFA stresses its view on the property rights situation with reference to the situation in the individual Member States ⁽⁶⁰⁾.

- (122) The Commission takes note of the fact that there is no common uniform concept in the EEA Member States regarding the ownership of the property media rights to football events nor is there any Community or EEA law concept ⁽⁶¹⁾. It is true that if UEFA were the sole owner of the rights in a Member State no horizontal restriction of competition would occur from UEFA selling the commercial rights. However, on the basis of the information submitted by UEFA, UEFA can at best be considered as a co-owner of the rights, but never the sole owner. The question of ownership is for national law and the Commission's appreciation of the issue in this case is without prejudice to any determination by national courts.

⁽⁶⁰⁾ In a reply of 16 February 2001 to the Commission's request for information of 15 November 2000, UEFA explains the situation regarding ownership to the TV rights in the EEA States as follows: In Austria, the home club is recognised as the owner of the TV rights. Belgian legislation does not determine ownership to the TV rights to football. Danish legislation does not determine ownership, but in a concrete case the Danish competition authorities have allegedly stated that they consider that the TV rights of a match played in the Danish National Championship belong to the Danish Football Association, as the owner of the tournament, and the home club of the specific match jointly. English legislation is silent about the matter. The Finnish clubs are the owners to the TV rights to the matches of the Finnish club competitions. In France it is the club participating in the European tournament, which is the owner. In Germany, the clubs are the owners of the rights and the organiser, UEFA, could be considered to be a co-owner. According to Greek and Italian legislation the clubs are the owners of the TV rights. Luxembourg legislation is silent about the matter. Dutch case-law (under appeal) gives the ownership of the TV rights to the home club. In Northern Ireland, according to the Irish Football Association, the association owns the rights to the national league (no legal source quoted), however, the clubs themselves sell the TV rights to matches in European competitions. Portuguese legislation does not regulate the matter. In the Republic of Ireland it seems that the national association is the owner of the TV rights, but the TV rights to the European competitions are disposed of without interference from the football association. No information regarding the legislative situation in Scotland has been given. Reference is only made to the bylaws of the Scottish Football Association which claim ownership to the rights. Spanish legislation has not taken a position on the ownership issue. The clubs in the First and Second Division sell the rights individually. Swedish legislation is silent about the matter. No information has been submitted regarding the legal situation in Wales.

The Commission has asked the national football association in Iceland, Liechtenstein and Norway directly: In Iceland and Liechtenstein it is the clubs participating in the European competitions, which are considered as the owner. In Norway the individual clubs seem to be recognised as the owner of the TV rights.

⁽⁶¹⁾ Article 295 of the Treaty provides that: 'The Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.'

- (123) The Commission therefore proceeds on the basis that there is co-ownership between the football clubs and UEFA for the individual matches, but that the co-ownership does not concern horizontally all the rights arising from a football tournament. It is not considered necessary for the purpose of this case to quantify the respective ownership shares.

- (124) It suffices to note that there are multiple owners of the media rights to the UEFA Champions League. An agreement between the three owners (the two football clubs and UEFA) which are indispensable to produce one unit of output (the licence to broadcast one match) would not be caught by Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. However, since the agreement regarding UEFA's joint selling arrangement extends beyond that, Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply to the arrangement.

6.5.2. *The special characteristics of sport*

- (125) UEFA is of the opinion that it is not appropriate to evaluate the relationship between football clubs with a 'free play of competition' test, as football clubs are not truly independent competitors. UEFA considers that this test may be valid to evaluate the merits of an agreement between independent business entities that would compete with one another under normal circumstances.
- (126) Furthermore according to UEFA, Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are not applicable because the structure and operation of the UEFA Champions League serves to promote and not to restrict competition in European football. UEFA considers that the model of financial solidarity helps to maintain a balance between clubs and to encourage recruitment of young players, which serves to promote competition in European football. As a result of the financial policies implemented by UEFA, competition between clubs in Europe is enhanced and the number of competitors on the market is increased.
- (127) The Court of Justice has ruled that, having regard to the objectives of the Community, sport is subject to Community law to the extent it constitutes an economic activity within the meaning of Article 2 of the Treaty ⁽⁶²⁾.

⁽⁶²⁾ See judgements in Case 36/74, *Walrave v Union Cycliste Internationale*, [1974] ECR 1405, paragraph 4; Case 13/76, *Donà v Mantero*, [1976] ECR 1333, paragraph 12; Case C-415/93, *URBSF v Bosman*, [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97, *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union Européenne de judo (C-51/96) and François Pacquée (C-191/97)*, [2000] ECR 2549, paragraphs 41-42; Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, [2000] ECR 2681 paragraphs 32-33.

(128) UEFA and the football clubs are economic competitors in selling commercial rights (property rights and media rights) to football matches. If there were no joint selling arrangement these parties would be selling the rights individually and in competition with one another.

(129) In fact, the object of the notified agreement is not the organisation of the UEFA Champions League but the sale of the commercial rights of the UEFA Champions League. The Commission is aware that some form of cooperation among the participants is necessary to organise a football league and that there is, in this context, certain interdependence among clubs. This interdependence between all clubs does not, however, extend to all activities of the UEFA Champions League participants. Clubs already compete in the areas of sponsorship, stadium advertising and merchandising. Clubs also compete for players. Consequently, the decision of an association of associations of undertakings to sell the commercial rights jointly on behalf of its members, which is an area in which the clubs are economic competitors, is not necessary in terms of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement to stage a football league. These provisions are therefore applicable to such an arrangement. Any need to take the specific characteristics of sport into account, such as the possible need to protect weaker clubs through a cross-subsidisation of funds from the richer to the poorer clubs, or by any other means, must be considered under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement.

(130) According to UEFA, its joint selling arrangement is a prerequisite for the existence of the UEFA Champions League. UEFA would not organise the UEFA Champions League without its joint selling arrangement and without being able to redistribute the revenues. UEFA considers that the joint selling arrangement does not impede trade between Member States and that the redistribution of revenue by UEFA serves to enlarge the competitive base in European football. In UEFA's view, its financial policy pursues objectives that have been recognised by the Court of Justice in the *Bosman* case⁽⁶³⁾, that is to say, the objective of maintaining a balance between clubs by preserving a certain degree of equality, and encouraging the recruitment of players.

(131) The Commission fully endorses the specificity of sport, as expressed for example in the declaration of the European Council in Nice in December 2000. On that occasion the Council encouraged the mutualisation of part of the revenue from the sales of TV rights, at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. However, while UEFA's interest in the commercial aspects is understandable, it has not demonstrated that a joint selling arrangement is an indispensable prerequisite for

the redistribution of revenue. The UEFA Cup demonstrates that a pan-European football competition can exist without a joint selling arrangement for the sale of the TV rights, as in this case the individual football clubs are selling the TV rights individually. There are also national examples of this in Spain, Italy and Greece. A redistribution of revenue can be undertaken in other ways without being linked to any joint selling arrangement. It can be implemented through a taxation system or through voluntary contributions. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are therefore applicable to such a joint selling arrangement. In any event it is more appropriate to consider any such argument under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement.

6.5.3. Appreciability of the restriction on competition

(132) In assessing the appreciability of the restrictions of competition, the Commission notes that premium sports, in particular football, are regarded as one of the main drivers of television. UEFA sold the UEFA Champions League TV rights for more than CHF 800 million in 1999 (EUR 526 million). In the 1999/2000 season in a Community-wide average, the UEFA Champions League accounted for around 20 % of the money paid for TV rights of football events by broadcasters⁽⁶⁴⁾. Bearing in mind that football accounts for the single highest proportion of TV channels' sports expenditure⁽⁶⁵⁾, the Commission considers that the effect of UEFA's joint selling arrangement is to bring about an appreciable restriction of competition in the broadcasting market.

6.6. Effect on trade between Member States

(133) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national

⁽⁶³⁾ Case C-415/93, *URBSF v Bosman*, [1995] ECR I-4921.

⁽⁶⁴⁾ This figure is calculated on the basis of the acquisition of domestic and UEFA tournaments. *Source*: A study commissioned by UEFA from Oliver & Ohlbaum Associates, London.

⁽⁶⁵⁾ See footnote 41.

markets, or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

(134) The commercial rights of the UEFA Champions League are sold throughout the EEA. UEFA's joint selling arrangement therefore affects trade between Member States. If the media rights were sold by the individual football clubs or on a non-exclusive basis, it would change the flow of trade in the TV rights.

(135) The UEFA Champions League is the most prestigious pan-European club football tournament, involving 32 of the best European clubs. The agreement establishing the joint selling arrangement between the football clubs participating in the UEFA Champions League has an appreciable effect on trade between Member States.

7. ARTICLE 81(3) OF THE TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

(136) In evaluating the restrictions of competition created by UEFA's joint selling arrangement pursuant to the criteria for exemption set out in Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the Commission has considered the benefits generated by the restrictive arrangement. Where the benefits are such as to offset the restrictive effects, then an exemption under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement is justified.

(137) The assessment required under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement is therefore whether the benefits generated by the notified joint selling arrangement outweigh the negative effects that it deploys, namely:

- (a) the grant by the football clubs to UEFA of the exclusive right to sell certain of the commercial rights relating to the UEFA Champions League;
- (b) the restrictions agreed to by the football clubs in selling their commercial rights individually.

(138) Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement provide that the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement respectively may be declared inapplicable to any 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 impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. The following sections contain an assessment in relation to each of those four conditions.

7.1. Improvement in production or distribution and/or promoting technical or economic progress

(139) UEFA considers that its joint selling arrangement facilitates the business operations of UEFA's commercial partners by creating a single point of sale. The creation of a single point of sale is of particular interest for an international tournament such as the UEFA Champions League, because this tournament involves a great number of football clubs from many different countries. In addition to the practical difficulties that may create, there is moreover the issue that the ownership structures vary from Member State to Member State with the possibility of the presence of multiple different co-owners of the media rights to each match. Furthermore, there is dispersed demand from broadcasters who are likewise of different nationalities and operating in many different national markets.

(140) Moreover, UEFA argues that the creation of a single point of sale is a prerequisite for the existence of the UEFA Champions League product. Since no individual club knows before the start of the season how far it will get in the tournament it could not sign a commercial agreement with a broadcaster giving the broadcaster any certainty that the football clubs will make it to the very end of the UEFA Champions League season. This provides an element of uncertainty for broadcasters. Similarly, joint selling of the rights by UEFA allows sponsors and other suppliers to receive a uniform package for the duration of the competition guaranteeing them media exposure for the entire period of the event, which allows them to structure their advertising budgets accordingly.

(141) UEFA also considers that its joint selling arrangement enables UEFA to maintain the uniform excellence and consistency of the 'product' at a level and quality which it would not be possible to achieve if the media rights were handled on an ad hoc basis by individual football clubs selling the media rights to a succession of different operators. This is essential for the maintenance of the distinctive UEFA Champions League brand, which is of particular interest to UEFA's commercial partners.

(142) UEFA finally argues that UEFA's financial solidarity model supports the development of football from the grass roots upwards. It improves production and stimulates the development of the sport in the smaller countries. This results in a more competitive base for the future of European football allowing even the smallest and financially weakest football clubs to compete with the biggest and strongest football clubs.

7.1.1. *Single point of sale of a league product*

(143) Joint selling of the media rights of a football tournament provides an advantage for media operators, football clubs and viewers since it leads to the creation of a single point of sale for the acquisition of a packaged league product.

(144) The advantages of a single point of sale are attractive in the context not only of a national football tournament, but also of an international competition where the difficulties in selling the rights are greater and where the efficiencies of joint selling may be particularly high. The creation of a single point of sale is of particular interest for an international tournament such as the UEFA Champions League, because this tournament involves a great number of football clubs from many different countries. In addition to the practical difficulties that may create, there is moreover the issue that the ownership structures vary from Member State to Member State. Furthermore, there is dispersed demand from broadcasters who are likewise of different nationalities and operating in many different national markets.

(145) Joint selling moreover allows the creation of packages of UEFA Champions League rights. This allows media operators to provide coverage to consumers of the league as a whole and over the course of an entire season. The creation of a single point of sale facilitates the existence of the UEFA Champions League product in view of the hybrid character of the UEFA Champions League which is a combination of a league and a knock-out competition where only a limited number of football clubs reach the final stages of the competition. Therefore, an individual club could not enter into a commercial agreement, which would give a broadcaster any guarantee of being able to plan its programme schedule for the whole UEFA Champions League season right to the final round. The joint selling of the TV rights solves this problem, as the broadcaster does not buy the rights of particular football clubs, but the right to broadcast the matches which are played on certain days.

(146) The benefits of this packaged approach are evident in every match week when rights to the entire UEFA Champions League allow a comprehensive highlights

programme to be produced which offers the possibility of showing the most interesting bits of the action of the match days/week in question.

(147) The benefits are also evident in respect of live coverage. Joint selling provides media operators and consumers with an overview of the whole UEFA Champions League, benefiting, for example, those viewers who have a general interest in the UEFA Champions League as a whole. By ensuring that clubs grant rights to UEFA, which are then licensed to media operators, UEFA can offer a complete package of rights to such operators. This package currently includes, for example, the first pick of matches played on each match day. It is obviously impossible to know at the start of the season which matches will be most interesting throughout the course of the season. The package therefore provides media operators with an opportunity to purchase, and then sell to consumers, a distinct and valuable media service, with guaranteed coverage of the most interesting matches throughout the whole season.

(148) It is conceivable that media operators could put such a package together even without joint selling. However, this would require the acquisition of significantly more rights than is currently the case. For a media operator to create the same end product in the context of individual sale of all media rights would risk being significantly less efficient, involving more acquisition and transaction costs⁽⁶⁶⁾. The only guarantee of an equally interesting selection of matches would be if one media operator were to buy all of the rights available individually either before the start of the football season or consecutively as the football season develops depending on the performance of the football clubs.

(149) In addition, instead of having to conduct negotiations with football clubs throughout the 51 different UEFA member territories with the communication difficulties and transaction costs that is likely to entail, broadcasters can acquire the league media rights packages from the original rights holders through a single outlet. Also in this respect, joint selling therefore reduces the transaction complexity and costs for broadcasters. Broadcasters can establish predictable commercial, technical and programming plans for a whole football season, which enhances the selling of advertising slots and subscriptions. It enables advertisers to build a campaign around the TV coverage of a league and is instrumental in securing broadcast sponsorship.

⁽⁶⁶⁾ ITV, in its reply of 12 May 1999 to the Commission's notice (OJ C 99, 10.4.1999, p. 23) states that joint selling by a central selling body '... also significantly reduces the transaction complexity for broadcasters.'

(150) Joint selling reduces broadcasters' financial risk. In a situation with individual selling of the media rights by the football clubs they risk a reduction in the value of the rights acquired from an individual club if that club performs badly in the league. Joint selling therefore allows a higher level of investment in the league product leading to more innovative match coverage such as better general presentation in both the stadium and the studio.

(151) Even in respect of competitions where the media rights are sold by the individual clubs, the rights are generally aggregated and packaged in later levels of the transaction chain by intermediaries such as sports agents or by the broadcasters creating clearing houses or joint exploitation bodies. A certain level of packaging or aggregation of the individual rights therefore seems optimal or even necessary for an efficient exploitation of the media rights of a football tournament.

(152) Viewers benefit from being offered multiple forms of coverage of the UEFA Champions League. The viewer is interested in having a choice between various forms of broadcasts of the matches of a league. A viewer is likely to wish to have a choice of being able to watch a match live in its total length and also to be informed about several matches in brief on a delayed basis at several different times. The viewer wants to gain information not only about a single match but also about all matches on a given match day. A jointly sold packaged league product is more likely to provide viewers with the product desired as a broadcaster cannot simply acquire the rights to a single match but also needs rights to provide a certain coverage of the other matches of the league on every match day ⁽⁶⁷⁾.

(153) Football clubs benefit from the sale of the commercial rights via a single point of sale/joint selling agency. The football clubs avoid having to build up own commercial departments of the magnitude that is necessary to deal with the complexity of developing a commercial policy and executing the rights deals in a large number of countries. It is likely that it would be extremely difficult for many football clubs to be able to build up such commercial departments and it is therefore likely that an outsourcing of such function would be necessary in any circumstances. It would seem that the individual football clubs could more easily carry out such a task in respect of national competitions, as the national market would be much more easily accessible in terms of language, culture, communication and commercial transparency.

7.1.2. Branding

(154) UEFA's second argument that it is able to create and maintain the uniformity and consistency in quality of a UEFA Champions League product via its joint selling

arrangement is not without merit. These are factors that contribute to establishing the reputation of a brand, which is associated with a uniform and high quality TV coverage underpinned by a homogeneous presentation which increases the attractiveness for the viewer ⁽⁶⁸⁾. These are also factors that attract the best football clubs who want to participate in this particular international tournament. The UEFA Champions League has, in fact, become the most prestigious pan-European club football tournament with the participation of the very best European football clubs.

(155) Among the factors underlying the success of the UEFA Champions League and distinguishing it from other tournaments are the specific tasks undertaken by UEFA including the 'dressing-up' of the stadium facilities, the recording of the match and the on-screen presentation, on-screen signage, music, etc.

(156) Furthermore, the organisational steps undertaken by UEFA and the joint selling of the league media products provide benefits for broadcasters in terms of a common and consistent look to the on-screen presentation of the matches by all partner broadcasters throughout the UEFA Champions League season. This is of benefit to viewers as they are able immediately to recognise a UEFA Champions League branded media product associated with quality football, which in turn stimulates viewers' interest and demand.

(157) UEFA's joint selling of packages of media rights to broadcasters leads to more objectivity in the media coverage of the UEFA Champions League. It provides coverage of the league in a manner that protects the league media product and the brand better than in a situation where one football club would be presented with a favourable bias to the detriment of other clubs and the league brand ⁽⁶⁹⁾. This improves the coverage of and the interest in the UEFA Champions League brand, thereby improving the production and the distribution of the UEFA Champions League media product.

7.1.3. Football clubs' individual sale of live TV rights unsold by the joint selling body

(158) UEFA's exclusive right to sell the live TV rights comprised by package 4 of the rights segmentation table becomes a non-exclusive right one week after the draw for the first round for the UEFA Champions League, which normally takes place in August. Following that cut-off date, where UEFA fails to sell such rights, the football clubs will have an opportunity to offer such rights to the pay-TV/pay-per-view market on a non-exclusive basis in parallel with UEFA. These are the rights referred to in package 5 of the rights segmentation table.

⁽⁶⁷⁾ Taurus Holding in a letter dated 22 January 2002.

⁽⁶⁸⁾ KrichMedia in a letter dated 17 September 2002 in reply to the Article 19(3) notice.

⁽⁶⁹⁾ Taurus Holding in a letter dated 22 January 2002.

(159) The philosophy behind the Commission's insistence in giving the football clubs an opportunity for individual sale of such live TV rights is twofold. First, the efficiencies and benefits of joint selling can be argued where the joint selling body fails to find demand in the market for such rights. Secondly, maintaining competition between UEFA and the football clubs in bringing such rights to the market helps to avoid rights to the UEFA Champions League remaining unused, where there is demand for them. Football clubs should therefore also be able to meet demand from free-TV broadcasters. For example, a risk of unused rights is likely to occur in territories where there are no pay-TV/pay-per-view broadcasters or where the existing pay-TV/pay-per-view broadcasters have already satisfied their demand with the Gold or Silver rights packages. In such cases, only free-TV broadcasters seem likely as potential buyers of such rights and there are no efficiencies in preventing them from potentially acquiring such rights. This decision should therefore be made subject to the condition that the provision in package 5 of the rights segmentation table restricting football clubs from selling live TV rights to free-TV broadcasters does not apply where there is no reasonable offer from any pay-TV broadcaster.

7.1.4. *Football clubs' individual sale of deferred media rights*

(160) The amended joint selling arrangement provides that a number of additional types of deferred TV rights, as well as new media rights, will be exploited not only by UEFA but also by the individual clubs in parallel. However, these additional media rights are made available for exploitation by UEFA and the football clubs only after some embargoes introduced to secure products for which there is much viewer interest and to establish the reputation of the UEFA Champions League brand, which is strictly associated with a uniform and high quality TV coverage, underpinned by a homogeneous presentation. Consequently, deferred TV rights are available as of midnight one day after the last of the games of the relevant match week. Archive rights are available 48 hours after the final. Given the current development of the Internet and to ensure that the UEFA Champions League Internet product remains a quality product, these rights are available 1½ hour after the game. This will of course change over time, making it necessary to revisit the embargo in the foreseeable future.

(161) Under these circumstances, the Commission considers that the negative effects arising from the joint selling arrangement are outweighed by the increased amount of content made available for a wider distribution, thereby promoting technical or economic progress of the media content itself and the new media carriers distributing them.

7.1.5. *Enhancing the focus of the respective UEFA Champions League and football clubs' brands*

(162) Football clubs exploiting UEFA Champions League footage individually will present the footage in a club-focused manner and relating only to action in which they are participating. Football clubs or the broadcasters exploiting the media rights in question⁽⁷⁰⁾ cannot package the rights from several football clubs into a single product which would appear as an UEFA Champions League branded product. In particular regarding live TV rights, UEFA defines as an UEFA Champions League branded product as one consisting of more than two live UEFA Champions League matches per day. Regarding delayed TV rights and Internet rights, UEFA would accept programmes containing 100 % UEFA Champions League content on a club channel. However, UEFA defines a UEFA Champions League branded programme as one presented as a club magazine programme, which contains more than 50 % UEFA Champions League content. In general programming, the maximum permissible UEFA Champions League amounts to 30 % of the programme. Where an entire match is shown on a delayed basis (that is to say, the full 90 minutes) on a club magazine programme then the 50 % rule would not apply and the programme could consist mostly or entirely of that single match. Similarly, if a whole match were broadcast in general programming on a channel, then the 30 % rule would not apply in that situation.

(163) The definitions of UEFA Champions League branded products will optimise the global interaction between UEFA Champions League branded and club branded products. The provisions regarding branding are aimed at furthering the development of the UEFA Champions League brand as being a unique independent quality labelled football media product distinguished from club branded products existing in parallel with the UEFA Champions League branded products. The definitions are designed to ensure that club rights do not metamorphose into a product which could be confused with the UEFA Champions League. This contributes to safeguarding the identity and reputation of the UEFA Champions League product, as the UEFA Champions League brand in many circumstances serves as a vehicle and a platform for exposure and promotion of the individual football clubs within and outside the EEA. This will be of benefit, in particular, to smaller clubs with less well-known brands in a wider geographic area who are likely to get broader television exposure through this means.

⁽⁷⁰⁾ The bundling limitation logically does not apply to the whole sale level, as there is no risk that viewers would experience any brand confusion caused by a bundling at that level.

7.1.6. Solidarity

- (164) In its notification, UEFA advanced as a justification for exemption the issue of financial solidarity. UEFA argues that its financial solidarity model supports the development of European football by ensuring a fairer distribution of revenue. The solidarity model could therefore be said to improve production and to stimulate the development of the sport⁽⁷¹⁾.
- (165) The Commission understands that it is desirable to maintain a certain balance among the football clubs playing in a league because it creates better and more exciting football matches, which could be reflected in/translate into better media rights. The same applies to the education and supply of new players, as the players are a fundamental element of the whole venture. The Commission recognises that a cross-subsidisation of funds from richer to poorer may help achieve this. The Commission is therefore in favour of the financial solidarity principle, which was also endorsed by the European Council declaration on sport in Nice in December 2000⁽⁷²⁾.
- (166) However, the Commission found that the efficiencies and the consumer benefits created by the originally notified joint selling arrangement in 1999 did not outweigh the negative impact of the restrictions of competition inherent in that system.
- (167) The Commission nevertheless considers that it is not necessary for the purpose of this procedure to consider the solidarity argument any further. An exemption, under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, of the new and amended joint selling arrangement is justified because of the creation of a branded league product which is sold in packages via a single point of sale.

7.1.7. Conclusion regarding improvement in production or distribution and/or promoting technical or economic progress

- (168) The Commission accepts that the decision of the football clubs and UEFA regarding the joint selling arrangement improves production and distribution of the UEFA Champions League within the meaning of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement

by enabling the creation of a quality branded content product and by providing an advantage for media operators, football clubs and viewers, since it leads to the creation of a single point of sale for the acquisition of a packaged league product. However, since no such benefits arise from the restriction of football clubs' freedom to sell live TV rights under package 5 to other broadcasters than pay-TV/pay-per-view broadcasters, this decision should be subject to a condition, which will enable football clubs to sell their live TV rights to free-TV broadcasters, where there is no reasonable offer from any pay-TV broadcaster.

7.2. Fair share of the benefit to consumers

- (169) The Commission considers that UEFA's joint selling arrangement provides consumers with a fair share of the benefits, which are in particular created by the single point of sale as explained above under section 7.1.1.
- (170) The Commission considers that the creation of a UEFA Champions League packaged content, which is available from a single point of sale, is a genuine benefit, which flows from UEFA's joint selling arrangement. Media operators, as consumers of football content, get more efficient and easier access to this unique content which is in addition carrying the UEFA Champions League quality brand label.
- (171) UEFA's joint selling arrangement therefore creates efficiencies, which allow media operators to invest more in new improved production and transmission technologies, quality television coverage, quality production and presentation, etc. It is also likely to lead to a more intensive and innovative exploitation of the rights to the benefit of the consumer. The sale of the UEFA Champions League media rights in separate packages by means of a public bidding procedure should enhance the possibility for more broadcasters, including small and medium-sized companies, to obtain UEFA Champions League content. The UEFA Champions League joint selling arrangement also ensures that companies interested in new media and deferred media rights and archives will have the opportunity to bid for such content rights.
- (172) The Commission also considers that viewers get access to better quality media coverage of the UEFA Champions League product allowing them to watch all premium matches of every match day over the course of the entire season which are of particular interest to them. Viewers also benefit from a facilitation of access to deferred media content and archive material, which may be of special interest to them.

⁽⁷¹⁾ Case 26/76 *Metro v Commission* [1977] ECR 1975, Case 42/84 *Remia v Commission* [1985] ECR 2545 and Cases 56 and 58/64 *Consten & Grundig v Commission* [1966] ECR 299.

⁽⁷²⁾ 'The European Council thinks that moves to encourage the mutualisation of part of the revenue from such sales, at the appropriate levels, are beneficial to the principle of solidarity between all levels and areas of sport.'

(173) However, as indicated in section 3.4.1.3, the Commission considers that the restriction in package 5 of the rights segmentation table limiting football clubs to selling such TV rights to pay-TV/pay-per-view broadcasters does not lead to an improvement in production or distribution and/or the promotion of technical or economic progress. In addition, no benefits to consumers are likely to arise from such restrictions. In fact, the main justification put forward by UEFA to justify the restriction was linked to UEFA's fear that in the absence of the restriction, there would be a risk of severe economic devaluation of the main rights packages. It is difficult to see how such restriction designed to maintain or raise prices and to remove content from free-TV broadcasters could be regarded as enhancing consumer benefits.

7.3. Restrictions that are indispensable

7.3.1. *Indispensability of restrictions to create a league product sold via a single point of sale*

(174) The Commission notes that media rights of sport competitions most often are aggregated in some form at some level of the exploitation chain before they are offered to the viewer. The Commission is neutral as to who undertakes this task. The Commission notes that UEFA could have a legitimate interest in creating a UEFA Champions League focused product, separate from any interest that any other operators may have in creating aggregated products based on UEFA Champions League footage. The interests may overlap, but would not always coincide. UEFA could therefore not necessarily rely on broadcasters, sport rights agents or others to create a UEFA Champions League focused product on its behalf. If UEFA wishes to ensure the benefits for itself, its members and its supporters of a UEFA Champions League media product, it would appear indispensable for UEFA to take a role in ensuring the production of such product. Under the notified joint selling arrangement UEFA is therefore able to ensure the production of a quality product, which represents the UEFA Champions League in an objective and independent manner.

(175) Secondly, it would appear that the complexity of producing such a product through individual sales by the clubs could compromise the quality and availability of a UEFA Champions League product, and could be less efficient for media operators, in particular since the UEFA Champions League is a pan-European football tournament involving participants from many different countries. As a practical matter, an interesting UEFA Champions League media product would have to encompass matches of interest to consumers throughout the season. As it is impossible to predict accurately at

the start of the season which matches will still be of interest at the end of the season, it would not be possible for media operators to buy those matches in advance. The alternative — buying a significant number of matches from a number of different clubs — would be inefficient and still not guarantee success. Media products of football leagues are generally aggregated into a media product covering the league as a whole. The Commission accepts that such aggregation seems indispensable to present a worthwhile product that interests viewers. The Commission will therefore simply have to examine the terms on which the aggregation takes place, not the identity of the body performing the task.

(176) Thirdly, it also seems indispensable that clubs are not able to sell on their own behalf precisely the same rights as those that are included in the jointly sold UEFA Champions League package. Where the same intellectual property is in the hands of two different sellers, it is likely that the combined revenue from the two possible sales would be significantly less than that which would be received were there only to be one seller. This is because a media operator would be less interested in rights which are available to all of its competitors, as there would be a reduced possibility to distinguish its product from those products of its competitors.

(177) In other words, it does not seem possible to alter the arrangements in such a way that the clubs grant UEFA a non-exclusive licence to all of their media rights while at the same time maintaining the improvements and efficiencies referred to in the first requirement of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement. However, where the joint selling body has failed to sell the aggregated media rights — the media rights sold by UEFA being a composite product — the rights of the joint selling body should not remain exclusive, but the individual co-owners should have an opportunity to test market demand for their individual rights. It would moreover not be indispensable for the proper functioning of the joint selling body if any further restrictions were to be imposed on the football clubs when selling those rights individually ⁽⁷³⁾.

(178) The Commission also accepts that it is indispensable for UEFA to have the exclusive right to sell the UEFA Champions League live and delayed TV rights outside Europe as it provides the likelihood of a wider and more efficient distribution of the UEFA Champions League. UEFA is, in principle, able to present a product of much wider appeal than any individual football clubs would be able to do.

⁽⁷³⁾ On this point see also section 3.4.3.2.

- (179) It is therefore likely that a centrally packaged product, identifiable as a UEFA Champions League product and focused not on one individual football club but on the UEFA Champions League as a whole, is most efficiently produced through joint selling. UEFA's role in coordinating this work through the mechanism of joint selling is indispensable to the provision to consumers of a UEFA Champions League media product.
- (180) The Commission therefore accepts that the restrictions of competition in UEFA's joint selling arrangement are indispensable within the meaning of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement to provide the efficiencies and improvements leading to consumer benefits, as long as the joint selling body is able to find demand for the jointly sold media rights.
- 7.3.2. *Individual football clubs' sale of own media rights*
- (181) It is a feature of European football that clubs typically participate in a number of different leagues, cups and tournaments over the course of a season. A successful UEFA Champions League team, for example, will also participate in national leagues and cups.
- (182) Each individual football club has a group of supporters which is particularly interested in the fate and actions of that particular club. Consequently, there is demand for club-related items including club-related media products. Clubs already carry out a large number of commercial activities aimed at providing their fans with targeted services.
- (183) For the football fan with an interest in one particular club, regardless of the tournament in which the club is participating, UEFA's new joint selling arrangement provides good opportunities to follow the club. While UEFA's joint selling arrangement is focused on the development of the UEFA Champions League brand, it nevertheless also allows clubs to pursue their relationship with their own fans.
- (184) The football clubs are subject to limited restrictions in selling their media rights individually. However, these restrictions are considered to be indispensable for the functioning of UEFA's joint selling arrangement.
- (185) UEFA's joint selling arrangement provides that the clubs may address their fans with live television if UEFA has not managed to sell those live rights. Football clubs may furthermore address their fans via deferred television, mechanical reproduction media, Internet, UMTS, etc.
- (186) The live TV rights, which could be sold by the football clubs⁽⁷⁴⁾, concern the football matches which are not picked by the broadcasters that have bought the Gold and Silver live television packages or sold by UEFA as part of package 4 of the rights segmentation table. The rights that are referred to in packages 4 and 5 cover the same matches. In order to improve the chances of these residual rights finding a buyer, it is considered indispensable for UEFA, as the joint selling body, to be given a first exclusive right to sell those live TV rights.
- (187) If the joint selling body, UEFA, fails to sell the rights in package 4 within one week after the draw for the group stage of the UEFA Champions League, UEFA loses its exclusive right to sell them. After this cut-off date both the football clubs holding the live TV rights to the matches in question also have an opportunity to sell those rights (referred to as package 5 in the rights segmentation table) on a non-exclusive basis in competition with UEFA.
- (188) However, UEFA's rights segmentation means that the football clubs are restricted to selling the residual live TV rights to pay-TV or pay-per-view broadcasters. The Commission considers that this is a restriction imposed on the football clubs, which is not indispensable for the attainment of the objectives set out in Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement. Once the joint selling body has proven inefficient in selling the residual rights in question at the cut-off date it cannot be considered indispensable to the proper operation of the joint selling arrangement and to the attainment of the resulting benefits that the football clubs are prevented from selling those rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster. This would be likely to occur in territories where there are no pay-TV/pay-per-view broadcasters or where the existing pay-TV/pay-per-view broadcasters have already satisfied their demand with the Gold or Silver rights packages.
- (189) This decision should therefore be made subject to the condition that, to the extent there is no reasonable offer from any pay-TV/pay-per-view broadcaster, the restriction imposed by the joint selling arrangement under package 5 in the rights segmentation table, aimed at preventing football clubs from selling their live TV rights to free-TV broadcasters, shall not apply.
- (190) The embargoes that are imposed on the exploitation of deferred media rights and which apply equally to rights sold jointly by UEFA as well as the rights sold individually by the football clubs, are indispensable to enhance focus on the league product and in particular the highlights product⁽⁷⁵⁾ covering the UEFA Champions League in its entirety. The embargoes contribute to creating a product for which there is much viewer
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- ⁽⁷⁴⁾ Package 5 of the rights segmentation table.
⁽⁷⁵⁾ Package 3 of the rights segmentation table.

interest and to establishing the reputation of the UEFA Champions League brand, which is closely associated with uniform and high quality TV coverage underpinned by a homogeneous presentation, which affects the acceptance by the viewer. As regards the embargoes imposed on the exploitation of the Internet rights, the need to maintain such embargoes for quality reasons will, of course, change over time with the development of Internet technologies.

(191) Moreover, football clubs exploiting UEFA Champions League footage individually must present the footage in a club-focused manner and relating only to action in which they are participating. Football clubs or bodies to whom they cede their media rights are not allowed to package the rights from several football clubs into a single product which would appear as an alternative UEFA Champions League branded product. In particular regarding live TV rights, such a product is defined as one consisting of more than two live UEFA Champions League matches per match day. Regarding delayed TV rights and Internet rights, UEFA would accept programmes containing 100 % UEFA Champions League content on a club channel. However, UEFA defines a UEFA Champions League branded programme as one presented as a club magazine programme which contains more than 50 % UEFA Champions League content. In general programming, the maximum permissible UEFA Champions League could amount to 30 % of the programme. Where an entire match is shown on a delayed basis (that is to say, the full 90 minutes) on a club magazine programme then the 50 % rule would not apply and the programme could consist mostly or entirely of that single match. Similarly, if a whole match were to be broadcast in general programming on a channel then the 30 % rule would not apply in that situation.

(192) The Commission accepts that provisions regulating the possibilities for third parties to bundle media rights sold by the individual football clubs are indispensable to preserve the integrity and branding of the jointly sold UEFA Champions League media rights. However, following receipt of the comments in reply to the notice published pursuant to Article 19(3) of Regulation No 17, the Commission requested clarifications of the rules, which lead to a reduction of their scope and intensity. It therefore has become possible for a single broadcaster to exploit two individually sold live matches contemporaneously. The Commission considers that opening up this possibility is likely to render the impact of the restriction so marginal that it will not be felt by the end-users of the rights, the broadcasters, as the rights available for any single broadcaster would be sufficient to satisfy existing demand from broadcasters for this type of residual matches. Likewise, regarding deferred rights, it has become possible to broadcast a whole match irrespective of the definition of a UEFA Champions League branded programme.

7.4. No elimination of competition

- (193) Commercial rights are available from a number of football tournaments which fall within the scope of the relevant markets. For example, according to UEFA, the TV rights of UEFA Champions League represent on average only 20 % of the rights in the relevant market. Since new media rights affect emerging markets, it is not yet possible to ascertain the position of the UEFA Champions League content in those markets. However, it is not likely to be more significant than its position in the traditional TV rights markets. The media rights of the UEFA Champions League are therefore just one possibility for media operators wishing to acquire content concerning football events taking place regularly throughout every year.
- (194) Moreover, jointly sold media rights of the UEFA Champions League are split up into several different rights packages, which are offered for sale in a competitive bidding procedure open to all interested media operators. This allows several media operators to acquire media rights of the UEFA Champions League from UEFA.
- (195) Finally both UEFA and the football clubs sell certain categories of UEFA Champions League media rights on a non-exclusive basis. Interested buyers therefore have several possible sources of supply from the owners of such rights.
- (196) The joint selling of the media rights of the UEFA Champions League by UEFA is therefore unlikely to eliminate competition in respect of a substantial part of the media rights in question.

7.5. Conclusion

- (197) In the light of the foregoing, it can be concluded that the cumulative conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement are fulfilled and an exemption can therefore be granted in respect of the joint selling arrangement.

8. CONDITIONS AND DURATION OF EXEMPTION

- (198) Under Article 8(1) of Regulation No 17, conditions may be attached to a declaration of exemption. In this case, the clause of the joint selling arrangement preventing football clubs from individually selling live TV rights to free-TV broadcasters is a restriction on competition which does not satisfy all the conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement. Such a restriction cannot be considered as improving the production or distribution of goods or promoting

technical or economic progress, while allowing consumers a fair share of the resulting benefit, and not imposing on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives.

(199) The exemption should therefore be subject to the condition that football clubs must not be prevented from selling their live TV rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster. The Commission considers that no reasonable offer would exist, in particular, when there is no offer from any pay-TV broadcaster, which is comparable to the offer from the free-TV broadcaster.

(200) Pursuant to Article 8(1) of Regulation No 17, a decision in application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement is to be issued for a specified period. The notified joint selling arrangement works with cycles of contract periods of three years. It is therefore appropriate to define the duration of this exemption accordingly and to let the joint selling arrangement operate for two contract periods. Exemption should therefore be granted pursuant to Article 8(1) of Regulation No 17 from 13 May 2002, the date of notification of the last version of the joint selling arrangement, until 31 July 2009.

9. CONCLUSION

(201) It is concluded that UEFA's joint selling arrangement leads to the improvement of production and distribution by creating a quality branded league focused product sold via a single point of sale. Moreover consumers receive a real fair share of the benefits deriving from it. Furthermore, the restrictions inherent in UEFA's joint selling arrangement are indispensable for achieving these benefits, save for the provision prohibiting individual football clubs from selling live TV rights to free-TV broadcasters. Finally, it is concluded that the joint selling of the media rights to the UEFA Champions League by UEFA is unlikely to eliminate competition in respect of a substantial part of the media rights in question. It is therefore appropriate to grant an exemption pursuant

to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, subject to a condition,

HAS ADOPTED THIS DECISION:

Article 1

1. Pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are declared inapplicable from 13 May 2002 until 31 July 2009 to the amended version of UEFA's joint selling arrangement in respect of the media rights to the UEFA Champions League, as described in this Decision.

2. The exemption in paragraph 1 shall be subject to compliance with the condition that the restriction prohibiting football clubs from selling live TV rights to free-TV broadcasters shall not apply where there is no reasonable offer from any pay-TV broadcaster.

Article 2

On the basis of the facts in its possession there are no grounds under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement for action by the Commission in respect of UEFA's joint selling arrangement for sponsorship, suppliership and IPR licensing relating to the UEFA Champions League.

Article 3

This Decision is addressed to:

Union des Associations Européennes de Football
Route de Genève, 46
1260 Nyon 2
Switzerland

Done at Brussels, 23 July 2003.

For the Commission

Mario MONTI

Member of the Commission