

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

DECISION OF THE EFTA SURVEILLANCE AUTHORITY

No 3/94/COL

of 12 January 1994

on the issuing of 10 notices and guidelines in the field of competition

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area ⁽¹⁾, and in particular points 16 to 25 of Annex XIV to this Agreement,

Having regard to Articles 5 (2) (b) and 25 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽²⁾,

Whereas according to Article 25 of the Surveillance and Court Agreement the EFTA Surveillance Authority shall give effect to the provisions of the EEA Agreement relating to the implementation of the competition rules applicable to undertakings and, upon the entry into force of this Agreement, adopt acts corresponding to those of the EC Commission listed in Annex II to the Surveillance and Court Agreement;

Whereas the objective of the acts is to provide guidance for undertakings by indicating the principles and rules which will guide the EFTA Surveillance Authority when applying Articles 53 to 60 of the EEA Agreement to a particular case in order to ensure a uniform application of the EEA competition rules throughout the European Economic Area,

HAS ADOPTED THIS DECISION:

1. The EFTA Surveillance Authority issues the 10 notices and guidelines listed below and annexed to this Decision as Annexes I to X.

— notice of the EFTA Surveillance Authority regarding restrictions ancillary to concentrations,

— notice of the EFTA Surveillance Authority regarding the concentrative and cooperative operations under the act on the control of concentration between undertakings referred to in point 1 of Annex XIV to the EEA Agreement,

— notice of the EFTA Surveillance Authority concerning the acts referred to in points 2 and 3 of Annex XIV to the EEA Agreement on the application of Article 53 (3) of the EEA Agreement to categories of exclusive distribution and exclusive purchasing agreements,

— notice of the EFTA Surveillance Authority concerning the act referred to in point 4 of Annex XIV to the EEA Agreement on the application of Article 53 (3) of the EEA Agreement to certain categories of motor vehicle distribution and servicing agreements,

— notice of the EFTA Surveillance Authority on exclusive dealing contracts with commercial agents,

— notice of the EFTA Surveillance Authority concerning agreements, decisions and concerted practices in the field of cooperation between enterprises,

— notice of the EFTA Surveillance Authority concerning imports into the territory covered by the EEA Agreement of third countries' goods falling within the scope of the EEA Agreement,

— notice of the EFTA Surveillance Authority concerning its assessment of certain subcontracting agreements in relation to Article 53 (1) of the EEA Agreement,

⁽¹⁾ Hereinafter referred to as the 'EEA Agreement'.

⁽²⁾ Hereinafter referred to as the 'Surveillance and Court Agreement'.

- notice of the EFTA Surveillance Authority on agreements of minor importance which do not fall under Article 53 (1) of the EEA Agreement,
- guidelines of the EFTA Surveillance Authority on the application of EEA competition rules in the telecommunications sector.

2. These notices and guidelines are authentic in the English language and shall be published in the EEA

Section of and the EEA supplement to the *Official Journal of the European Communities*.

Done at Brussels, 12 January 1994.

For the EFTA Surveillance Authority.

Knut ALMESTAD

President

ANNEX I

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY REGARDING RESTRICTIONS ANCILLARY TO CONCENTRATIONS

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice regarding restrictions ancillary to concentrations referred to in point 16 of Annex XIV to the EEA Agreement and, respectively, point 1 of Annex II to the Surveillance and Court Agreement.
- E. For EEA purposes, the text of Council Regulation (EEC) No 4064/89 has been divided into substantive rules which are contained in the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EEC) No 4064/89) and procedural rules which are contained in Chapter XIII of Protocol 4 to the Surveillance and Court Agreements. This is the reason why these two references appear in the text below.

I. Introduction

1. The act on the control of concentrations between undertakings referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EEC) No 4064/89) (hereinafter referred to as 'the Act') states in recital 25 that its application is not excluded where the undertakings concerned accept restrictions which are directly related and necessary to the implementation of the concentration, hereinafter referred to as 'ancillary restrictions'. In the scheme of the Act, such restrictions are to be assessed together with the concentration itself. It follows, as confirmed by Article 8 (2), second subparagraph, last sentence of Chapter XIII of Protocol 4 to the Surveillance and Court Agreement, that a decision declaring the concentration compatible also covers these restrictions. In this situation, under the provisions of Article 22, paragraphs 1 and 2 of Chapter XIII of Protocol 4 to the Surveillance and Court Agreement, the Act and Chapter XIII of Protocol 4 to the Surveillance and Court Agreement are solely applicable, to the exclusion of Chapter II of Protocol 4 to the Surveillance and Court Agreement as well as the acts referred to in points 10 and 11 of Annex XIV to the

EEA Agreement (Council Regulations (EEC) No 1017/68 and (EEC) No 4056/86) and Chapters VI, IX and XI of Protocol 4 to the Surveillance and Court Agreement. This avoids parallel proceedings by the EFTA Surveillance Authority, one concerned with the assessment of the concentration under the Act, and the other aimed at the application of Articles 53 and 54 of the EEA Agreement to the restrictions which are ancillary to the concentration.

2. In this notice, the EFTA Surveillance Authority sets out to indicate the interpretation it gives to the notion of 'restrictions directly related and necessary to the implementation of the concentration'. Under the Act and Chapter XIII of Protocol 4 to the Surveillance and Court Agreement such restrictions must be assessed in relation to the concentration, whatever their treatment might be under Articles 53 and 54 of the EEA Agreement if they were to be considered in isolation or in a different economic context. The EFTA Surveillance Authority endeavours, within the limits set by the Act and Chapter XIII of Protocol 4 to the Surveillance and Court Agreement, to take the greatest account of business practice and of the conditions necessary for the implementation of concentrations.

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

This notice is without prejudice to the interpretation which may be given by the EFTA Court.

II. Principles of evaluation

3. The 'restrictions' meant are those agreed on between the parties to the concentration which limit their own freedom of action in the market. They do not include restrictions to the detriment of third parties. If such restrictions are the inevitable consequence of the concentration itself, they must be assessed together with it under the provisions of Article 2 of the Act. If, on the contrary, such restrictive effects on third parties are separable from the concentration they may, if appropriate, be the subject of an assessment of compatibility with Articles 53 and 54 of the EEA Agreement.

4. For restrictions to be considered 'directly related' they must be ancillary to the implementation of the concentration, that is to say subordinate in importance to the main object of the concentration. They cannot be substantial restrictions wholly different in nature from those which result from the concentration itself. Neither are they contractual arrangements which are among the elements constituting the concentration, such as those establishing economic unity between previously independent parties, or organizing joint control by two undertakings of another undertaking. As integral parts of the concentration, the latter arrangements constitute the very subject matter of the evaluation to be carried out under the Act and Chapter XIII of Protocol 4 to the Surveillance and Court Agreement.

Also excluded, for concentrations which are carried out in stages, are the contractual arrangements relating to the stages before the establishment of control within the meaning of Article 3, paragraphs 1 and 3 of the Act. For these, Articles 53 and 54 of the EEA Agreement remain applicable as long as the conditions set out in Article 3 are not fulfilled.

The notion of directly related restrictions likewise excludes from the application of the Act and Chapter XIII of Protocol 4 to the Surveillance and Court Agreement additional restrictions agreed at the same time which have no direct link with the concentration. It is not enough that the additional restrictions exist in the same context as the concentration.

5. The restrictions must likewise be 'necessary to the implementation of the concentration', which means that in their absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success. This must be judged on an objective basis.

6. The question of whether a restriction meets these conditions cannot be answered in general terms. In particular as concerns the necessity of the restrictions, it is proper not only to take account of its nature, but equally to ensure, in applying the rule of proportionality; that its duration and subject matter, and geographic field of application, do not exceed what the implementation of the concentration reasonably requires. If alternatives are available for the attainment of the legitimate aim pursued, the undertakings must choose the one which is objectively the last restrictive of competition.

These principles will be followed and further developed by the practice of the EFTA Surveillance Authority in individual cases.

However, it is possible to indicate the attitude the EFTA Surveillance Authority will take to those restrictions most commonly encountered in relation to the transfer of undertakings or parts of undertakings, the division of undertakings or of their assets following a joint acquisition of control, or the creation of concentrative joint ventures.

III. Evaluation of common ancillary restrictions in cases of the transfer of an undertaking

A. Non-competition clauses

1. Among the ancillary restrictions which meet the criteria set out in the Act and in Chapter XIII of Protocol 4 to the Surveillance and Court Agreement are contractual prohibitions on competition which are imposed on the vendor in the context of a concentration achieved by the transfer of an undertaking or part of an undertaking. Such prohibitions guarantee the transfer to the acquirer of the full value of the assets transferred, which in general include both physical assets and intangible assets such as the goodwill which the vendor has accumulated or the know-how he has developed. These are not only directly related to the concentration, but are also necessary for its implementation because, in their absence, there would be reasonable grounds to expect that the sale of the undertaking or part of an undertaking could not be accomplished satisfactorily. In order to take over fully the value of the assets transferred, the acquirer must be able to benefit from some protection against competitive acts of the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such protection cannot generally be considered necessary when *de facto* the transfer is limited to physical assets (such as land, buildings or machinery) or to exclusive industrial and commercial property rights (the holders of which could immediately take action against infringements by the transferor of such rights).

However, such a prohibition on competition is justified by the legitimate objective sought of implementing the concentration only when its duration, its geographical field of application, its subject matter and the persons subject to it do not exceed what is reasonably necessary to that end.

2. With regard to the acceptable duration of a prohibition on competition, a period of five years has been recognized as appropriate when the transfer of the undertaking includes the goodwill and know-how, and a period of two years when it includes only the goodwill. However, these are not absolute rules; they do not preclude a prohibition of longer duration in particular circumstances, where for example the parties can demonstrate that customer loyalty will persist for a period longer than two years or that the economic life cycle of the products concerned is longer than five years and should be taken into account.

3. The geographic scope of the non-competition clause must be limited to the area where the vendor had established the products or services before the transfer. It does not appear objectively necessary that the acquirer be protected from competition by the vendor in territories which the vendor had not previously penetrated.

4. In the same manner, the non-competition clause must be limited to products and services which form the economic activity of the undertaking transferred. In particular, in the case of a partial transfer of assets, it does not appear that the acquirer needs to be protected from the competition of the vendor in the products or services which constitute the activities which the vendor retains after the transfer.

5. The vendor may bind himself, his subsidiaries and commercial agents. However, an obligation to impose similar restrictions on others would not qualify as an ancillary restriction. This applies in particular to clauses which would restrict the scope for resellers or users to import or export.

6. Any protection of the vendor is not normally an ancillary restriction and is therefore to be examined under Articles 53 and 54 of the EEA Agreement.

B. Licences of industrial and commercial property rights and of know-how

1. The implementation of a transfer of an undertaking or part of an undertaking generally includes the transfer to the acquirer, with a view to the full exploitation of the assets transferred, of rights to industrial or commercial property or know-how. However, the vendor may remain the owner of the rights in order to exploit them for activities other than those transferred. In these cases, the usual means for ensuring that the acquirer will have the full use of the assets transferred is to conclude licensing agreements in his favour.

2. Simple or exclusive licences of patents, similar rights or existing know-how can be accepted as necessary for the completion of the transaction, and likewise agreements to grant such licences. They may be limited to certain fields of use, to the extent that they correspond to the activities of the undertaking transferred. Normally it will not be necessary for such licences to include territorial limitations on manufacture which reflect the territory of the activity transferred. Licences may be granted for the whole duration of the patent or similar rights or the duration of the normal economic life of the know-how. As such licences are economically equivalent to a partial transfer of rights, they need not be limited in time.

3. Restrictions in licence agreements, going beyond what is provided above, fall outside the scope of the Act. They must be assessed on their merits according to Article 53 (1) and (3). Accordingly, where they fulfil the conditions required, they may benefit from the block exemptions provided for by the act on patent licences referred to in point 5 of Annex XIV to the EEA Agreement (Commission Regulation (EEC) No 2349/84) or the act on know-how licences referred to in point 9 of Annex XIV to the EEA Agreement (Commission Regulation (EEC) No 556/89).

4. The same principles are to be applied by analogy in the case of licences of trademarks, business names or similar rights. There may be situations where the vendor wishes to remain the owner of such rights in relation to activities retained, but the

acquirer needs the rights to use them to market the products constituting the object of the activity of the undertaking or part of an undertaking transferred.

In such circumstances, the conclusion of agreements for the purpose of avoiding confusion between trademarks may be necessary.

C. Purchase and supply agreements

1. In many cases, the transfer of an undertaking or part of an undertaking can entail the disruption of traditional lines of internal procurement and supply resulting from the previous integration of activities within the economic entity of the vendor. To make possible the break up of the economic unity of the vendor and the partial transfer of the assets to the acquirer under reasonable conditions, it is often necessary to maintain, at least for a transitional period, similar links between the vendor and the acquirer. This objective is normally attained by the conclusion of purchase and supply agreements between the vendor and the acquirer of the undertaking or part of an undertaking. Taking account of the particular situation resulting from the break up of the economic unity of the vendor such obligations, which may lead to restrictions of competition, can be recognized as ancillary. They may be in favour of the vendor as well as the acquirer.

2. The legitimate aim of such obligations may be to ensure the continuity of supply to one or other of the parties of products necessary to the activities retained (for the vendor) or taken over (for the acquirer). Thus, there are grounds for recognizing, for a transitional period, the need for supply obligations aimed at guaranteeing the quantities previously supplied within the vendor's integrated business or enabling their adjustment in accordance with the development of the market.

Their aim may also be to provide continuity of outlets for one or the other of the parties, as they were previously assured within the single economic entity. For the same reason, obligations providing for fixed quantities, possibly with a variation clause, may be recognized as necessary.

3. However, there does not appear to be a general justification for exclusive purchase or supply obligations. Save in exceptional circumstances, for example resulting from the absence of a market or the specificity of products, such exclusivity is not objectively necessary to permit the implementation of a concentration in the form of a transfer of an undertaking or part of an undertaking.

In any event, in accordance with the principle of proportionality, the undertakings concerned are bound to consider whether there are no alternative means to the ends pursued, such as agreements for fixed quantities, which are less restrictive than exclusivity.

4. As for the duration of procurement and supply obligations, this must be limited to a period necessary for the replacement of the relationship of dependency by autonomy in market. The duration of such a period must be objectively justified.

IV. Evaluation of ancillary restrictions in the case of a joint acquisition

1. As set out in recital 24, the Act is applicable when two or more undertakings agree to acquire jointly the control of one or

more other undertakings, in particular by means of a public tender offer, where the object or effect is the division among themselves of the undertakings or their assets. This is a concentration implemented in two successive stages; the common strategy is limited to the acquisition of control. For the transaction to be concentrative, the joint acquisition must be followed by a clear separation of the undertakings or assets concerned.

2. For this purpose, an agreement by the joint acquirers of an undertaking to abstain from making separate competing offers for the same undertaking, or otherwise acquiring control, may be considered an ancillary restriction.

3. Restrictions limited to putting the division into effect are to be considered directly related and necessary to the implementation of the concentration. This will apply to arrangements made between the parties for the joint acquisition of control in order to divide among themselves the production facilities or the distribution networks together with the existing trademarks of the undertaking acquired in common. The implementation of this division may not in any circumstances lead to the coordination of the future behaviour of the acquiring undertakings.

4. To the extent that such a division involves the break up to a pre-existing economic entity, arrangements that make the break up possible under reasonable conditions must be considered ancillary. In this regard, the principles explained above in relation to purchase and supply arrangements over a transitional period in cases of transfer of undertakings should be applied by analogy.

V. Evaluation of ancillary restrictions in cases of concentrative joint ventures within the meaning of Article 3 (2), subparagraph 2, of the Act

This evaluation must take account of the characteristics peculiar to concentrative joint ventures, the constituent elements of which are the creation of an autonomous economic entity exercising on

a long-term basis all the functions of an undertaking, and the absence of coordination of competitive behaviour between the parent undertakings and between them and the joint venture. This condition implies in principle the withdrawal of the parent undertakings from the market assigned to the joint venture and, therefore, their disappearance as actual or potential competitors of the new entity.

A. *Non-competition obligations*

To the extent that a prohibition on the parent undertakings competing with the joint venture aims at expressing the reality of the lasting withdrawal of the parents from the market assigned to the joint venture, it will be recognized as an integral part of the concentration.

B. *Licences for industrial and commercial property rights and know-how*

The creation of a new autonomous economic entity usually involves the transfer of the technology necessary for carrying on the activities assigned to it, in the form of a transfer of rights and related know-how. Where the parent undertakings intend none the less to retain the property rights, particularly with the aim of exploitation in other fields of use, the transfer of technology to the joint venture may be accomplished by means of licences. Such licences may be exclusive, without having to be limited in duration or territory, for they serve only as a substitute for the transfer of property rights. They must therefore be considered necessary to the implementation of the concentration.

C. *Purchase and supply obligations*

If the parent undertakings remain present in a market upstream or downstream of that of the joint venture, any purchase and supply agreements are to be examined in accordance with the principles applicable in the case of the transfer of an undertaking.

ANNEX II

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY REGARDING THE CONCENTRATIVE AND COOPERATIVE OPERATIONS UNDER THE ACT ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS REFERRED TO IN POINT 1 OF ANNEX XIV TO THE EEA AGREEMENT (COUNCIL REGULATION (EEC) No 4064/89)

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of the principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice regarding the concentrative and cooperative operations pursuant to Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings referred to in point 17 of Annex XIV to the EEA Agreement and, respectively, point 2 of Annex II to the Surveillance and Court Agreement.
- E. For EEA purposes, the text of Regulation (EEC) No 4064/89 has been divided between substantive rules which are contained in the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EEC) No 4064/89) and procedural rules which are contained in Chapter XIII of Protocol 4 to the Surveillance and Court Agreement. This is the reason why these two references appear in the text below.

I. Introduction

1. Article 3 (1) of the act referred to in point 1 of Annex XIV to the EEA Agreement (Regulation (EEC) No 4064/89) (hereinafter referred to as 'the Act') contains an exhaustive list of the factual circumstances which fall to be considered as concentrations. In accordance with recital 23, this term refers only to operations that lead to a lasting change in the structures of the participating undertakings.

By contrast, the Act does not deal with operations whose object or effect is the coordination of the competitive activities of undertakings that remain independent of each other. Situations of this kind are cooperative in character. Accordingly, they fall to be assessed under the provisions of the acts referred to in points 10 and 11 of Annex XIV to the EEA Agreement (Council Regulations (EEC) No 1071/68 and (EEC) No 4056/86) and Chapter II, VI, IX or XI of Protocol 4 to the Surveillance and

Court Agreement. The same applies to an operation which includes both a lasting structural change and the coordination of competitive behaviour, where the two are inseparable.

If the structural change can be separated from the coordination of competitive behaviour, the former will be assessed under the Act and Chapter XIII of Protocol 4 to the Surveillance and Court Agreement and the latter, to the extent that it does not amount to an ancillary restriction within the meaning of Article 8 (2), second subparagraph of Chapter XIII of the Surveillance and Court Agreement, falls to be assessed under the other acts referred to in Annex XIV to the EEA Agreement or under the chapters of Protocol 4 to the Surveillance and Court Agreement which implement Articles 53 and 54 of the EEA Agreement.

2. The purpose of this notice is to define as clearly as possible, in the interests of legal certainty, concentrative and cooperative situations. This is particularly important in the case of joint ventures. The same issue is raised in other forms of association between undertakings such as unilateral or reciprocal shareholdings and common directorships, and of certain operations involving more than one undertaking, such as unilateral or reciprocal transfer of undertakings or parts of undertakings, or joint acquisition of an undertaking with a view to its division. In all these cases, operations may not fall within

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

the scope of the Act, where their object or effect is the coordination of the competitive behaviour of the undertakings concerned.

3. This notice sets out the main considerations which will determine the view of the EFTA Surveillance Authority to what extent the aforesaid operations are or are not caught by the Act. It is not concerned with the assessment of these operations, whether under the Act or any other applicable provisions, in particular Article 53 and 54 of the EEA Agreement.

4. The principles set out in this notice will be followed and further developed by the practice of the EFTA Surveillance Authority in individual cases. As the operations considered are generally of a complex nature, this notice cannot provide a definitive answer to all conceivable situations.

5. This notice is without prejudice to the interpretation which may be given by the EFTA Court.

II. Joint ventures within the meaning of Article 3 of the Act

6. The Act in Article 3 (2) refers to two types of joint venture: those which have as their object or effect the coordination of the competitive behaviour of undertakings which remain independent (referred to as 'cooperative joint ventures') and those which perform on a lasting basis all the functions of an autonomous economic entity and which do not give rise to coordination amongst themselves or between them and the joint venture (referred to as 'concentrative joint ventures'). The latter are concentrations and as such are caught by the Act. Cooperative joint ventures fall to be considered under other acts referred to in Annex XIV to the EEA Agreement or under the chapters of Protocol 4 to the Surveillance and Court Agreement which implement Articles 53 and 54 of the EEA Agreement.

A. Concept of joint venture

7. To define the term 'joint venture' ('JV') within the meaning of Article 3 (2), it is necessary to refer to the provision of Article 3 (1) (b) of the Act. According to the latter, JVs are undertakings that are jointly controlled by several other undertakings, the parent companies. In the context of the Act the term JV thus implies several characteristics:

(a) Undertaking

8. A JV must be an undertaking. That is to be understood as an organized assembly of human and material resources, intended to pursue a defined economic purpose on a long-term basis.

(b) Control by other undertakings

9. In the context of the Act, a JV is controlled by other undertakings. Pursuant to Article 3 (3) of the Act, control means the possibility of exercising, directly or indirectly, a decisive influence on the activities of the JV; whether this condition is fulfilled can only be decided by reference to all the legal and factual circumstances of the individual case.

10. Control of a JV can be based on legal, contractual or other means, within which the following elements are especially important:

- ownership or rights to the use of all or some of the JV's assets,
- influence over the composition, voting or decisions of the managing or supervisory bodies of the JV,
- voting rights in the managing or supervisory bodies of the JV,
- contracts concerning the running of the JV's business.

(c) Joint control

11. A JV under the Act is jointly controlled. Joint control exists where the parent companies must agree on decisions concerning the JV's activities, either because of the rights acquired in the JV or because of contracts or other means establishing the joint control. Joint control may be provided for in the JV's constitution (memorandum or articles of association). However, it need not be present from the beginning, but may also be established later, in particular by taking a share in an existing undertaking.

12. There is no joint control where one of the parent companies can decide alone on the JV's commercial activities. This is generally the case where one company owns more than half the capital or assets of the undertaking, has the right to appoint more than half of the managing or supervisory bodies, controls more than half of the votes in one of those bodies, or has the sole right to manage the undertaking's business. Where the other parent companies either have completely passive minority holdings or, while able to have a certain influence on the undertaking, cannot, individually or together, determine its behaviour, a relative majority of the capital or of the votes or seats on the decision-making bodies will suffice to control the undertaking.

13. In many cases, the joint control of the JV is based on agreements or concertation between the parent companies. Thus, a majority shareholder in a JV often extends to one or more minority shareholders a contractual right to take part in the control of the JV. If two undertakings each hold half of a JV, even if there is no agreement between them, both parent companies will be obliged permanently to cooperate so as to avoid reciprocal blocking votes on decisions affecting the JV's activity. The same applies to JVs with three or more parents, where each of them has a right of veto. A JV can even be controlled by a considerable number of undertakings that can together muster a majority of the capital or the seats or votes on the JV's decision-making bodies. However, in such cases, joint control can be presumed only if the factual and legal circumstances — especially a convergence of economic interests — support the notion of a deliberate common policy of the parent companies in relation to the JV.

14. If one undertaking's holding in another is, by its nature or its extent, insufficient to establish sole control, and if there is no joint control together with third parties, then there is no concentration within the meaning of Article 3 (1) (b) of the Act. Articles 53 or 54 of the EEA Agreement may however be

applicable on the basis of Chapter II of Protocol 4 to the Surveillance and Court Agreement or implementing acts referred to in Annex XIV to the EEA Agreement or reproduced in other chapters of Protocol 4 to the Surveillance and Court Agreement (see III (1) of this notice).

B. Concentrative joint ventures

15. For a joint venture to be regarded as concentrative it must fulfil all the conditions of Article 3 (2), subparagraph 2 of the Act, which lays down a positive condition and a negative condition.

(a) Positive condition: joint venture performing on a lasting basis all the functions of an autonomous economic entity

16. To fulfil this condition, a JV must first of all act as an independent supplier and buyer on the market. JVs that take over from their parents only specific partial responsibilities are not to be considered as concentrations where they are merely auxiliaries to the commercial activities of the parent companies. This is the case where the JV supplies its products or services exclusively to its parent companies, or when it meets its own needs wholly from them. The independent market presence can even be insufficient if the JV achieves the majority of its supplies or sales with third parties, but remains substantially dependent on its parents for the maintenance and development of its business.

17. A JV exists on a lasting basis if it is intended and able to carry on its activity for an unlimited, or at least for a long, time. If this is not the case there is generally no long-term change in the structures of the parent companies. More important than the agreed duration are the human and material resources of the JV. They must be of such nature and quantity as to ensure the JV's existence and independence in the long term. This is generally the case where the parent companies invest substantial financial resources in the JV, transfer an existing undertaking or business to it, or give it substantial technical or commercial know-how, so that after an initial starting-up period it can support itself by its own means.

18. A decisive question for assessing the autonomous character of the JV is whether it is in a position to exercise its own commercial policy. This requires, within the limits of its company objects, that it plans, decides and acts independently. In particular, it must be free to determine its competitive behaviour autonomously and according to its own economic interests. If the JV depends for its business on facilities that remain economically integrated with the parent companies' businesses, that weakens the case for the autonomous nature of the JV.

19. The JV's economic independence will not be contested merely because the parent companies reserve to themselves the right to take certain decisions that are important for the development of the JV, namely those concerning alterations of the objects of the company, increases or reductions of capital, or the application of profits. However, if the commercial policy of the JV remains in the hands of the parent undertakings, the JV may take on the aspect of an instrument of the parent undertakings' market interests. Such a situation will usually exist where the JV operates in the market of the parent undertakings. It may also exist where the JV operates in markets neighbouring,

or upstream or downstream of, those of the parent undertakings.

(b) Negative condition: absence of coordination of competitive behaviour

20. Subject to what is said in paragraph 1 of this notice a JV can only be considered to be concentrative within the meaning of Article 3 (2), subparagraph 2 of the Act, if it does not have as its object or effect the coordination of the competitive behaviour of undertakings that remain independent of each other. There must not be such coordination either between the parent companies themselves or between any or all of them on the one hand and the JV on the other hand. Such coordination must not be an object of the establishment or operation of the JV, nor may it be the consequence thereof. The JV is not to be regarded as concentrative if as a result of the agreement to set up the JV or as a result of its existence or activities it is reasonably foreseeable that the competitive behaviour of a parent or of the JV on the relevant market will be influenced. Conversely, there will normally be no foreseeable coordination when all the parent companies withdraw entirely and permanently from the JV's market and do not operate on markets neighbouring those of the JV's.

21. Not every cooperation between parent companies with regard to the JV prevents a JV from being considered concentrative. Even concentrative JVs generally represent a means for parent companies to pursue common or mutually complementary interests. The establishment and joint control of a JV is, therefore, inconceivable without an understanding between the parent companies as concerns the pursuit of those interests. Irrespective of its legal form, such a concordance of interests is an essential feature of a JV..

22. As regards the relations of the parent undertakings, or any one of them, with the JV, the risk of coordination within the meaning of Article 3 (2) will not normally arise where the parent undertakings are not active in the markets of the JV or in neighbouring or upstream or downstream markets. In other cases, the risk of coordination will be relatively small where the parents limit the influence they exercise to the JV's strategic decisions, such as those concerning the future direction of investment, and when they express their financial, rather than their market-oriented, interests. The membership of the JV's managing and supervisory bodies is also important. Common membership of the JV's and the parent companies' decision-making bodies may be an obstacle to the development of the JV's autonomous commercial policy.

23. The dividing line between the concordance of interests in a JV and a coordination of competitive behaviour that is incompatible with the notion of concentration cannot be laid down for all conceivable kinds of case. The decisive factor is not the legal form of the relationship between the parent companies and between them and the JV. The direct or indirect, actual or potential effects of the establishment and operation of the JV on market relationships, have determinant importance.

24. In assessing the likelihood of coordination of competitive behaviour, it is useful to consider some of the different situations which often occur:

- (a) JVs that take over pre-existing activities of the parent companies;
- (b) JVs that undertake new activities on behalf of the parent companies;
- (c) JVs that enter the parent companies' markets;
- (d) JVs that enter upstream, downstream or neighbouring markets.

- (a) JVs that take over pre-existing activities of the parent companies

25. There is normally no risk of coordination where the parent companies transfer the whole of certain business activities to the JV and withdraw permanently from the JV's market so that they remain neither actual nor potential competitors — of each other nor of the JV. In this context, the notion of potential competition is to be interpreted realistically, according to established practice⁽¹⁾. A presumption of a competitive relationship requires not only that one or more of the parent companies could re-enter the JV's market at any time: this must be a realistic option and represent a commercially reasonable course in the light of all objective circumstances.

26. Where the parent companies transfer their entire business activities to the JV, and thereafter act only as holding companies, this amounts to complete merger from the economic viewpoint.

27. Where the JV takes on only some of the activities that the parent companies formerly carried on independently, this can also amount to a concentration. In this case, the establishment and operation of the JV must not lead to a coordination of the parent companies' competitive behaviour in relation to other activities which they retain. Coordination of competitive behaviour between any or all of the parent companies and the JV must also be excluded. Such coordination is likely where there are close economic links between the areas of activity of the JV on one side and of the parent companies on the other. This applies to upstream, downstream and neighbouring product markets.

28. The withdrawal of the parent companies need not be simultaneous with the establishment of the JV. It is possible — so far as necessary — to allow the parent companies a short transitional period to overcome any starting-up problems of the JV, especially bottlenecks in production or supplies. This period should not normally exceed one year.

29. It is even possible for the establishment of a JV to represent a concentration situation where the parent companies remain permanently active on the JV's product or service market. In this case, however, the parent companies' geographic market must be different from that of the JV. Moreover, the markets in question must be so widely separated, or must present structures so different, that, taking account of the nature

of the goods or services concerned and of the cost of (first or renewed) entry by either into the other's market, competitive interaction may be excluded.

30. If the parent companies' markets and the JV's are in different parts of the territory covered by the EEA Agreement or neighbouring third countries, there is a degree of probability that either, if it has the necessary human and material resources, could extend its activities from the one market to the other. Where the territories are adjacent or very close to each other, this may even be assumed to be the case. At least in this last case, the actual allocation of markets gives reason to suppose that it follows from a coordination of competition behaviour between parent companies and the JV.

- (b) JVs that undertake new activities on behalf of the parent companies

31. There is normally no risk of coordination in the sense described above where the JV operates on a product or service market which the parent companies individually have not entered and will not enter in the foreseeable future, because they lack the organizational, technical or financial means or because, in the light of all the objective circumstances, such a move would not represent a commercially reasonable course. An individual market entry will also be unlikely where, after establishing the JV, the parent companies no longer have the means to make new investments in the same field, or where an additional individual operation on the JV's market would not make commercial sense. In both cases there is no competitive relationship between the parent companies and the JV. Consequently, there is no possibility of coordination of their competitive behaviour. However, this assessment is only true if the JV's market is neither upstream nor downstream of, nor neighbouring, that of the parent companies.

32. The establishment of a JV to operate in the same product or service market as the parent companies but in another geographic market involves the risk of coordination if there is competitive interaction between the parent companies' geographic market and that of the JV.

- (c) JVs that enter the parent companies' market

33. Where the parent companies, or one of them, remain active on the JV's market or remain potential competitors of the JV, a coordination of competitive behaviour between the parent companies or between them and the JV must be presumed. So long as this presumption is not rebutted, the EFTA Surveillance Authority will take it that the establishment of the JV does not fall within Article 3 (2), subparagraph 2 of the Act.

- (d) JVs that operate in upstream, downstream or neighbouring markets

34. If the JV is operating in a market that is upstream or downstream of that of the parent companies, then, in general, coordination of purchasing or, as the case may be, sales policy

⁽¹⁾ See the Thirteenth report by the Commission of the European Communities (1983) on competition policy, point 55.

between the parent companies is likely where they are competitors on the upstream or downstream market.

35. If the parent companies are not competitors, it remains to be examined whether there is a real risk of coordination of competitive behaviour between the JV and any of the parents. This will normally be the case where the JV's sales or purchases are made in substantial measure with the parent companies.

36. It is not possible to lay down general principles regarding the likelihood of coordination of competitive behaviour in cases where the parent companies and the JV are active in neighbouring markets. The outcome will depend in particular on whether the JV's and the parent companies' products are technically or economically linked, whether they are both components of another product or are otherwise mutually complementary, and whether the parent companies could realistically enter the JV's market. If there are no concrete opportunities for competitive interaction of this kind, the EFTA Surveillance Authority will treat the JV as concentrative.

III. Other links between undertakings

A. Minority shareholdings

37. The taking of a minority shareholding in an undertaking can be considered a concentration within the meaning of Article 3 (1) (b) of the Act if the new shareholder acquires the possibility of exercising a decisive influence on the undertaking's activity. If the acquisition of a minority shareholding brings about a situation in which there is an undertaking jointly controlled by two or more others, the principles described above in relation to JVs apply.

38. As long as the threshold of individual or joint decisive influence has not been reached, the Act is not in any event applicable. Accordingly, the assessment under competition law will be made only in relation to the criteria laid down in Articles 53 and 54 of the EEA Agreement and on the basis of the usual procedural rules for restrictive practices and abuses of dominant position⁽¹⁾.

39. There may likewise be a risk of coordination where an undertaking acquires a majority or minority interest in another in which a competitor already has a minority interest. If so, this acquisition will be assessed under Articles 53 and 54 of the EEA Agreement.

B. Cross-shareholding

40. In order to bring their autonomous and hitherto separate undertakings or groups closer together, company owners often cause them to exchange shareholdings in each other. Such reciprocal influences can serve to establish or to secure industrial or commercial cooperation between the undertakings or groups. But they may also result in establishing a 'single economic entity'. In the first case, the coordination of competitive behaviour between independent undertakings is predominant; in

the second, the result may be a concentration. Consequently, reciprocal directorships and cross-shareholdings can only be evaluated in relation to their foreseeable effects in each case.

41. The EFTA Surveillance Authority considers that two or more undertakings can also combine without setting up a parent-subsidiary relationship and without either losing its legal personality. Article 3 (1) of the Act refers not only to legal, but also to economic concentrations. The condition for the recognition of a concentration in the form of a combined group is, however, that the undertakings or groups concerned are not only subject to permanent, single economic management, but are also amalgamated into a genuine economic unit, characterized internally by profit and loss compensation between the various undertakings within the groups and externally by joint liability.

C. Representation on controlling bodies of other undertakings

42. Common membership of managing or supervisory boards of various undertakings is to be assessed in accordance with the same principles as cross-shareholdings.

43. The representation of one undertaking on the decision-making bodies of another is usually the consequence of an existing shareholding. It reinforces the influence of the investing undertaking over the activities of the undertaking in which it holds a share, because it affords it the opportunity of obtaining information on the activities of a competitor or of taking an active part in its commercial decisions.

44. Thus, common membership of the respective boards may be the vehicle for the coordination of the competitive behaviour of the undertakings concerned, or for a concentration of undertakings within the meaning of the Act. This will depend on the circumstances of the individual case, among which the economic link between the shareholding and the personal connection must always be examined. This is equally true of unilateral and reciprocal relationships between undertakings.

45. Personal connections not accompanied by shareholdings are to be judged according to the same criteria as shareholding relationships between undertakings. A majority of seats on the managing or supervisory board of an undertaking will normally imply control of the latter; a minority of seats at least a degree of influence over its commercial policy, which may further entail a coordination of behaviour. Reciprocal connections justify a presumption that the undertakings concerned are coordinating their business conduct. A very wide communality of membership of the respective decision-making bodies — that is, up to half of the members or more — may be an indication of a concentration.

D. Transfers of undertakings or parts of undertakings

46. A transfer of assets or shares falls within the definition of a concentration, according to Article 3 (1) (b) of the Act, if it results in the acquirer gaining control of all or of part of one or more undertakings. However, the situation is different where the

⁽¹⁾ Reference is made to the judgment of the Court of Justice of the European Communities in Joined Cases 142 and 156/84 BAT and Reynolds, ECR [1987], p. 4566.

transfer conferring control over part of an undertaking is linked with an agreement to coordinate the competitive behaviour of the undertakings concerned, or where it necessarily leads to or is accompanied by coordination of the business conduct of undertakings which remain independent. Cases of this kind are not covered by the Act; they must be examined according to Articles 53 and 54 of the EEA Agreement and under the appropriate implementing acts.

47. The practical application of this rule requires a distinction between unilateral and reciprocal arrangements. A unilateral acquisition of assets or shares strongly suggests that the Act is applicable. The contrary needs to be demonstrated by clear evidence of the likelihood of coordination of the parties' competitive behaviour. A reciprocal acquisition of assets or shares, by contrast, will usually follow from an agreement between the undertakings concerned as to their investments, production or sales, and thus serves to coordinate their competitive behaviour. A concentration situation does not exist

where a reciprocal transfer of assets or shares forms part of a specialization or restructuring agreement or other type of coordination. Coordination presupposes in any event that the parties remain at least potential competitors after the exchange has taken place.

E. Joint acquisition of an undertaking with a view to its division

48. Where several undertakings jointly acquire another, the principles for the assessment of a joint venture are applicable, provided that within the acquisition operation, the period of joint control goes beyond the very short term. In this case the Act may or may not be applicable, depending on the concentrative or cooperative nature of the JV. If, by contrast, the sole object of the agreement is to divide up the assets of the undertaking and this agreement is put into effect immediately after the acquisition, then, in accordance with recital 24, the Act applies.

ANNEX III

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY CONCERNING THE ACTS REFERRED TO
IN POINTS 2 AND 3 OF ANNEX XIV TO THE EEA AGREEMENT (COMMISSION REGULATIONS
(EEC) No 1983/83 AND (EEC) No 1984/83) ON THE APPLICATION OF ARTICLE 53 (3) OF THE
EEA AGREEMENT TO CATEGORIES OF EXCLUSIVE DISTRIBUTION AND EXCLUSIVE
PURCHASING AGREEMENTS

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements referred to in point 18 of Annex XIV to the EEA Agreement and, respectively, point 3 of Annex II to the Surveillance and Court Agreement.

I. Introduction

1. A certain amount of interpretative guidance is called for concerning the acts referred to in points 2 and 3 of Annex XIV to the EEA Agreement (Regulations (EEC) No 1983/83 and (EEC) No 1984/83, hereinafter referred to as 'Regulation (EEC) No 1983/83' and 'Regulation (EEC) No 1984/83'). This will assist undertakings in bringing their agreements into line with the legal requirements and will also help ensure that the said acts are applied uniformly in the territory covered by the EEA Agreement.

2. In determining how a given provision is to be applied, one must take into account, in addition to the ordinary meaning of the words used, the intention of the provision as this emerges from the preamble. For further guidance, reference can also be made to the principles that have been evolved in the case-law of the Court of Justice of the European Communities and in the EC Commission's decisions on individual cases.

3. This notice sets out the main consideration which will determine the view of the EFTA Surveillance Authority of whether or not an exclusive distribution or purchasing agreement is covered by the block exemption. This notice is

without prejudice to any interpretation that may be given by other competent authorities, and in particular by the national courts and the EFTA Court.

II. Exclusive distribution and exclusive purchasing agreements (Regulations (EEC) No 1983/83 and (EEC) No 1984/83)

A. Similarities and differences

4. The said acts are both concerned with exclusive agreements between two undertakings for the purpose of the resale of goods. Each deals with a particular type of such agreements. Regulation (EEC) No 1983/83 applies to exclusive distribution agreements, Regulation (EEC) No 1984/83 to exclusive purchasing agreements. The distinguishing feature of exclusive distribution agreements is that one party, the supplier, allots to the other, the reseller, a defined territory (the contract territory) on which the reseller has to concentrate his sales effort, and in return undertakes not to supply any other reseller in that territory. In exclusive purchasing agreements, the reseller agrees to purchase the contract goods only from the other party and not from any other supplier. The supplier is entitled to supply other resellers in the same sales area and at the same level of distribution. Unlike an exclusive distributor, the tied reseller is not protected against competition from other resellers who, like himself, receive the contract goods direct from the supplier. On

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

the other hand, he is free of restrictions as to the area over which he may make his sales effort.

5. In keeping with their common starting point, the said acts have many provisions that are the same or similar in both acts. This is true of the basic provision in Article 1, in which the respective subject-matters of the block exemption, the exclusive supply or purchasing obligation, are defined, and of the exhaustive list of restrictions of competition which may be agreed in addition to the exclusive supply or purchasing obligation (Article 2 (1) and (2)), the non-exhaustive enumerations of other obligations which do not prejudice the block exemption (Article 2 (3)), the inapplicability of the block exemption in principle to exclusive agreements between competing manufacturers (Articles 3 (a) and (b), 4 and 5), the withdrawal of the block exemption in individual cases (Article 6 of Regulation (EEC) No 1983/83 and Article 14 of Regulation (EEC) No 1984/83), and the inclusion of concerted practices within the scope of the said acts (Article 9 of Regulation (EEC) No 1983/83 and Article 18 of Regulation (EEC) No 1984/83). In so far as their wording permits, these parallel provisions are to be interpreted in the same way.

6. Different rules are laid down in the said acts wherever they need to take account of matters which are peculiar to the exclusive distribution agreements or exclusive purchasing agreements respectively. This applies in Regulation (EEC) No 1983/83, to the provisions regarding the obligation on the exclusive distributor not actively to promote sales outside the contract territory (Article 2 (2) (c)) and the inapplicability of the block exemption to agreements which give the exclusive distributor absolute territorial protection (Article 3 (c) and (d)) and, in Regulation (EEC) No 1984/83, to the provisions limiting the scope and duration of the block exemption for exclusive purchasing agreements in general (Article 3 (c) and (d)) and for beer-supply and service-station agreements in particular (Titles II and III).

7. The scope of the two acts has been defined so as to avoid any overlap (Article 16 of Regulation (EEC) No 1984/83).

B. Basic provision (Article 1)

8. Both acts apply only to agreements entered into for the purpose of the resale of goods to which not more than two undertakings are party.

(a) 'For resale'

9. The notion of resale requires that the goods concerned be disposed of by the purchasing party to others in return for a consideration. Agreements on the supply or purchase of goods which the purchasing party transforms or processes into other goods or uses or consumes in manufacturing other goods are not agreements for resale. The same applies to the supply of components which are combined with other components into a different product. The criterion is that the goods distributed by the reseller are the same as those the other party has supplied to him for that purpose. The economic identity of the goods is not affected if the reseller merely breaks up and packages the goods in smaller quantities, or repackages them, before resale.

10. Where the reseller performs additional operations to improve the quality, durability, appearance or taste of the goods (such as rustproofing of metals, sterilization of food or the addition of colouring matter or flavourings to drugs), the position will mainly depend on how much value the operation adds to the goods. Only a slight addition in value can be taken not to change the economic identity of the goods. In determining the precise dividing line in individual cases, trade usage in particular must be considered. The EFTA Surveillance Authority applies the same principles to agreements under which the reseller is supplied with a concentrated extract for a drink which he has to dilute with water, pure alcohol or another liquid and to bottle before reselling.

(b) 'Goods'

11. Exclusive agreements for the supply of services rather than the resale of goods are not covered by the acts. The block exemption still applies, however, where the reseller provides customer or after-sales services incidentally to the resale of the goods. Nevertheless, a case where the charge for the service is higher than the price of the goods would fall outside the scope of the acts.

12. The hiring out of goods in return for payment comes closer, economically speaking, to a resale of goods than to provision of services. The EFTA Surveillance Authority therefore regards exclusive agreements under which the purchasing party hires out or leases to others the goods supplied to him as covered by the acts.

(c) 'Only two undertakings party'

13. To be covered by the block exemption, the exclusive distribution or purchasing agreement must be between only one supplier and one reseller in each case. Several undertakings forming one economic unit count as one undertaking.

14. This limitation on the number of undertakings that may be party relates solely to the individual agreement. A supplier does not lose the benefit of the block exemption if he enters into exclusive distribution or purchasing agreements covering the same goods with several resellers.

15. The supplier may delegate the performance of his contractual obligations to a connected or independent undertaking which he has entrusted with the distribution of his goods, so that the reseller has to purchase the contract goods from the latter undertaking. This principle is expressly mentioned only in Regulation (EEC) No 1984/83 (Articles 1, 6 and 10), because the question of delegation arises mainly in connection with exclusive purchasing agreements. It also applies, however, to exclusive distribution agreements pursuant to Regulation (EEC) No 1983/83.

16. The involvement of undertakings other than the contracting parties must be confined to the execution of deliveries. The parties may accept exclusive supply or purchase obligations only for themselves, and not impose them on third parties, since otherwise more than two undertakings would be party to the agreement. The obligation of the parties to ensure

that the obligations they have accepted are respected by connected undertakings is, however, covered by the block exemption.

*C. Other restrictions on competition that are exempted
(Article 2 (1) and (2))*

17. Apart from the exclusive supply obligation (Regulation (EEC) No 1983/83) or exclusive purchase obligation (Regulation (EEC) No 1984/83), obligations defined in Article 1 which must be present if the block exemption is to apply, the only other restrictions of competition that may be agreed by the parties are those set out in Article 2 (1) and (2). If they agree on further obligations restrictive of competition, the agreement as a whole is no longer covered by the block exemption and requires individual exemption. For example, an agreement will exceed the bounds of the said acts if the parties relinquish the possibility of independently determining their prices or conditions of business or undertake to refrain from, or even prevent, cross-border trade, which the said acts expressly state must not be impeded. Among other clauses which in general are not permissible under the said acts are those which impede the reseller in his free choice of customers.

18. The obligations restrictive of competition that are exempted may be agreed only for the duration of the agreement. This also applies to restrictions accepted by the supplier or reseller on competing with the other party.

D. Obligations upon the reseller which do not prejudice the block exemption (Article 2 (3))

19. The obligations cited in this provision are examples of clauses which generally do not restrict competition. Undertakings are therefore free to include one, several or all of these obligations in their agreements. However, the obligations may not be formulated or applied in such a way as to take on the character of restrictions of competition that are not permitted. To forestall this danger, Article 2 (3) (b) of Regulation (EEC) No 1984/83 expressly allows minimum purchase obligations only for goods that are subject to an exclusive purchasing obligation.

20. As part of the obligation to take measures for promotion of sales and in particular to maintain a distribution network (Article 2 (3) (c) of Regulation (EEC) No 1983/83 and Article 2 (3) (d) of Regulation (EEC) No 1984/83), the reseller may be forbidden to supply the contract goods to unsuitable dealers. Such clauses are unobjectionable if admission to the distribution network is based on objective criteria of a qualitative nature relating to the professional qualifications of the owner of the business or his staff or the suitability of his business premises, if the criteria are the same for all potential dealers, and if the criteria are actually applied in a non-discriminatory manner. Distribution systems which do not fulfil these conditions are not covered by the block exemption.

E. Inapplicability of the block exemption to exclusive agreements between competing manufacturers (Articles 3 (a) and (b), 4 and 5)

21. The block exemption does not apply if either the parties themselves or undertakings connected with them are manufacturers, manufacture goods belonging to the same

product market, and enter into exclusive distribution or purchasing agreements with one another in respect of those goods. Only identical or equivalent goods are regarded as belonging to the same product market. The goods in question must be interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price and intended use of the goods together. In certain cases, however, goods can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed. The above provisions are applicable regardless of whether or not the parties or the undertakings connected with them are based in the territory covered by the EEA Agreement and whether or not they are already actually in competition with one another in the relevant goods inside or outside the territory covered by the EEA Agreement.

22. In principle, both reciprocal and non-reciprocal exclusive agreements between competing manufacturers are not covered by the block exemption and are therefore subject to individual scrutiny of their compatibility with Article 53 of the EEA Agreement, but there is an exception for non-reciprocal agreements of the abovementioned kind where one or both of the parties are undertakings with a total annual turnover of no more than ECU 100 million ⁽¹⁾ (Article 3 (b)). Annual turnover is used as a measure of the economic strength of the undertakings involved. Therefore, the aggregate turnover from goods and services of all types, and not only from the contract goods, is to be taken. Turnover taxes and other turnover-related levies are not included in turnover. Where a party belongs to a group of connected undertakings, the world-wide turnover of the group, excluding intra-group sales (Article 5 (3)), is to be used.

23. The total turnover limit can be exceeded during any period of two successive financial years by up to 10% without loss of the block exemption. The block exemption is lost if, at the end of the second financial year, the total turnover over the preceding two years has been over ECU 220 million (Article 5 (2)).

F. Withdrawal of the block exemption in individual cases (Article 6 of Regulation (EEC) No 1983/83 and Article 14 of Regulation (EEC) No 1984/83)

24. The benefit of the block exemption can only be withdrawn by a decision in an individual case following proceedings under Chapter II of Protocol 4 to the Surveillance and Court Agreement. Such a decision cannot have retroactive effect. It may be coupled with an individual exemption subject to conditions or obligations or, in an extreme case, with the finding of an infringement and an order to bring it to an end.

G. (no text) ⁽²⁾

25. (no text) ⁽³⁾

⁽¹⁾ For the purpose of this notice 'ecu' means the European currency unit as defined in Council Regulation (EEC) No 3180/78. The value of the ecu is published daily in the 'C' series of the *Official Journal of the European Communities*.

⁽²⁾ Point G has no text since it, in the corresponding EC notices, deals with Article 7 of Regulation (EEC) No 1983/83 and Article 15 of Regulation (EEC) No 1984/83, which shall not apply, as stated in Annex XIV to the EEA Agreement.

⁽³⁾ See footnote 2.

H. Concerted practices (Article 9 of Regulation (EEC) No 1983/83 and Article 18 of Regulation (EEC) No 1984/83)

26. These provisions bring within the scope of the said acts exclusive distribution and purchasing arrangements which are operated by undertakings but are not the subject of a legally binding agreement.

III. Exclusive distribution agreements (Regulation (EEC) No 1983/83)

A. Exclusive supply obligation (Article 1)

27. The exclusive supply obligation does not prevent the supplier from providing the contract goods to other resellers who afterwards sell them in the exclusive distributor's territory. It makes no difference whether the other dealers concerned are established outside or inside the territory. The supplier is not in breach of his obligation to the exclusive distributor provided that he supplies the resellers who wish to sell the contract goods in the territory only at their request and that the goods are handed over outside the territory. It does not matter whether the reseller takes delivery of the goods himself or through an intermediary, such as a freight forwarder. However, supplies of this nature are only permissible if the reseller and not the supplier pays the transport costs of the goods into the contract territory.

28. The goods supplied to the exclusive distributor must be intended for resale in the contract territory. This basic requirement does not, however, mean that the exclusive distributor cannot sell the contract goods to customers outside his contract territory should he receive orders from them. Pursuant to Article 2 (2) (c), the supplier can prohibit him only from seeking customers in other areas, but not from supplying them.

29. It would also be incompatible with Regulation (EEC) No 1983/83 for the exclusive distributor to be restricted to supplying only certain categories of customers (e.g. specialist retailers) in his contract territory and prohibited from supplying other categories (e.g. department stores), which are supplied by other resellers appointed by the supplier for that purpose.

B. Restriction on competition by the supplier (Article 2 (1))

30. The restriction on the supplier himself supplying the contract goods to final users in the exclusive distributor's contract territory need not be absolute. Clauses permitting the supplier to supply certain customers in the territory — with or without payment of compensation to the exclusive distributor — are compatible with the block exemption provided the customers in question are not resellers. The supplier remains free to supply the contract goods outside the contract territory to final users based in the territory. In this case the position is the same as for dealers (see paragraph 27).

C. Inapplicability of the block exemption in cases of absolute territorial protection (Article 3 (c) and (d))

31. The block exemption cannot be claimed for agreements that give the exclusive distributor absolute territorial protection. If the situation described in Article 3 (c) obtains, the parties

must ensure either that the contract goods can be sold in the contract territory by parallel importers or that users have a real possibility of obtaining them from undertakings outside the contract territory, if necessary outside the territory covered by the EEA Agreement, at the prices and on the terms there prevailing. The supplier can represent an alternative source of supply for the purposes of this provision if he is prepared to supply the contract goods on request to final users located in the contract territory.

32. Article 3 (d) is chiefly intended to safeguard the freedom of dealers and users to obtain the contract goods in other EFTA States or EC Member States. Action to impede imports into the territory covered by the EEA Agreement from third countries will only lead to loss of the block exemption if there are no alternative sources of supply in the territory covered by the EEA Agreement. This situation can arise especially where the exclusive distributor's contract territory covers the whole or the major part of the territory covered by the EEA Agreement.

33. The block exemption ceases to apply as from the moment that either of the parties takes measures to impede parallel imports into the contract territory. Agreements in which the supplier undertakes with the exclusive distributor to prevent his other customers from supplying into the contract territory are ineligible for the block exemption from the outset. This is true even if the parties agree only to prevent imports into the territory covered by the EEA Agreement from third countries. In this case it is immaterial whether or not there are alternative sources of supply in the territory covered by the EEA Agreement. The inapplicability of the block exemption follows from the mere fact that the agreement contains restrictions on competition which are not covered by Article 2 (1).

IV. Exclusive purchasing agreements (Regulation (EEC) No 1984/83)

A. Structure of the act

34. Title I of the act contains general provisions for exclusive purchasing agreements and Titles II and III special provisions for beer-supply and service-station agreements. The latter types of agreement are governed exclusively by the special provisions, some of which (Articles 9 and 13), however, refer to some of the general provisions; Article 17 also excludes the combination of agreements of the kind referred to in Title I with those of the kind referred to in Title II or III to which the same undertakings or undertakings connected with them are party. To prevent any avoidance of the special provisions for beer-supply and service-station agreements, it is also made clear that the provisions governing the exclusive distribution of goods do not apply to agreements entered into for the resale of drinks on premises used for the sale or consumption of beer or for the resale of petroleum products in service stations (Article 8 of Regulation (EEC) No 1983/83).

B. Exclusive purchasing obligation (Article 1)

35. The act only covers agreements whereby the reseller agrees to purchase all his requirements for the contract goods from the other party. If the purchasing obligation relates to only part of such requirements, the block exemption does not apply. Clauses which allow the reseller to obtain the contract goods from other suppliers, should these sell them more cheaply or on

more favourable terms than the other party are still covered by the block exemption. The same applies to clauses releasing the reseller from his exclusive purchasing obligation should the other party be unable to supply.

36. The contract goods must be specified by brand or denomination in the agreement. Only if this is done will it be possible to determine the precise scope of the reseller's exclusive purchasing obligation (Article 1) and of the ban on dealing in competing products (Article 2 (2)).

C. Restriction on competition by the supplier (Article 2 (1))

37. This provision allows the reseller to protect himself against direct competition from the supplier in his principal sales area. The reseller's principal sales area is determined by his normal business activity. It may be more closely defined in the agreement. However, the supplier cannot be forbidden to supply dealers who obtain the contract goods outside this area and afterwards resell them to customers inside it or to appoint other resellers in the area.

D. Limits of the block exemption (Article 3 (c) and (d))

38. Article 3 (c) provides that the exclusive purchasing obligation can be agreed for one or more products, but in the latter case the products must be so related as to be thought of as belonging to the same range of goods. The relationship can be founded on technical (e.g. a machine, accessories and spare parts for it) or commercial grounds (e.g. several products used for the same purpose) or on usage in the trade (different goods that are customarily offered for sale together). In the latter case, regard must be had to the usual practice at the reseller's level of distribution on the relevant market, taking into account all relevant dealers and not only particular forms of distribution. Exclusive purchasing agreements covering goods which do not belong together can only be exempted from the competition rules by an individual decision.

39. Pursuant to Article 3 (d), exclusive purchasing agreements concluded for an indefinite period are not covered by the block exemption. Agreements which specify a fixed term but are automatically renewable unless one of the parties gives notice to terminate are to be considered to have been concluded for an indefinite period.

V. Beer-supply agreements (Title II of Regulation (EEC) No 1984/83)

A. Exclusive purchasing obligation (Article 6)

40. The beers and other drinks covered by the exclusive purchasing obligation must be specified by brand or denomination in the agreement. An exclusive purchasing obligation can only be imposed on the reseller for drinks which the supplier carries at the time the contract takes effect and provided that they are supplied in the quantities required, at sufficiently regular intervals and at prices and on conditions allowing normal sales to the consumer. Any extension of the exclusive purchasing obligation to drinks not specified in the agreement requires an additional agreement, which must likewise

satisfy the requirements of Title II of Regulation (EEC) No 1984/83. A change in the brand or denomination of a drink which in other respects remains unchanged does not constitute such an extension of the exclusive purchasing obligation.

41. The exclusive purchasing obligation can be agreed in respect of one or more premises used for sale and consumption of drinks which the reseller runs at the time the contract takes effect. The name and location of the premises must be stated in the agreement. Any extension of the exclusive purchasing obligation to other such premises requires an additional agreement, which must likewise satisfy the provisions of Title II of Regulation (EEC) No 1984/83.

42. The concept of 'premises used for the sale and consumption of drinks' covers any licensed premises used for this purpose. Private clubs are also included. Exclusive purchasing agreements between the supplier and the operator of an off-licence shop are governed by the provisions of Title I of Regulation (EEC) No 1984/83.

43. Special commercial or financial advantages are those going beyond what the reseller could normally expect under an agreement. The explanations given in recital 13 are illustrations. Whether or not the supplier is affording the reseller special advantages depends on the nature, extent and duration of the obligation undertaken by the parties. In doubtful cases usage in the trade is the decisive element.

44. The reseller can enter into exclusive purchasing obligations both with a brewery in respect of beers of a certain type and with a drinks wholesaler in respect of beers of another type and/or other drinks. The two agreements can be combined into one document. Article 6 also covers cases where the drinks wholesaler performs several functions at once, signing the first agreement on the brewery's and the second on his own behalf and also undertaking delivery of all the drinks. The provisions of Title II do not apply to the contractual relations between the brewery and the drinks wholesaler.

45. Article 6 (2) makes the block exemption also applicable to cases in which the supplier affords the owner of premises financial or other help in equipping them as a public house, restaurant, etc. and in return the owner imposes on the buyer or tenant of the premises an exclusive purchasing obligation in favour of the supplier. A similar situation, economically speaking, is the transmission of an exclusive purchasing obligation from the owner of a public house to his successor. Pursuant to Article 8 (1) (e) this is also, in principle, permissible.

B. Other restrictions of competition that are exempted (Article 7)

46. The list of permitted obligations given in Article 7 is exhaustive. If any further obligations restricting competition are imposed on the reseller, the exclusive purchasing agreement as a whole is no longer covered by the block exemption.

47. The obligation referred to in paragraph 1 (a) applies only so long as the supplier is able to supply the beers or other drinks specified in the agreement and subject to the exclusive purchasing obligation in sufficient quantities to cover the demand the reseller anticipates for the products from his customers.

48. Pursuant to paragraph 1 (b), the reseller is entitled to sell beer of other types in draught form if the other party has tolerated this in the past. If this is not the case, the reseller must indicate that there is sufficient demand from his customers to warrant the sale of other draught beers. The demand must be deemed sufficient if it can be satisfied without a simultaneous drop in sales of the beers specified in the exclusive purchasing agreement. It is definitely not sufficient if sales of the additional draught beer turn out to be so slow that there is a danger of its quality deteriorating. It is for the reseller to assess the potential demand of his customers for other types of beer, after all, he bears the risk if his forecasts are wrong.

49. The provision in paragraph 1 (c) is not only intended to ensure the possibility of advertising products supplied by other undertakings to the minimum extent necessary in any given circumstances. The advertising of such products should also reflect their relative importance *vis-à-vis* the competing products of the supplier who is party to the exclusive purchasing agreement. Advertising for products which the public house has just begun to sell may not be excluded or unduly impeded.

50. The EFTA Surveillance Authority believes that the designation of types customary in inter-State trade and within the individual EFTA States or EC Member States may afford useful pointers to the interpretation of Article 7 (2). Nevertheless the alternative criteria stated in the provisions itself are decisive. In doubtful cases, whether or not two beers are clearly distinguishable by their composition, appearance or taste depends on custom at the place where the public house is situated. The parties may, if they wish, jointly appoint an expert to decide the matter.

C. Agreements excluded from the block exemption (Article 8)

51. The reseller's right to purchase drinks from third parties may be restricted only to the extent allowed by Articles 6 and 7. In his purchases of goods other than drinks and in his procurement of services which are not directly connected with the supply of drinks by the other party, the reseller must remain free to choose his supplier. Pursuant to Article 8 (1) (a) and (b), any action by the other party or by an undertaking connected with or appointed by him or acting at his instigation or with his agreement to prevent the reseller exercising his rights in this regard will entail the loss of the block exemption. For the purposes of these provisions it makes no difference whether the reseller's freedom is restricted by contract, informal understanding, economic pressures or other practical measures.

52. The installation of amusement machines in tenanted public houses may by agreement be made subject to the owner's permission. The owner may refuse permission on the ground that this would impair the character of the premises or he may restrict the tenant to particular types of machines. However, the practice of some owners of tenanted public houses to allow the tenant to conclude contracts for the installation of such machines only with certain undertakings which the owner recommends is, as a rule, incompatible with Regulation (EEC)

No 1984/83, unless the undertakings are selected on the basis of objective criteria of a qualitative nature that are the same for all potential providers of such equipment and are applied in a non-discriminatory manner. Such criteria may refer to the reliability of the undertaking and its staff and the quality of the services it provides. The supplier may not prevent a public house tenant from purchasing amusement machines rather than renting them.

53. The limitations of the duration of the agreement in Article 8 (1) (c) and (d) does not affect the parties' right to renew their agreement in accordance with the provisions of Title II of Regulation (EEC) No 1984/83.

54. Article 8 (2) (b) must be interpreted in the light both of the aims of the competition rules of the EEA Agreement and of the general legal principle whereby contracting parties must exercise their rights in good faith.

55. Whether or not a third undertaking offers certain drinks covered by the exclusive purchasing obligations on more favourable terms than the other party for the purposes of the first indent of Article 8 (2) (b) is to be judged in the first instance on the basis of a comparison of prices. This should take into account the various factors that go to determine the prices. If a more favourable offer is available and the tenant wishes to accept it, he must inform the other party of his intentions without delay so that the other party has an opportunity of matching the terms offered by the third undertaking. If the other party refuses to do so or fails to let the tenant have his decision within a short period, the tenant is entitled to purchase the drinks from the other undertaking. The EFTA Surveillance Authority will ensure that exercise of the brewery's or drinks wholesaler's right to match the prices quoted by another supplier does not make it significantly harder for other suppliers to enter the market.

56. The tenant's right provided for in the second indent of Article 8 (2) (b) to purchase drinks of another brand or denomination from third undertakings obtains in cases where the other party does not offer them. Here the tenant is not under a duty to inform the other party of his intentions.

57. The tenant's rights arising from Article 8 (2) (b) override any obligation to purchase minimum quantities imposed upon him pursuant to Article 9 in conjunction with Article 2 (3) (b) to the extent that this is necessary to allow the tenant full exercise of those rights.

VI. Service-station agreements (Title III of Regulation (EEC) No 1984/83)

A. Exclusive purchasing obligation (Article 10)

58. The exclusive purchasing obligation can cover either motor vehicle fuels (e.g. petrol, diesel fuels, LPG, kerosene) alone or motor vehicle fuels and other fuels (e.g. heating oil, bottled gas, paraffin). All the goods concerned must be petroleum-based products.

59. The motor vehicle fuels covered by the exclusive purchasing obligations must be for use in motor-powered land

or water vehicles or aircraft. The term 'service station' is to be interpreted in a correspondingly wide sense.

60. Regulation (EEC) No 1984/83 applies to petrol stations adjoining public roads and fuelling installations on private property not open to public traffic.

*B. Other restrictions on competition that are exempted
(Article 11)*

61. Pursuant to Article 11 (b) only the use of lubricants and related petroleum-based products supplied by other undertakings can be prohibited. This provision refers to the servicing and maintenance of motor vehicles, i.e. to the reseller's activity in the field of provision of services. It does not affect the reseller's

freedom to purchase the said products from other undertakings for resale in the service station. The petroleum-based products related to lubricants referred to in paragraph (b) are additives and brake fluids.

62. For the interpretation of Article 11 (c), the considerations stated in paragraph 49 apply by analogy.

*C. Agreements excluded from the block exemption
(Article 12)*

63. These provisions are analogous to those of Article 8 (1) (a), (b), (d) and (e) and 8 (2) (a).

Reference is therefore made to paragraphs 51 and 53.

ANNEX IV

**NOTICE OF THE EFTA SURVEILLANCE AUTHORITY CONCERNING THE ACT REFERRED TO
IN POINT 4 OF ANNEX XIV TO THE EEA AGREEMENT (REGULATION (EEC) No 123/85) ON
THE APPLICATION OF ARTICLE 53 (3) OF THE EEA AGREEMENT TO CERTAIN CATEGORIES
OF MOTOR VEHICLE DISTRIBUTION AND SERVICING AGREEMENTS**

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice concerning Regulation (EEC) No 123/85 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements referred to in point 19 of Annex XIV to the EEA Agreement and, respectively, point 4 of Annex II to the Surveillance and Court Agreement.
- E. In the act referred to in point 4 of Annex XIV to the EEA Agreement (Regulation (EEC) No 123/85 on the block exemption of motor vehicle distribution agreements, hereinafter referred to as 'the Act', it is recognized that exclusive and selective distribution in this industry is in principle compatible with Article 53 (3) of the EEA Agreement. This assessment is subject to a number of conditions. This notice sets out some of those conditions and lays down certain administrative principles for the procedures which the EFTA Surveillance Authority might initiate pursuant to Article 10, points 3 and 4 of the Act.

I

1. Freedom of movement of European consumers and limited availability of vehicle models

The EFTA Surveillance Authority starts from the position that the EEA Agreement affords advantages to European consumers, and that this is especially so where there is effective competition. Accordingly, the Act presupposes that in the motor vehicles sector effective competition exists between manufacturers and between their distribution networks. The European consumer must derive a fair share of the benefits which flow from the distribution and servicing agreements. Admittedly, the consumer may benefit from the fact that servicing is carried out by specialists (Article 3, points 3 and 5) and that such service can be obtained throughout the network from dealers and repairers who are obliged to observe minimum requirements (Article 4 (1)).

However, the European consumer's basic rights include above all the right to buy a motor vehicle and to have it maintained or

repaired wherever prices and quality are most advantageous to him.

- (a) This right to buy relates to new vehicles from a manufacturer each of whose dealers offers them in a form and specification mainly required by final consumers in the dealer's contract territory (contract goods).
- (b) In the interests of competition at the various stages of distribution in the territory covered by the EEA Agreement and in those of European consumers, a certain limited availability of other vehicles within the distribution system is also considered indispensable. Any dealer within the distribution system must be able to order from a supplier within the distribution system any volume-produced passenger car which a final consumer has ordered from him and intends to register in another EFTA State or Member State, in the form and specification marketed by the manufacturer or with his consent in that State (passenger cars corresponding to those in the contract programme, Article 5 (1), point 2 (d), and Article 13, point 10 of the Act.

This provision does not oblige the manufacturer to produce vehicles which he would not otherwise offer within the territory

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

covered by the EEA Agreement. Nor does it oblige the manufacturer to sell particular vehicle models in any particular part of the territory covered by the EEA Agreement where he does not, nor does not yet, wish to market them. He is only obliged to supply to a dealer within his distribution system a new passenger car required by that dealer to fulfil a contract with a final consumer and intended for another EFTA State or EC Member State where that dealer's contract programme includes cars of a corresponding kind.

2. *Abusive hindrance*

The European consumer must not be subject to abusive hindrance either in the exporting country, where he wishes to buy a vehicle, or in the country of destination, where he seeks to register it. The restrictions inherent in an exempted exclusive and selective distribution system do not represent abuses. However, further agreements or concerted practices between undertakings in the distribution system that limit the European consumer's final freedom to purchase do jeopardize the exemption given by the Act, as do unilateral measures on the part of a manufacturer or his importers or dealers which have a widespread effect against consumers' interest (Article 10, point 2). Examples are: dealers refuse to perform guarantee work on vehicles which they have not sold and which have been imported from other EFTA States or EC Member States; manufacturers or their importers withhold their cooperation in the registration of vehicles which European consumers have imported from other EFTA States or EC Member States; abnormally long delivery periods.

3. *Intermediaries*

The European consumer must be able to make use of the services of individuals or undertakings to assist in purchasing a new vehicle in another EFTA State or EC Member State (Article 3, points 10 and 11). However, except as regards contracts between dealers within the distribution system for the sale of contract goods, undertakings within the distribution system can be obliged not to supply new motor vehicles within the contract programme or corresponding vehicles to or through a third party who represents himself as an authorized reseller of new vehicles within the contract programme or corresponding vehicles or carries on an activity equivalent to that of a reseller. It is for the intermediary or the consumer to give the dealer within the distribution system documentary evidence that the intermediary, in buying and accepting delivery of a vehicle, is acting on behalf and for account of the consumer.

II.

The EFTA Surveillance Authority may withdraw the benefit of the application of the Act where it finds that in an individual case an agreement which falls within the scope of the Act nevertheless has effects which are incompatible with the provisions of Article 53 (3) of the EEA Agreement, and in particular:

- where, over a considerable period, prices or conditions of supply for contract goods or for corresponding goods are applied which differ substantially as between EFTA States

and/or EC Member States, and such substantial differences are chiefly due to obligations exempted by the Act,

- where, in agreements concerning the supply to the dealer of passenger cars which correspond to a model within the contract programme, prices or conditions which are not objectively justifiable are applied, with the object or effect of partitioning the market covered by the EEA Agreement (Article 10, point 4).

The EFTA Surveillance Authority may pursue such proceedings in individual cases, upon application (particularly on the basis of complaints from consumers) or on its own initiative, in accordance with the procedural rules laid down in Chapters II and IV of Protocol 4 to the Surveillance and Court Agreement, under which the parties concerned must be informed of the objections raised and given an opportunity to respond to them before the EFTA Surveillance Authority adopts a decision. Whether the EFTA Surveillance Authority initiates such proceedings depends chiefly on the results of preliminary inquiries, the circumstances of the case and the degree of prejudice to the public interest.

Price differentials for motor vehicles as between EFTA States and/or EC Member States are to a certain extent a reflection of the particular play of supply and demand in the areas concerned. Substantial price differences generally give reason to suspect that national measures or private restrictive practices are behind them.

For the time being certain circumstances will not of themselves justify an investigation of whether an agreement exempted by the Act is incompatible with the conditions of Article 53 (3) of the EEA Agreement. For the time being, the EFTA Surveillance Authority does not propose to carry out investigations into private practices under Article 10, points 3 or 4 of the Act where the following circumstances obtain (this does not exclude intervention by the EFTA Surveillance Authority in particular cases).

1. Price differentials between EFTA States or EC Member States (Article 10, point 3 in association with Article 13, point 11)

Recommended net prices for resale to final consumers (list prices) of a motor vehicle within the contract programme in one EFTA State or EC Member State and of the same or a corresponding motor vehicle in another State differ, and:

- (a) the difference expressed in ecu⁽¹⁾ does not exceed 12 % of the lower price, or, over a period of less than one year, exceeds that percentage either:
 - by not more than a further 6 % of the list price, or
 - only in respect of an insignificant portion of the motor vehicles within the contract programme; or
- (b) the difference is to be attributed, following analysis of the objective data, to the fact that:

⁽¹⁾ For the purpose of this notice 'ecu' means the European currency unit as defined in Council Regulation (EEC) No 3180/78. The value of the ecu is published daily in the 'C' series of the *Official Journal of the European Communities*.

- the purchaser of the vehicle in one of those EFTA States or EC Member States must pay taxes, charges or fees amounting in total to more than 100% of the net price,
- or
- the freedom to set the price or margin for the resale of the vehicles is directly or indirectly subject in one of those EFTA States or EC Member States to restriction by national measures lasting longer than one year;

and that such measures do not represent infringements of the EEA Agreement.

In so far as they are public knowledge, prices net of discounts shall replace recommended net prices. Particular account will be taken, for an appropriate period, of alterations of the parities within the European monetary system or fluctuations in exchange rates in an EFTA State or EC Member State.

2. Price differentials between passenger cars within the contract programme and corresponding cars (Article 10, point 4 in association with Article 5 (1), point 2 (d) and Article 13, point 10)

When selling to a dealer a passenger car corresponding to a model within the contract programme, the supplier charges an objectively justifiable supplement on account of special distribution costs and any differences in equipment and specification.

In an EFTA State or EC Member State where pricing is affected in the manner described at II.1 (b), the supplier charges a further supplement, however, he does not exceed the price which would be charged in similar cases in that State not subject to such

effects in which the lowest price net of tax is recommended for the sale to a final consumer of that vehicle within the contract programme (or, as the case may be, of a corresponding vehicle).

3. Where the limits indicated above are exceeded, the EFTA Surveillance Authority may open a procedure on its own initiative under Article 10, points 3 and 4 of the Act. Whether it does so or not will depend mainly on the results of investigations that may be made as to whether the exempted agreement is in fact the principal cause of actual price differences in the meaning of Article 10, point 3 or 4 or, as the case may be, has led to a partitioning of the market covered by the EEA Agreement or is, in the light of experience, liable to do so. Price comparisons made in this connection will take account of differences in equipment and specification and in ancillary items such as the extent of the guarantee, delivery services or registration formalities.

III

1. The rights of EFTA States, persons and associations of persons to make applications to the EFTA Surveillance Authority pursuant to Article 3 of Chapter II of Protocol IV to the Surveillance and Court Agreement (i.e. complaints) are unaffected. The EFTA Surveillance Authority will examine such complaints with all due diligence.

2. This notice is without prejudice to any interpretation that may be given by other competent authorities, and in particular by the national courts and the EFTA Court.

3. Any withdrawal of or amendment to this notice will be effected by publication in the EEA section of and the EEA supplement to the *Official Journal of the European Communities*.

ANNEX V

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY ON EXCLUSIVE DEALING CONTRACTS WITH COMMERCIAL AGENTS

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice on exclusive dealing contracts with commercial agents referred to in point 20 of Annex XIV to the EEA Agreement and, respectively, point 5 of Annex II to the Surveillance and Court Agreement.

I. The EFTA Surveillance Authority considers that contracts made with commercial agents in which those agents undertake, for a specified part of the territory covered by the EEA Agreement:

- to negotiate transactions on behalf of an enterprise,
- or
- to conclude transactions in the name and on behalf of an enterprise,
- or
- to conclude transactions in their own name and on behalf of this enterprise,

do not fall under the prohibition in Article 53 (1) of the EEA Agreement.

It is essential in this case that the contracting party, described as a commercial agent, should, in fact, be such, by the nature of his functions, and that he should neither undertake nor engage in activities proper to an independent trader in the course of commercial operations. The EFTA Surveillance Authority regards as the decisive criterion which distinguishes the commercial agent from the independent trader, the agreement — express or implied — which deals with responsibility for the financial risks bound up with the sale or with the performance of the contract. Thus the EFTA Surveillance Authority's assessment is not governed by the name used to describe the representative. Except for the usual *del credere* guarantee, a commercial agent must not by the nature of his functions assume any risk resulting from the transaction. If he does assume such risks, his function becomes economically akin to that of an independent trader and he must therefore be treated as such for

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

the purpose of the rules of competition. In such a situation, the exclusive dealing contracts must be regarded as agreements made with independent traders.

The EFTA Surveillance Authority considers that there is particular reason to assume that the function performed is that of an independent trader where the contracting party described as a commercial agent:

- is required to keep or does in fact keep, as his own property, a considerable stock of the products covered by the contract,
- or
- is required to organize, maintain or ensure at his own expense a substantial service to customers free of charge, or does in fact organize, maintain or ensure such a service,
- or
- can determine or does in fact determine prices or terms of business.

II. Unlike the contracts with commercial agents covered here, exclusive dealing contracts with independent traders may well fall within Article 53 (1). In the case of such exclusive contracts the restriction of competition lies either in the limitation of supply, when the vendor undertakes to supply a given product to one purchaser only, or in the limitation of demand, when the purchaser undertakes to obtain a given product from only one vendor. Where there are reciprocal undertakings competition is being restricted by both parties. The question whether a restriction of competition of this nature may affect trade between Contracting Parties to the EEA Agreement depends on the circumstances of the particular case.

On the other hand, the EFTA Surveillance Authority takes the view that the test for prohibition pursuant to Article 53 (1) is not met by exclusive dealing contracts with commercial agents,

since these contracts have neither the object nor the effect of preventing, restricting or distorting competition within the territory covered by the EEA Agreement. The commercial agent only performs an auxiliary function in the market for goods. In that market he acts on the instructions and in the interest of the enterprise on whose behalf he is operating. Unlike the independent trader, he himself is neither a purchaser nor a vendor, but seeks purchasers or vendors in the interest of the other party to the contract, who is the person doing the buying or selling. In this type of exclusive dealing contract, the selling or buying enterprise does not cease to be a competitor, it merely uses an auxiliary, i.e. the commercial agent, to distribute or acquire products on the market.

The legal status of commercial agents is determined, more or less uniformly, by statute law in most of the EFTA States or EC Member States and by case-law in others. The characteristic feature which all commercial agents have in common is their function as auxiliaries in the transaction of business. The powers of commercial agents are subject to the civil law provisions of agency. Within the limits of these provisions, the other party to the contract — who is the person selling or buying — is free to decide the product and the territory in respect of which he is willing to give these powers to his agent.

In addition to the competitive situation on the markets where the commercial agent functions as an auxiliary for the other

party to the contract, the particular market on which the commercial agents offer their services for the negotiation or conclusion of transactions has to be considered. The obligation assumed by the agent — to work exclusively for one principal for a certain period of time — entails a limitation of supply on that market, the obligation assumed by the other party to the contract — to appoint him sole agent for a given territory involves a limitation of demand on the market. Nevertheless, the EFTA Surveillance Authority views these restrictions as a result of the special obligation between the commercial agent and his principal to protect each other's interests and therefore considers that they involve no restriction of competition.

The object of this notice is to give enterprises some indication of the considerations by which the EFTA Surveillance Authority will be guided when interpreting Article 53 (1) of the EEA Agreement and applying it to exclusive dealing contracts with commercial agents. The situation having thus been clarified, it will as a general rule no longer be useful for enterprises to obtain negative clearance for the agreements mentioned, nor will it be necessary to have the legal position established through a EFTA Surveillance Authority decision on an individual case; this also means that notification will no longer be necessary for agreements of this type. This notice is without prejudice to any interpretation that may be given by other competent authorities and in particular by the national courts and the EFTA Court.

ANNEX VI

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY CONCERNING AGREEMENTS, DECISIONS AND CONCERTED PRACTICES IN THE FIELD OF COOPERATION BETWEEN ENTERPRISES

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises referred to in point 21 of Annex XIV to the EEA Agreement and, respectively, point 6 of Annex II to the Surveillance and Court Agreement.
- E. With regard to agreements, decisions and concerted practices in the field of cooperation between enterprises, the EFTA Surveillance Authority endeavours to provide guidance which, though it cannot be exhaustive, may prove useful to enterprises in the correct interpretation, in particular, of Article 53 (1) of the EEA Agreement and Article 1 (1) of Protocol 25 to the EEA Agreement.

I

The EFTA Surveillance Authority welcomes cooperation among small and medium-sized enterprises where such cooperation enables them to work more efficiently and increase their productivity and competitiveness on a larger market. While considering that its duty is to facilitate cooperation among small and medium-sized enterprises in particular the EFTA Surveillance Authority recognizes that cooperation among large enterprises, too, can be economically desirable without presenting difficulties from the angle of competition policy.

Article 53 (1) of the EEA Agreement and Article 1 (1) of Protocol 25 to the EEA Agreement provide that agreements, decisions and concerted practices (hereinafter referred to as 'agreements') which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement (hereinafter referred to as 'restraints of competition') are prohibited as incompatible with

the EEA Agreement, if such agreements may affect trade between Contracting Parties to the EEA Agreement.

The EFTA Surveillance Authority feels that, in the interest of the small and medium-sized enterprises in particular, it should give some indication of the considerations by which it will be guided when interpreting Article 53 (1) of the EEA Agreement and Article 1 (1) of Protocol 25 to the EEA Agreement and applying them to certain cooperation arrangements between enterprises, and should indicate which of these arrangements in its opinion do not come under these provisions. This notice applies to all enterprises, irrespective of their size.

There may also be forms of cooperation between enterprises other than those listed below which are not prohibited by Article 53 (1) of the EEA Agreement and Article 1 (1) of Protocol 25 to the EEA Agreement. This applies in particular if the market position of the enterprises cooperating with each other is in the aggregate too weak for the cooperation agreement between them to lead to an appreciable restraint of competition in the territory covered by the EEA Agreement and to affect trade between Contracting Parties to the EEA Agreement. It is also pointed out that other forms of cooperation between enterprises or agreements containing additional clauses, to which

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

the rules of competition of the EEA Agreement apply, can be exempted pursuant to Article 53 (3) of the EEA Agreement or be authorized pursuant to Article 1 (2) of Protocol 25 to the EEA Agreement.

The EFTA Surveillance Authority intends to clarify, by means of suitable decisions in individual cases or by general notices, the status of the various forms of cooperation in accordance with the provisions of the EEA Agreement.

No general statement can be made at this stage on the application of Article 54 of the EEA Agreement on the abuse of dominant positions within the territory covered by the EEA Agreement or in a part of it. The same applies to Article 2 (4) of Protocol 25 to the EEA Agreement.

As a result of this notice, as a general rule, it should not be useful for enterprises to obtain negative clearance, as defined by Article 2 of Chapter II of the Surveillance and Court Agreement for the agreements listed, nor should it be necessary to have the legal position established through an EFTA Surveillance Authority decision on an individual case. This also means that notification with this end in view will not be necessary for agreements of this type. However, if it is doubtful whether in an individual case an agreement between enterprises restricts competition or if other forms of cooperation between enterprises which, in the view of the enterprises, do not restrict competition are not listed here, the enterprises are free to apply, where the matter comes under Article 53 (1) of the EEA Agreement, for negative clearance, or to file as a precautionary measure, where Article 1 (1) of Protocol 25 to the EEA Agreement is the relevant provision, an application on the basis of Article 1 (2) of that Protocol. This notice is without prejudice to any interpretation that may be given by other competent authorities and in particular by the national courts and the EFTA Court.

II

The EFTA Surveillance Authority takes the view that the following agreements do not restrict competition:

1. *Agreements having as their sole object:*

- (a) an exchange of opinion or experience;
- (b) joint market research;
- (c) the joint carrying out of comparative studies of enterprises or industries;
- (d) the joint preparation of statistics and calculation models.

Agreements whose sole purpose is the joint procurement of information which the various enterprises need to determine their future market behaviour freely and independently; or the use by each of the enterprises of a joint advisory body, do not have as their object or effect the restriction of competition. But if the freedom of action of the enterprises is restricted or if their market behaviour is coordinated either expressly or through concerted practices, there may be restraint of competition. This is in particular the case where concrete recommendations are

made or where conclusions are given such a form that they induce at least some of the participating enterprises to behave in an identical manner on the market.

The exchange of information may take place between the enterprises themselves or through a body acting as an intermediary. It is, however, particularly difficult to distinguish between information which has no bearing on competition on the one hand and behaviour in restraints of competition on the other, if there are special bodies which have to register orders, turnover figures, investments and prices, so that it can as a rule not be automatically assumed that Article 53 (1) of the EEA Agreement or Article 1 (1) of Protocol 25 to the EEA Agreement do not apply to them. A restraint of competition may occur in particular on an oligopolistic market for homogeneous products.

In the absence of more far-reaching cooperation between the participating enterprises, joint market research and comparative studies of different enterprises and industries to collect information and ascertain facts and market conditions do not in themselves affect competition. Other arrangements of this type, as for instance the joint establishment of economic and structural analyses, so obviously do not affect competition that there is no need to mention them specifically.

Calculation models containing specified rates of calculation must be regarded as recommendations that may lead to restraints of competition.

2. *Agreements having as their sole object:*

- (a) cooperation in accounting matters;
- (b) joint provision of credit guarantees;
- (c) joint debt-collecting associations;
- (d) joint business or tax consultant agencies.

In such cases, the cooperation involved covers fields that are not concerned with the supply of goods and services or the economic decisions of the enterprises taking part, and thus does not lead to restraint of competition.

Cooperation in accounting matters is neutral from the point of view of competition as it only assists in the technical handling of the accounting work. Nor is the creation of credit guarantee associations affected by the competition rules, since it does not modify the relationship between supply and demand.

Joint debt-collecting associations whose work is not confined to the collection of outstanding payments in line with the intentions and conditions of the participating enterprises, or which fix prices or exert in any other way an influence on price formation, may restrict competition. Application of uniform terms by all participating firms may constitute a concerted practice, and the making of joint price comparisons may have the same result. In this connection, no objection can be raised against the use of standardized printed forms; their use must, however, not be combined with an understanding or tacit agreement on uniform prices, rebates or conditions of sale.

3. *Agreements having as their sole object:*

- (a) the joint implementation of research and development projects;
- (b) the joint placing of research and development contracts;

- (c) the sharing out of research and development projects among participating enterprises.

In the field of research, too, the mere exchange of experience and results serves for information only and does not restrict competition. It therefore need not be mentioned expressly.

Agreements on the joint execution of research work or the joint development of the results of research up to the stage of industrial application do not affect the competitive position of the parties. This also applies to the sharing of research fields and development work if the results are available to all participating enterprises.

However, if the enterprises enter into commitments which restrict their own research and development activity or the utilization of the results of joint work so that they do not have a free hand with regard to their own research and development outside the joint projects, this may constitute an infringement of the rules of competition of the EEA Agreement. Where firms do not carry out joint research work, any contractual obligations or concerted practices binding them to refrain from research work of their own either completely or in certain sectors may result in a restraint of competition.

The sharing out of sectors of research without an understanding providing for mutual access to the results is to be regarded as a case of specialization that may restrict competition.

There may also be a restraint of competition if agreements are concluded or corresponding concerted practices applied with regard to the practical exploitation of the results of research and development work carried out jointly, particularly if the participating enterprises undertake or agree to manufacture only the products or types of product developed jointly or to share out future production among themselves.

It is of the essence of joint research that the results should be exploited by the participating enterprises in proportion to their participation. If the participation of certain enterprises is confined to a specific sector of the joint research project or to the provision of only limited financial assistance, there is no restraint of competition — in so far as there has been any joint research at all — if the results of research are made available to these enterprises only in relation with the degree of their participation. There may, however, be a restraint of competition if certain participating enterprises are excluded from exploitation of the results, either entirely or to an extent not commensurate with their participation.

If the granting of licences to third parties is expressly or tacitly excluded, there may be a restraint of competition. However, the fact that research is carried out jointly warrants arrangements binding the enterprise to grant licences to third parties only by common agreement or by majority decision.

For the assessment of the compatibility of the agreement with the rules of competition, the legal status of the joint research and development work is immaterial.

4. *Agreements which have as their sole object the joint use of production facilities and storing and transport equipment*

These forms of cooperation do not restrict competition because they are confined to organization and technical arrangements for the use of the facilities. There may be a restraint of competition if the enterprises involved do not bear the cost of utilization of

the installation of equipment themselves or if agreements are concluded or concerted practices applied regarding joint production or the sharing out of production or the establishment or running of a joint enterprise.

5. *Agreements having as their sole object the setting up of consortia for the joint execution of orders, where the participating enterprises do not compete with each other as regards the work to be done or where each of them by itself is unable to execute the orders*

Where enterprises do not compete with each other they cannot restrict competition between them by setting up consortia. This applies in particular to enterprises belonging to different industries but also to firms in the same industry to the extent that their contribution under the consortium consists only of goods or services which cannot be supplied by the other participating enterprises. It is not a question of whether the enterprises compete with each other in other sectors so much as whether in the light of the concrete circumstances of a particular case there is a possibility that in the foreseeable future they may compete with each other with regard to the products or services involved. If the absence of competition between the enterprises and the maintenance of this situation are based on agreements or concerted practices, there may be a restraint of competition.

But even in the case of consortia formed by enterprises which normally compete with each other there is no restraint of competition if the participating enterprises cannot execute a specific order by themselves. This applies in particular if, for lack of experience, specialized knowledge, capacity or financial resources, these enterprises, when working alone, have no chance of success or cannot finish the work within the required time limit or cannot bear the financial risk.

Nor is there a restraint of competition if it is only by the setting up of a consortium that the enterprises are put in a position to make an attractive offer. There may, however, be a restraint of competition if the enterprises undertake to work solely in the framework of a consortium.

6. *Agreements having as their sole object:*

- (a) joint selling arrangements;
- (b) joint after-sales and repairs service, provided the participating enterprises are not competitors with regard to the products or services covered by the agreement.

As already explained in detail under heading 5, cooperation between enterprises cannot restrict competition if the firms are not in competition with each other.

Very often joint selling by small or medium-sized enterprises — even if they are competing with each other — does not entail an appreciable restraint of competition: it is, however, impossible to establish in this notice any general criteria or to specify what enterprises may be deemed 'small or medium-sized'.

There is no joint after-sales and repair service if several manufacturers, without acting in concert with each other, arrange for an after-sales and repair service for their products to be provided by an enterprise which is independent of them. In such a case there is no restraint of competition even if the manufacturers are competitors.

7. Agreements having joint advertising as their sole object

Joint advertising is designed to draw the buyers' attention to the products of an industry or to a common brand; as such it does not restrict competition between the participating enterprises. However, if the participating enterprises are partly or wholly prevented, by agreements or concerted practices, from themselves advertising or if they are subjected to other restrictions, there may be a restraint of competition.

8. Agreements having as their sole object the use of a common label to designate a certain quality, where the label is available to all competitors on the same conditions

Such associations for the joint use of a quality label do not restrict competition if other competitors, whose products objectively meet the stipulated quality requirements, can use the label on the same conditions as the members. Nor do the obligations to accept quality control of the products provided with the label, to issue uniform instructions for use, or to use the label for the products meeting the quality standards constitute restraints of competition.

But there may be restraint of competition if the right to use the label is linked to obligations regarding production, marketing, price formation or obligations of any other type, as is for instance the case when the participating enterprises are obliged to manufacture or sell only products of guaranteed quality.

ANNEX VII

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY CONCERNING IMPORTS INTO THE TERRITORY COVERED BY THE EEA AGREEMENT OF THIRD COUNTRIES' GOODS FALLING WITHIN THE SCOPE OF THE EEA AGREEMENT

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice concerning imports into the Community of Japanese goods falling within the scope of the Rome Treaty referred to in point 22 of Annex XIV to the EEA Agreement and, respectively, point 7 of Annex II to the Surveillance and Court Agreement.

Given the number of instances of third countries' industries preparing, sometimes independently and sometimes after consultation with their European counterparts, measures to restrict imports of third countries' goods into the territory covered by the EEA Agreement or otherwise regulate quantities, prices, quality or the like, the EFTA Surveillance Authority considers that it should point out to those concerned that Article 53 (1) of the EEA Agreement prohibits as incompatible with the functioning of the EEA Agreement all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties to the EEA Agreement and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement. The fact that the headquarters of some or all of the firms involved are located outside the territory covered by the EEA Agreement does not vitiate this provision if the effect of such agreements, decisions or concerted practices are felt within the said territory.

The EFTA Surveillance Authority recommends those concerned to notify such agreements, decisions and practices in good time, as required by Chapter II of Protocol 4 to the Surveillance and Court Agreement implementing Articles 53 and 54 of the EEA Agreement. The EFTA Surveillance Authority will scrutinize these agreements, decisions and practices to determine whether they are compatible with the competition rules of the EEA Agreement. At the same time the EFTA Surveillance Authority will keep a close watch on developments in the industries concerned.

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

ANNEX VIII

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY CONCERNING ITS ASSESSMENT OF CERTAIN SUBCONTRACTING AGREEMENTS IN RELATION TO ARTICLE 53 (1) OF THE EEA AGREEMENT

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty referred to in point 23 of Annex XIV to the EEA Agreement and, respectively, point 8 of Annex II to the Surveillance and Court Agreement.

1. In this notice the EFTA Surveillance Authority gives its view as to subcontracting agreements in relation to Article 53 (1) of the EEA Agreement. This class of agreement is at the present time a form of work distribution which concerns firms of all sizes, but which offers opportunities for development in particular to small and medium-sized firms.

The EFTA Surveillance Authority considers that agreements under which one firm, called 'the contractor', whether or not in consequence of a prior order from a third party, entrusts to another, called 'the subcontractor', the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf, are not of themselves caught by the prohibition in Article 53 (1).

To carry out certain subcontracting agreements in accordance with the contractor's instructions, the subcontractor may have to make use of particular technology or equipment which the contractor will have to provide. In order to protect the economic value of such technology or equipment, the contractor may wish to restrict their use by the subcontractor to whatever is necessary for the purpose of the agreement. The question arises whether such restrictions are caught by Article 53 (1). They are assessed in this notice with due regard to the purpose of such agreements, which distinguishes them from ordinary patent and know-how licensing agreements.

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

2. In the EFTA Surveillance Authority's view, Article 53 (1) does not apply to clauses whereby:

- technology or equipment provided by the contractor may not be used except for the purposes of the subcontracting agreement,
- technology or equipment provided by the contractor may not be made available to third parties,
- the goods, services or work resulting from the use of such technology or equipment may be supplied only to the contractor or performed on his behalf,

provided that and in so far as this technology or equipment is necessary to enable the subcontractor under reasonable conditions to manufacture the goods, to supply the services or to carry out the work in accordance with the contractor's instructions. To that extent the subcontractor is providing goods, services or work in respect of which he is not an independent supplier in the market.

The above proviso is satisfied where performance of the subcontracting agreement makes necessary the use by the subcontractor of:

- industrial property rights of the contractor or at his disposal, in the form of patents, utility models, designs protected by copyright, registered designs or other rights,

or

- secret knowledge of manufacturing processes (know-how) of the contractor or at his disposal,

or of

— studies, plans or documents accompanying the information given which have been prepared by or for the contractor,

or

— dies, patterns or tools, and accessory equipment that are distinctively the contractor's,

which even though not covered by industrial property rights not containing any element of secrecy, permit the manufacture of goods which differ in form, function or composition from other goods manufactured or supplied on the market.

However, the restrictions mentioned above are not justifiable where the subcontractor has at his disposal or could under reasonable conditions obtain access to the technology and equipment needed to produce the goods, provide the services or carry out the work. Generally, this is the case when the contractor provides no more than general information which merely describes the work to be done. In such circumstances the restrictions could deprive the subcontractor of the possibility of developing his own business in the fields covered by the agreement.

3. The following restrictions in connection with the provision of technology by the contractor may in the EFTA Surveillance Authority's view also be imposed by subcontracting agreements without giving grounds for objection pursuant to Article 53 (1):

— an undertaking by either of the parties not to reveal manufacturing processes or other know-how of a secret character, or confidential information given by the other party during the negotiation and performance of the agreement, as long as the know-how or information in question has not become public knowledge,

— an undertaking by the subcontractor not to make use, even after expiry of the agreement, of manufacturing processes or other know-how of a secret character received by him during the currency of the agreement, as long as they have not become public knowledge,

— an undertaking by the subcontractor to pass on to the contractor on a non-exclusive basis any technical improvements which he has made during the currency of the

agreement or, where a patentable invention has been discovered by the subcontractor, to grant non-exclusive licences in respect of inventions relating to improvements and new applications of the original invention to the contractor for the term of the patent held by the latter.

This undertaking by the subcontractor may be exclusive in favour of the contractor in so far as improvements and inventions made by the subcontractor during the currency of the agreement are incapable of being used independently of the contractor's secret know-how or patent, since this does not constitute an appreciable restriction of competition.

However, any undertaking by the subcontractor regarding the right to dispose of the results of his own research and development work may restrain competition, where such results are capable of being used independently. In such circumstances, the subcontracting relationship is not sufficient to displace the ordinary competition rules on the disposal of industrial property rights or secret know-how.

4. Where the subcontractor is authorized by a subcontracting agreement to use a specified trade mark, trade name or get up, the contractor may at the same time forbid such use by the subcontractor in the case of goods, services or work which are not to be supplied to the contractor.

5. Although this notice should in general obviate the need for firms to obtain a ruling on the legal position by an individual decision of the EFTA Surveillance Authority, it does not affect the right of the firms concerned to apply for negative clearance as defined by Article 2 of Chapter II of Protocol 4 to the Surveillance and Court Agreement or to notify the agreement to the EFTA Surveillance Authority pursuant to Article 4 (1) of that Chapter.

The notice on cooperation between enterprises ⁽¹⁾, which lists a number of agreements that by their nature are not to be regarded as anti-competitive, is thus supplemented in the subcontracting field. The EFTA Surveillance Authority also reminds firms that, in order to promote cooperation between small and medium-sized businesses, it has published a notice concerning agreements of minor importance which do not fall under Article 53 (1) of the EEA Agreement. This notice is without prejudice to any interpretation that may be given by other competent authorities and in particular by the national courts and the EFTA Court

⁽¹⁾ Notice of the EFTA Surveillance Authority concerning agreements, decisions and concerted practices relating to cooperation between enterprises.

ANNEX IX

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY ON AGREEMENTS OF MINOR IMPORTANCE WHICH DO NOT FALL WITHIN ARTICLE 53 (1) OF THE EEA AGREEMENT

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case. The notice corresponds to the Commission notice on agreements of minor importance which do not fall within Article 85 (1) of the Treaty establishing the European Economic Community referred to in point 24 of Annex XIV to the EEA Agreement and, respectively, point 9 of Annex II to the Surveillance and Court Agreement.

I

1. The EFTA Surveillance Authority considers it important to facilitate cooperation between undertakings where such cooperation is economically desirable without presenting difficulties from the point of view of competition policy, which is particularly true of cooperation between small and medium-sized undertakings. To this end it has published the 'notice concerning agreements, decisions and concerted practices in the field of cooperation between undertakings' listing a number of agreements that by their nature cannot be regarded as restraints of competition. Furthermore, in the notice concerning its assessment of certain subcontracting agreements the EFTA Surveillance Authority considers that this type of contract which offers opportunities for development, in particular, to small and medium-sized undertakings is not itself caught by the prohibition in Article 53 (1). By issuing the present notice, the EFTA Surveillance Authority is taking a further step towards defining the field of application of Article 53 (1), in order to facilitate cooperation between small and medium-sized undertakings.

2. In the EFTA Surveillance Authority's opinion, agreements whose effects on trade between Contracting Parties to the EEA Agreement or on competition are negligible do not fall under the ban on restrictive agreements contained in Article 53 (1). Only

those agreements are prohibited which have an appreciable impact on market conditions, in that they appreciably alter the market position, in other words the sales or supply possibilities, of third undertakings and of users.

3. In the present notice the EFTA Surveillance Authority, by setting quantitative criteria and by explaining their application, has given a sufficiently concrete meaning to the concept 'appreciable' for undertakings to be able to judge for themselves whether the agreements they have concluded with other undertakings, being of minor importance, do not fall within Article 53 (1). The quantitative definition of 'appreciable' given by the EFTA Surveillance Authority is, however, no absolute yardstick; in fact, in individual cases even agreements between undertakings which exceed these limits may still have only a negligible effect on trade between Contracting Parties to the EEA Agreement or on competition, and are therefore not caught by Article 53 (1).

4. As a result of this notice, there should not be any point in undertakings obtaining negative clearance, as defined by Article 2 of Chapter II of Protocol 4 to the Surveillance and Court Agreement, for the agreements covered, nor should it be necessary to have the legal position established through decisions of the EFTA Surveillance Authority in individual cases; notification with this end in view will not be necessary for such agreements. However, if it is doubtful whether in an individual case an agreement appreciably affects trade between Contracting Parties to the EEA Agreement or competition, the undertakings are free to apply for negative clearance or to notify the agreement.

5. In cases covered by the present notice the EFTA Surveillance Authority, as a general rule, will not open

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

proceedings under Chapter II of Protocol 4 to the Surveillance and Court Agreement, either upon application or upon its own initiative. Where, due to exceptional circumstances, an agreement which is covered by the present notice nevertheless falls within Article 53 (1), the EFTA Surveillance Authority will not impose fines. Where undertakings have failed to notify an agreement falling within Article 53 (1) because they wrongly assumed, owing to a mistake in calculating their market share or aggregate turnover, that the agreement was covered by the present notice, the EFTA Surveillance Authority will not consider imposing fines unless the mistake was due to negligence.

6. This notice is without prejudice to any interpretation that may be given by other competent authorities and in particular by the national courts and the EFTA Court.

II

7. The EFTA Surveillance Authority holds the view that agreements between undertakings engaged in the production or distribution of goods or in the provision of services generally do not fall under the prohibition of Article 53 (1) if:

— the goods or services which are the subject of the agreement (hereinafter referred to as 'the contract products') together with the participating undertakings' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not represent more than 5 % of the total market for such goods or services (hereinafter referred to as 'products') in the area of the territory covered by the EEA Agreement affected by the agreement,

and

— the aggregate annual turnover of the participating undertakings does not exceed ECU 200 million ⁽¹⁾.

8. The EFTA Surveillance Authority also holds the view that the said agreements do not fall under the prohibition of Article 53 (1) if the abovementioned market share or turnover is exceeded by not more than one-tenth during two successive financial years.

9. For the purposes of this notice, participating undertakings are:

- (a) undertakings party to the agreement;
- (b) undertakings in which a party to the agreement, directly or indirectly:
 - owns more than half the capital or business assets,
 - or
 - has the power to exercise more than half the voting rights,
 - or
 - has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertakings,
 - or
 - has the right to manage the affairs;

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

(d) undertakings in or over which an undertaking referred to in (c) directly or indirectly has the rights or powers listed in (b).

Undertakings in which several undertakings as referred to in (a) to (d) jointly have, directly or indirectly, the rights or powers set out in (b) shall also be considered to be participating undertakings.

10. In order to calculate the market share, it is necessary to determine the relevant market. This implies the definition of the relevant product market and the relevant geographical market.

11. The relevant product market includes besides the contract products any other products which are identical or equivalent to them. This rule applies to the products of the participating undertakings as well as to the market for such products. The products in question must be interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price and intended use of the goods together. In certain cases, however, products can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed.

12. Where the contract products are components which are incorporated into another product by the participating undertakings, reference should be made to the market for the latter product, provided that the components represent a significant part of it. Where the contract products are components which are sold to third undertakings, reference should be made to the market for the components. In cases where both conditions apply, both markets should be considered separately.

13. The relevant geographical market is the area within the territory covered by the EEA Agreement in which the agreement produces its effects. This area will be the whole territory covered by the EEA Agreement where the contract products are regularly bought and sold in all EFTA States and EC Member States. Where the contract products cannot be bought and sold in a part of the territory covered by the EEA Agreement, or are bought and sold only in limited quantities or at irregular intervals in such a part, that part should be disregarded.

14. The relevant geographical market will be narrower than the whole territory covered by the EEA Agreement in particular where:

— the nature and characteristics of the contract product, e.g. high transport costs in relation to the value of the product, restrict its mobility,

or

— movement of the contract product within the territory covered by the EEA Agreement is hindered by barriers to entry to national markets resulting from State intervention, such as quantitative restrictions, severe taxation differentials and non-tariff barriers, e.g. type approvals or safety standard certifications. In such cases the national territory may have to

⁽¹⁾ For the purpose of this notice 'ecu' means the European currency unit as defined in Council Regulation (EEC) No 3180/78. The value of the ecu is published daily in the 'C' series of the *Official Journal of the European Communities*.

be considered as the relevant geographical market. However, this will only be justified if the existing barriers to entry cannot be overcome by reasonable effort and at an acceptable cost.

15. Aggregate turnover includes the turnover in all goods and services, excluding tax, achieved during the last financial year by the participating undertaking. In cases where an undertaking has concluded similar agreements with various other undertakings in the relevant market, the turnover of all participating

undertakings should be taken together. The aggregate turnover shall not include dealings between participating undertakings.

16. The present notice shall not apply where in a relevant market competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers.

17. The present notice is likewise applicable to decisions by associations of undertakings and to concerted practices.

ANNEX X

GUIDELINES OF THE EFTA SURVEILLANCE AUTHORITY ON THE APPLICATION OF EEA COMPETITION RULES IN THE TELECOMMUNICATIONS SECTOR

- A. The present guidelines are issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. Annex XIV to the EEA Agreement lists notices and guidelines issued by the EC Commission before 31 July 1991. These non-binding acts contain principles and rules which the Commission follows in the field of competition. The EEA Agreement obliges the EFTA Surveillance Authority to take due account of these principles and rules.
- C. The EFTA States ⁽¹⁾ have included in Article 25 of the Surveillance and Court Agreement the obligation for the EFTA Surveillance Authority to adopt acts corresponding to those of the EC Commission mentioned above.
- D. In accordance with this obligation the EFTA Surveillance Authority adopts the present guidelines exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in these guidelines when applying the relevant EEA competition rules to a particular case. The guidelines correspond to the Commission guidelines on the application of EEC competition rules in the telecommunications sector referred to in point 25 of Annex XIV to the EEA Agreement and, respectively, point 10 of Annex II to the Surveillance and Court Agreement.

Preface

These guidelines aim at clarifying the application of EEA competition rules to the market participants in the telecommunications sector. They must be viewed in the context of the special conditions of the telecommunications sector.

A major aim, in the view of the EFTA Surveillance Authority, must be the development of efficient Europe-wide networks and services, at the lowest cost and of the highest quality, to provide the European user in the market covered by the EEA Agreement with a basic infrastructure for efficient operation.

In this context it is considered that liberalization and harmonization in the sector must go hand in hand.

Given the competition context in the telecommunications sector, the telecommunications operators should be allowed, and encouraged, to establish the necessary cooperation mechanisms, in order to create — or ensure — EEA-wide full interconnectivity between public networks, and where required between services to enable European users to benefit from a wider range of better and cheaper telecommunications services.

This can and has to be done in compliance with, and respect of, EEA competition rules in order to avoid the diseconomies which otherwise could result. For the same reasons, operators and other firms that may be in a dominant market position should be made aware of the prohibition of abuse of such positions.

The guidelines should be read in the light of this objective. They set out to clarify, *inter alia*, which forms of cooperation amount to undesirable collusion, and in this sense they list what is not acceptable. They should therefore be seen as one aspect of an overall policy towards telecommunications, and notably of policies and actions to encourage and stimulate those forms of cooperation which promote the development and availability of advanced communications for Europe.

The full application of competition rules forms a major part of the overall approach to telecommunications. These guidelines should help market participants to shape their strategies and arrangements for Europe-wide networks and services from the outset in a manner which allows them to be fully in line with these rules. In the event of significant changes in the conditions which prevailed when the guidelines were drawn up, the EFTA Surveillance Authority may find it appropriate to adapt the guidelines to the evolution of the situation in the telecommunications sector.

I. Summary

1. The objective of this communication is to issue guidelines regarding the application of competition rules to the telecommunications sector.

⁽¹⁾ For the purpose of this notice, any reference to EFTA States shall be understood to mean those EFTA States in respect of which the EEA Agreement has entered into force. See the relevant texts of Article 2 (2) of the Protocols adjusting the EEA Agreement and the Surveillance and Court Agreement.

2. The telecommunications sector in many cases requires cooperation agreements, *inter alia*, between telecommunications organizations (TOs) in order to ensure network and services interconnectivity, one-stop shopping and one-stop billing which are necessary to provide for Europe-wide services and to offer optimum service to users. These objectives can be achieved, *inter alia*, by TOs cooperating — for example, in those areas where exclusive or special rights for provision may continue in accordance with EEA rules, including competition rules, as well as in areas where optimum service will require certain features of cooperation. On the other hand the overriding objective to develop the conditions for the market to provide European users with a greater variety of telecommunications services, of better quality and at lower cost requires the introduction and safeguarding of a strong competitive structure. Competition plays a central role for the EEA.

The EEA will represent a new dimension for telecommunications operators and users. Competition will give them the opportunity to make full use of technological development and to accelerate it, and encourage them to restructure and reach the necessary economies of scale to become competitive not only on the market covered by the EEA Agreement, but worldwide.

With this in mind, these guidelines recall the main principles which the EFTA Surveillance Authority according to its mandate under the EEA competition rules, will apply in the sector without prejudging the outcome of any specific case which will have to be considered on the facts.

The objective is, *inter alia*, to contribute to more certainty of conditions for investment in the sector and the development of Europe-wide services.

The mechanisms for creating certainty for individual cases (apart from complaints and *ex officio* investigations) are provided for by the notification and negative clearance procedures provided under Chapter II of Protocol 4 to the Surveillance and Court Agreement, which give a formal procedure for clearing cooperation agreements in this area whenever a formal clearance is requested. This is set out in further detail in this communication.

II. Introduction

3. The fundamental technological development worldwide in the telecommunications sector⁽¹⁾ has caused considerable changes in the competition conditions. The traditional monopolistic administrations cannot alone take up the challenge of the technological revolution. New economic forces have appeared on the telecommunications scene which are capable of offering users the numerous enhanced services generated by the new technologies. This has given rise to and stimulated a wide deregulation process propagated with various degrees of intensity.

This move is progressively changing the face of the European market structure. New private suppliers have penetrated the

market with more and more transnational value-added services and equipment. The telecommunications administrations, although keeping a central role as public services providers, have acquired a businesslike way of thinking. They have started competing dynamically with private operators in services and equipment. Wide restructuring, through mergers and joint ventures, is taking place in order to complete more effectively on the deregulated market through economies of scale and rationalization. All these events have a multiplier effect on technological progress.

4. In the light of this, the central role of competition for the EEA appears clear.

5. In the application of competition rules the EFTA Surveillance Authority endeavours to avoid the adopting of State measures or undertakings erecting or maintaining artificial barriers incompatible with functioning of the EEA Agreement. But is also favours all forms of cooperation which foster innovation and economic progress, as contemplated by competition law. Pursuing effective competition in telecommunications is not a matter of political choice. The choice of a free market and a competition-oriented economy is already envisaged in the EEA Agreement and the competition rules of the Agreement shall apply within the territory covered by it. The abovementioned fundamental changes make necessary the full application of competition law.

6. There is a need for more certainty as to the application of competition rules. The telecommunications administrations together with keeping their duties of public interest, are now confronted with the application of these rules practically without transition from a long tradition of legal protection. Their scope and actual implications are often not easily perceivable. As the technology is fast-moving and huge investments are necessary, in order to benefit from the new possibilities on the market-place, all the operators, public or private, have to take quick decisions, taking into account the competition regulatory framework.

7. This need for more certainty regarding the application of competition rules is already met by assessments made in several individual cases. However, assessments of individual cases so far have enabled a response to only some of the numerous competition questions which arise in telecommunications. Future cases will further develop the EFTA Surveillance Authority's practice in this sector.

Purpose of these guidelines

8. These guidelines are intended to advise public telecommunications operators, other telecommunications service and equipment suppliers and users, the legal profession and the interested members of the public about the general legal and economic principles which will be followed by the EFTA Surveillance Authority in the application of competition rules to undertakings in the telecommunications sector, keeping in mind the experience gained by the EC Commission in individual cases in compliance with rulings of the Court of Justice of the European Communities.

9. The EFTA Surveillance Authority will apply these principles to individual cases in a flexible way, and taking the

⁽¹⁾ Telecommunications embraces any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical and other electromagnetic systems (Article 2 of WATTC Regulation of 9 December 1988).

particular context of each case into account. These guidelines do not cover all the general principles governing the application of competition rules, but only those which are of specific relevance to telecommunications issues. The general principles of competition rules not specifically connected with telecommunications but entirely applicable to these will be found, *inter alia*, in the regulatory acts, the Court judgments and the EFTA Surveillance Authority decisions dealing with the individual cases, the EFTA Surveillance Authority's yearly reports on competition policy, press releases and other public information originating from the EFTA Surveillance Authority.

10. These guidelines do not create enforceable rights. Moreover, they are without prejudice to any interpretation that may be given by other competent authorities, and in particular by the national courts and the EFTA Court.

11. A change in the economic and legal situation will not automatically bring about a simultaneous amendment to the guidelines. The EFTA Surveillance Authority, however, reserves the possibility to make such an amendment when it considers that these guidelines no longer satisfy their purpose, because of fundamental and/or repeated changes in legal precedents, methods of applying competition rules, and the regulatory, economic and technical context.

12. These guidelines essentially concern the direct application of competition rules to undertakings, i.e., Articles 53 and 54 of the EEA Agreement. They do not concern those applicable to the Contracting Parties to the EEA Agreement, in particular Articles 3 and 59 (1) and (3) of the EEA Agreement. Principles ruling the application of Article 59 in telecommunications are expressed in the acts referred to in points 12 and 13 of Annex XIV to the EEA Agreement (Directives 88/301/EEC and 90/338/EEC, hereinafter referred to as 'Directive on terminals' and 'services Directive', respectively).

Relationship between competition rules applicable to undertakings and those applicable to EFTA States or EC Member States

13. In applying Articles 85 and 86 of the EEC Treaty (corresponding to Articles 53 and 54 of the EEA Agreement) the Court of Justice of the European Communities ⁽¹⁾ has ruled that while it is true that Articles 85 and 86 of the Treaty concern the conduct of undertakings and not the laws or regulations of the Member States, by virtue of Article 5 (2) of the EEC Treaty (which corresponds to Article 3 (2) of the EEA Agreement), Member States must not adopt or maintain in force any measure which could deprive those provisions of their effectiveness. The Court of Justice of the European Communities has stated that such would be the case, in particular, if a Member State were to require or favour prohibited cartels or reinforce the effects thereof or to encourage abuses by dominant undertakings.

If those measures are adopted or maintained in force *vis-à-vis* public undertakings or undertakings to which an EFTA State or

EC Member State grants special or exclusive rights, Article 59 might also apply.

14. When the conduct of a public undertaking or an undertaking to which an EFTA State or EC Member State grants special or exclusive rights arises entirely as a result of the exercise of the undertaking's autonomous behaviour, it can only be caught by Articles 53 and 54.

When this behaviour is imposed by a mandatory State measure (regulative or administrative), leaving no discretionary choice to the undertakings concerned, Article 59 may apply to the State involved in association with Articles 53 and 54. In this case Articles 53 and 54 apply to the undertakings' behaviour taking into account the constraints to which the undertakings are submitted by the mandatory State measure.

Ultimately, when the behaviour arises from the free choice of the undertakings involved, but the State has taken a measure which encourages the behaviour or strengthens its effects, Article 53 and/or 54 apply to the undertakings' behaviour and Article 59 may apply to the State measure. This could be the case, *inter alia*, when the State has approved and/or legally endorsed the result of the undertakings' behaviour (for instance tariffs).

These guidelines and the Directive on terminals and the services Directive complement each other to a certain extent in that they cover the principles governing the application of the competition rules: Articles 53 and 54 on the one hand, Article 59 on the other.

Application of competition rules and other EEA rules, including open network provision (ONP) rules

15. Articles 53 and 54 and rules implementing those Articles constitute law in force and enforceable throughout the territory covered by the EEA Agreement. Conflicts should not arise with other EEA rules because EEA rules as a whole form a coherent regulatory framework. Other EEA rules, and in particular those specifically governing the telecommunications sector, cannot be considered as provisions implementing Articles 53 and 54 in this sector. However it is obvious that EEA acts adopted in the telecommunications sector are to be interpreted in a way consistent with competition rules.

16. This applies, *inter alia*, to the relationship between competition rules applicable to undertakings and the ONP rules. ONP comprises the rapid definition of technical conditions, usage conditions and tariff principles for open network provision, starting with harmonized conditions for the use of leased lines. The details of the ONP procedures have been fixed by the act referred to in point 2 of Annex XI to the EEA Agreement (Council Directive 90/387/EEC, hereinafter referred to as 'Directive 90/387/EEC') on the establishment of the internal market for telecommunications services through the implementation of open network provision.

17. ONP has a fundamental role in providing European-wide access to EEA-wide interconnected public networks. When ONP

⁽¹⁾ Judgment of 10 January 1985 in Case 229/83 *Leclerc/gasoline*, [1985] ECR, p. 17; judgment of 11 July 1985 in Case 299/83, *Leclerc/books*, [1985] ECR 2517; judgment of 30 April 1986 in Cases 209 to 213/84, *Ministère public v. Asjes*, [1986] ECR 1425; judgment of 1 October 1987 in Case 311/85, *Vereniging van Vlaamse Reisbureaus v. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, [1987] ECR 3801.

harmonization is implemented, a network user will be offered harmonized access conditions throughout the territory covered by the EEA Agreement, whichever country they address. Harmonized access will be ensured in compliance with the competition rules as mentioned above, as the ONP rules specifically provide.

ONP rules cannot be considered as competition rules which apply to States and/or to undertakings' behaviour. ONP and competition rules therefore constitute two different but coherent sets of rules. Hence, the competition rules have full application, even when all ONP rules have been adopted.

18. Competition rules are and will be applied in a coherent manner with EEA trade rules in force. However, competition rules apply in a non-discriminatory manner to undertakings located within the territory covered by the EEA Agreement and to the ones which, although not located within that territory, have access to the market covered by the EEA Agreement.

III. Common principles of application of Articles 53 and 54

Equal application of Articles 53 and 54

19. Articles 53 and 54 apply directly and throughout the territory covered by the EEA Agreement to all undertakings, whether public or private, on equal terms and to the same extent, apart from the exception provided in Article 59 (2) ⁽¹⁾.

The EFTA Surveillance Authority and national administrative and judicial authorities are competent to apply these rules under the conditions set out in Chapter II of Protocol 4 to the Surveillance and Court Agreement.

20. Therefore, Articles 53 and 54 apply both to private enterprises and public telecommunications operators embracing telecommunications administrations and recognized private operating agencies, hereinafter called 'telecommunications organizations' (TOs).

TOs are undertakings within the meaning of Articles 53 and 54 to the extent that they exert an economic activity, for the manufacturing and/or sale of telecommunications equipment and/or for the provision of telecommunications services, regardless of other facts such as, for example, whether their nature is economic or not and whether they are legally distinct entities or form part of the State organization ⁽²⁾. Associations of TOs are associations of undertakings within the meaning of

Article 53, even though TOs participate as undertakings in organizations in which governmental authorities are also represented. Articles 53 and 54 apply also to undertakings located outside the territory covered by the EEA Agreement when restrictive agreements are implemented or intended to be implemented or abuses are committed by those undertakings within that territory to the extent that trade between Contracting Parties is affected ⁽³⁾.

Competition restrictions justified pursuant to Article 59 (2) or by essential requirements

21. The exception provided in Article 59 (2) may apply both to State measures and to practices by undertakings. The services Directive, in particular in Article 3, makes provision for an EFTA State or EC Member State to impose specified restrictions in the licences which it can grant for the provision of certain telecommunications services. These restrictions may be imposed pursuant to Article 59 (2) or in order to ensure the compliance with State essential requirements specified in the said act.

22. As far as Article 59 (2) is concerned, the benefit of the exception provided by this provision may still be invoked for a TO's behaviour when it brings about competition restrictions which its State (EFTA State or EC Member State) did not impose in application of the said act. However, the fact should be taken into account that in this case the State whose function is to protect the public and the general economic interest, did not deem it necessary to impose the said restrictions. This makes particularly hard the burden of proving that the Article 59 (2) exception still applies to an undertaking's behaviour involving these restrictions.

23. The EFTA Authority infers from the case-law of the Court of Justice of the European Communities ⁽⁴⁾ that it has exclusive competence, under the control of the EFTA Court, to decide that the exception of Article 59 (2) applies. The national authorities including judicial authorities can assess that this exception does not apply, when they find that the competition rules clearly do not obstruct the performance of the task of general economic interest assigned to undertakings. When those authorities cannot make a clear assessment in this sense they should suspend their decision in order to enable the EFTA Surveillance Authority to find that the conditions for the application of that provision are fulfilled.

24. As to measures aiming at the compliance with 'essential requirements' within the meaning of the services Directive, pursuant to Article 1 of the latter ⁽⁵⁾, they can only be taken by EFTA States or EC Member States and not by undertakings.

⁽¹⁾ Article 59 (2) states: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.'

⁽²⁾ Reference is made to the judgment of the Court of Justice of the European Communities of 16 June 1987 in Case 118/85, *Commission v. Italy* — Transparency of financial relations between Member States and public undertakings, [1987] ECR, p. 2599.

⁽³⁾ Reference is made to the judgment of the Court of Justice of the European Communities of 27 September 1988 in Joined Cases 89, 104, 114, 116, 117, 125, 126, 127 and 129/85, *Ahlström & others v. Commission* ('Woodpulp'), [1988] ECR p. 5193.

⁽⁴⁾ Case 10/71, *Mueller-Hein*, [1971] ECR p. 723; judgment of 11 April 1989 in Case 66/86, *Ahmed Saeed*, [1989] ECR p. 803.

⁽⁵⁾ '... the non-economic reasons in the general interest which may cause an EFTA State or EC Member State to restrict access to the public telecommunications network or public telecommunications services.'

The relevant market

25. In order to assess the effects of an agreement on competition for the purposes of Article 53 and whether there is a dominant position on the market for the purposes of Article 54, it is necessary to define the relevant market(s), product or service market(s) and geographic market(s), within the domain of telecommunications. In a context of fast-moving technology the relevant market definition is dynamic and variable.

(a) The product market

26. A product market comprises the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products in terms of price, usage and consumer preference. An examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration ⁽¹⁾.

The EFTA Surveillance Authority can precisely define these markets only within the framework of individual cases.

27. For the guidelines' purpose it can only be indicated that distinct service markets could exist at least for terrestrial network provision, voice communication, data communication and satellites. With regard to the equipment market, the following areas could all be taken into account for the purposes of market definition: public switches, private switches, transmission systems and more particularly, in the field of terminals, telephone sets, modems, telex terminals, data transmission terminals and mobile telephones. The above indications are without prejudice to the definition of further narrower distinct markets. As to other services — such as value-added ones — as well as terminal and network equipment, it cannot be specified here whether there is a market for each of them or for an aggregate of them, or for both, depending upon the interchangeability existing in different geographic markets. This is mainly determined by the supply and the requirements in those markets.

28. Since the various national public networks compete for the installation of the telecommunications hubs of large users, market definition may accordingly vary. Indeed, large telecommunications users, whether or not they are service providers, locate their premises depending, *inter alia*, upon the features of the telecommunications services supplied by each TO. Therefore, they compare national public networks and other services provided by the TOs in terms of characteristics and prices.

29. As to satellite provision, the question is whether or not it is substantially interchangeable with terrestrial network provision:

- (a) communication by satellite can be of various kinds: fixed service (point to point communication), multipoint (point to multipoint and multipoint to multipoint), one-way or two-way;
- (b) satellites' main characteristics are: coverage of a wide geographic area not limited by national borders, insensitivity of costs to distance, flexibility and ease of networks deployment, in particular in the very small aperture terminals (VSAT) systems;
- (c) satellites' uses can be broken down into the following categories: public switched voice and data transmission, business value-added services and broadcasting;
- (d) a satellite provision presents a broad interchangeability with the terrestrial transmission link for the basic voice and data transmission on long distance. Conversely, because of its characteristics it is not substantially interchangeable but rather complementary to terrestrial transmission links for several specific voice and data transmission uses. These uses are: services to peripheral or less-developed regions, links between non-contiguous countries, reconfiguration of capacity and provision of routing for traffic restoration. Moreover, satellites are not currently substantially interchangeable for direct broadcasting and multipoint private networks for value-added business services. Therefore, for all those uses satellites should constitute distinct product markets. Within satellites, there may be distinct markets.

30. In mobile communications distinct services seem to exist such as cellular telephone, paging, telepoint, cordless voice and cordless data communication. Technical development permits providing each of these systems with more and more enhanced features. A consequence of this is that the differences between all these systems are progressively blurring and their interchangeability increasing. Therefore, it cannot be excluded that in future for certain uses several of those systems may be embraced by a single product market. By the same token, it is likely that, for certain uses, mobile systems will be comprised in a single market with certain services offered on the public switched network.

(b) The geographic market

31. A geographic market is an area:

- where undertakings enter into competition with each other, and
- where the objective conditions of competition applying to the product or service in question are similar for all traders ⁽²⁾.

32. Without prejudice to the definition of the geographic market in individual cases, each national territory within the territory covered by the EEA Agreement seems still to be a

⁽¹⁾ Reference is made to Case 322/81 of the Court of Justice of the European Communities, *Michelin v. Commission*, 9 November 1983, [1983] ECR, p. 3529, ground 37.

⁽²⁾ Reference is made to the judgment of the Court of Justice of the European Communities of 14 February 1978 in Case 27/76, *United Brands v. Commission* [1978] ECR, p. 207, ground 44. In the telecommunications sector: judgment of the Court of Justice of the European Communities of 5 May 1988 in Case 247/86, *Alcatel-Novasam*, [1988] ECR, p. 5987.

distinct geographic market as regards those relevant services or products, where:

- the customer's needs cannot be satisfied by using a non-domestic service,
- there are different regulatory conditions of access to services, in particular special or exclusive rights which are apt to isolate national territories,
- as to equipment and network, there are no EEA-common standards, whether mandatory or voluntary, whose absence could also isolate the national markets. The absence of voluntary EEA-wide standards shows different national customers' requirements.

However, it is expected that the geographic market will progressively extend to the territory covered by the EEA Agreement.

33. It has also to be ascertained whether each national market or a part thereof is a substantial part of the market covered by the EEA Agreement. This is the case where the services of the product involved represent a substantial percentage of volume within the territory covered by the EEA Agreement. This applies to all services and products involved.

34. As to satellite uplinks, for cross-border communications by satellite the uplink could be provided from any of several countries. In this case, the geographic market is wider than the national territory and may cover the whole territory covered by the EEA Agreement.

As to space segment capacity, the extension of the geographic market will depend on the power of the satellite and its ability to compete with other satellites for transmission to a given area, in other words on its range. This can be assessed only case by case.

35. As to services in general as well as terminal and network equipment, the EFTA Surveillance Authority assesses the market power of the undertakings concerned and the result for competition within the territory covered by the EEA Agreement of the undertakings' conduct, taking into account their interrelated activities and interaction between the market covered by the EEA Agreement and world markets. This could have a considerable effect on the structure of the markets in the territory covered by the EEA Agreement, on the overall competitiveness of the undertakings operating in those markets, and in the long run, on their capacity to remain independent operators.

IV. Application of Article 53

36. In many cases Europe-wide services can be achieved by TOs' cooperation — for example, by ensuring interconnectivity and interoperability:

- (i) in those areas where exclusive or special rights for provision may continue in accordance with EEA rules and in particular with the Services Directive;

and

- (ii) in areas where optimum service will require certain features of cooperation such as so-called 'one-stop shopping'

arrangements, i.e. the possibility of acquiring Europe-wide services at a single sales point.

The EFTA Surveillance Authority welcomes and fully supports the necessity of cooperation particularly in order to promote the development of trans-European services and strengthen the competitiveness of the industry throughout the territory covered by the EEA Agreement and in the world markets. However, this cooperation can only attain that objective if it complies with EEA competition rules. Chapter II of Protocol 4 to the Surveillance and Court Agreement provides well-defined clearing procedures for such cooperation agreements. The procedures foreseen by Chapter II of Protocol 4 to the Surveillance and Court Agreement are:

- (i) the application for negative clearance, by which the EFTA Surveillance Authority certifies that the agreements are not caught by Article 53, because they do not restrict competition and/or do not affect trade between Contracting Parties to the EEA Agreement;

and

- (ii) the notification of agreements caught by Article 53 in order to obtain an exemption pursuant to Article 53 (3). Although if a particular agreement is caught by Article 53, an exemption can be granted by the EFTA Surveillance Authority pursuant to Article 53 (3), this is only so when the agreement brings about economic benefits — assessed on the basis of the criteria in the said paragraph 3 — which outweigh its restrictions on competition. In any event competition may not be eliminated for a substantial part of the products in question. Notification is not an obligation, but if, for reasons of legal certainty, the parties decide to request an exemption pursuant to Article 4 of Chapter II of Protocol 4 to the Surveillance and Court Agreement the agreements may not be exempted until they have been notified to the EFTA Surveillance Authority.

37. Cooperation agreements may be covered by one of the block exemption acts referred to in Annex XIV to the EEA Agreement or notices by the EFTA Surveillance Authority. In the first case the agreement is automatically exempted pursuant to Article 53 (3). In the latter case, in the EFTA Surveillance Authority's view, the agreement does not appreciably restrict competition and trade between Contracting Parties to the EEA Agreement and therefore does not justify an EFTA Surveillance Authority action. In either case, the agreement does not need to be notified, but it may be notified in case of doubt. If the EFTA Surveillance Authority receives a multitude of notifications of similar cooperation agreements in the telecommunications sector, one may consider whether a specific block exemption regulation for such agreements would be appropriate.

38. The categories of agreements ⁽¹⁾ which seem to be typical in telecommunications and may be caught by Article 53 are listed below. This list provides examples only and is, therefore, not exhaustive. The EFTA Surveillance Authority is thereby

⁽¹⁾ For simplification's sake this term stands also for 'decisions by associations' and 'concerted practices' within the meaning of Article 53.

indicating possible competition restrictions which could be caught by Article 53 and cases where there may be the possibility of an exemption.

39. These agreements may affect trade between Contracting Parties to the EEA Agreement for the following reasons:

- (i) services other than services reserved to TOs, equipment and spatial segment facilities are traded throughout the territory covered by the EEA Agreement; agreements on these services and equipment are therefore likely to affect trade. Although at present cross-frontier trade is limited, there is potentially no reason to suppose that suppliers of such facilities will in future confine themselves to their national market;
- (ii) as to reserved network services, one can consider that they also are traded throughout the territory covered by the EEA Agreement. These services could be provided by an operator located in one EFTA State or EC Member State to customers located in another of those States, which decide to move their telecommunications hub into the first one because it is economically or qualitatively advantageous. Moreover, agreements on these matters are likely to affect trade within the territory covered by the EEA Agreement at least to the extent that they influence the conditions under which other services and equipment are supplied throughout the territory covered by the EEA Agreement.

40. Finally, to the extent that the TOs hold dominant positions in facilities, services and equipment markets, their behaviour leading to — and including the conclusion of — the agreements in question could also give rise to a violation of Article 54, if agreements have or are likely to have as their effect hindering the maintenance of the degree of competition still existing in the market or the growth of that competition, or causing the TOs to reap trading benefits which they would not have reaped if there had been normal and sufficiently effective competition.

A. *Horizontal agreements concerning the provision of terrestrial facilities and reserved services*

41. Agreements concerning terrestrial facilities (public switched network or leased circuits) or services (e.g. voice telephony for the general public) can currently only be concluded between TOs because of this legal regime providing for exclusive or special rights. The fact that the services Directive recognizes the possibility for an EFTA State or EC Member State to reserve this provision to certain operators does not exempt those operators from complying with the competition rules in providing these facilities or services. These agreements may restrict competition within the territory covered by the EEA Agreement only where such exclusive rights are granted to more than one provider.

42. These agreements may restrict the competition between TOs for retaining or attracting large telecommunications users for their telecommunications centres. Such 'hub competition' is substantially based upon favourable rates and other conditions,

as well as the quality of the services. EFTA States or EC Member States are not allowed to prevent such competition since the services Directive allows only the granting of exclusive and special rights by each EFTA State or EC Member State in its own territory.

43. Finally, these agreements may restrict competition in non-reserved services from third party undertakings, which are supported by the facilities in question, for example if they impose discriminatory or inequitable trading conditions on certain users.

44. (aa) Price agreements

All TOs' agreements on prices, discounting or collection charges for international services, are apt to restrict the hub competition to an appreciable extent. Coordination on or prohibition of discounting could cause particularly serious restrictions. In situations of public knowledge such as exists in respect of the tariff level, discounting could remain the only possibility of effective price competition.

45. In several cases the Court of Justice of the European Communities and the EC Commission have considered price agreements among the most serious infringements of Article 85 of the EEC Treaty⁽¹⁾. While harmonization of tariff structures may be a major element for the provision of EEA-wide services, this goal should be pursued as far as compatible with EEA competition rules and should include definition of efficient pricing principles throughout the territory covered by the EEA Agreement. Price competition is a crucial, if not the principal, element of customer choice and is apt to stimulate technical progress. Without prejudice to any application for individual exemption that may be made, the justification of any price agreement in terms of Article 53 (3) would be the subject of very rigorous examination by the EFTA Surveillance Authority.

46. Conversely, where the agreements concern only the setting up of common tariff structures or principles, the EFTA Surveillance Authority may consider whether this would not constitute one of the economic benefits under Article 53 (3) which outweigh the competition restriction. Indeed, this could provide the necessary transparency on tariff calculations and facilitate users' decisions about traffic flow or the location of headquarters or premises. Such agreements could also contribute to achieving the economic objective of more cost-orientated tariffs.

In this connection, following the intervention of the EEC Commission, the CEPT has decided to abolish recommendation PGT/10 on the general principles for the lease of international telecommunications circuits and the establishment of private international networks. This recommendation recommended,

⁽¹⁾ PVC, Commission Decision 89/190/EEC (OJ No L 74, 17. 3. 1989, p. 1); Case 123/85, *BNIC, v. Clair*, [1985] ECR p. 391; Case 8/72, *Cementhandelaren v. Commission* [1972] ECR, p. 977; *Polypropylene*, Commission Decision 86/398/EEC (OJ No L 230, 18. 8. 1986, p. 1) on appeal Case 179/86.

inter alia, the imposition of a 30% surcharge or an access charge where third-party traffic was carried on an international telecommunications leased circuit, or if such a circuit was interconnected to the public telecommunications network. It also recommended the application of uniform tariff coefficients in order to determine the relative price level of international telecommunications leased circuits. Thanks to the CEPT's cooperation with the Commission leading to the abolition of the recommendation, competition between telecommunications operators for the supply of international leased circuits is re-established, to the benefit of users, especially suppliers of non-reserved services. The Commission had found that the recommendation amounted to a price agreement between undertakings pursuant to Article 85 of the EEC Treaty (corresponds to Article 53 of the EEA Agreement) which substantially restricted competition within the European Community⁽¹⁾.

47. (ab) Agreements on other conditions for the provision of facilities

These agreements may limit hub competition between the partners. Moreover, they may limit the access of users to the network, and thus restrict third undertakings' competition as to non-reserved services. This applies especially to the use of leased circuits. The abolished CEPT recommendation PGT/10 on tariffs had also recommended restrictions on conditions of sale which the Commission objected to. These restrictions were mainly:

- making the use of leased circuits between the customer and third parties subject to the condition that the communication concern exclusively the activity for which the circuit has been granted,
- a ban on subleasing,
- authorization of private networks only for customers tied to each other by economic links and which carry out the same activity,
- prior consultation between the TOs for any approval of a private network and of any modification of the use of the network, and for any interconnection of private networks.

For the purpose of an exemption pursuant to Article 53 (3), the granting of special conditions for a particular facility in order to promote its development could be taken into account among other elements. This could foster technologies which reduce the costs of services and contribute in increasing competitiveness of European industry structures. Naturally, the other Article 53 (3) requirements should also be met.

48. (ac) Agreements on the choice of telecommunication routes

These may have the following restrictive effects:

- (i) to the extent that they coordinate the TOs' choice of the routes to be set up in international services, they may limit competition between TOs as suppliers to users' communications hubs, in terms of investments and production, with a possible effect on tariffs. It should be determined whether this restriction of their business autonomy is sufficiently appreciable to be caught by Article 53. In any event, an argument for an exemption pursuant to Article 53 (3) could be more easily sustained if common routes designation were necessary to enable interconnections and, therefore, the use of a Europe-wide network;
- (ii) to the extent that they reserve the choice of routes already set up to the TOs, and this choice concerns one determined facility, they could limit the use of other facilities and thus services provision possibly to the detriment of technological progress. By contrast, the choice of routes does not seem restrictive in principle to the extent that it constitutes a technical requirement.

49. (ad) Agreements on the imposition of technical and quality standards on the services provided on the public network

Standardization brings substantial economic benefits which can be relevant under Article 53 (3). It facilitates, *inter alia*, the provision of pan-European telecommunications services. As set out in the framework of the approach to standardization contained in the EEA Agreement, products and services complying with standards may be used EEA-wide. In the context of this approach, European standards institutions have developed in this field (ETSI and CEN-Cenelec). National markets in the territory covered by the EEA Agreement would be opened up and form an EEA market. Service and equipment markets would be enlarged, hence favouring economies of scale. Cheaper products and services are thus available to users. Standardization may also offer an alternative to specifications controlled by undertakings dominant in the network architecture and in non-reserved services. Standardization agreements may, therefore, lessen the risk of abuses by these undertakings which could block the access to the markets for non-reserved services and for equipment. However, certain standardization agreements can have restrictive effects on competition: hindering innovation, freezing a particular stage of technical development, blocking the network access of some users/service providers. This restriction could be appreciable, for example when deciding to what extent intelligence will in future be located in the network or continue to be permitted in customers' equipment. The imposition of specifications other than those provided for by EEA rules could have restrictive effects on competition. Agreements having these effects are, therefore, caught by Article 53.

The balance between economic benefits and competition restrictions is complex. In principle, an exemption could be granted if an agreement brings more openness and facilitates access to the market, and these benefits outweigh the restrictions caused by it.

⁽¹⁾ See Commission press release IP (90) 188 of 6 March 1990.

50. Standards jointly developed and/or published in accordance with the ONP procedures carry with them the presumption that the cooperating TOs which comply with those standards fulfil the requirement of open and efficient access (see Directive 90/387/EEC on ONP mentioned in paragraph 16). This presumption can be rebutted, *inter alia*, if the agreement contains restrictions which are not foreseen by EEA rules and are not indispensable for the standardization sought.

51. One important Article 53 (3) requirement is that users must also be allowed a fair share of the resulting benefit. This is more likely to happen when users are directly involved in the standardization process in order to contribute to deciding what products or services will meet their needs. Also, the involvement of manufacturers or service providers other than TOs seems a positive element for Article 53 (3) purposes. However, this involvement must be open and widely representative in order to avoid competition restrictions to the detriment of excluded manufacturers or service providers. Licensing other manufacturers may be deemed necessary, for the purpose of granting an exemption to these agreements pursuant to Article 53 (3).

52. (ae) Agreements foreseeing special treatment for TOs' terminal equipment or other companies' equipment for the interconnection or interoperation of terminal equipment with reserved services and facilities

53. (af) Agreements on the exchange of information

A general exchange of information could indeed be necessary for the good functioning of international telecommunications services, and for cooperation aimed at ensuring interconnectivity or one-stop shopping and billing. It should not be extended to competition-sensitive information, such as certain tariff information which constitutes business secrets, discounting, customers and commercial strategy, including that concerning new products. The exchange of this information would affect the autonomy of each TO's commercial policy and it is not necessary to attain the said objectives.

B. Agreements concerning the provision of non-reserved services and terminal equipment

54. Unlike facilities markets, where only the TOs are the providers, in the services markets the actual or potential competitors are numerous and include, besides the TOs, international private companies, computer companies, publishers and others. Agreements on services and terminal equipment could therefore be concluded between TOs, between TOs and private companies, and between private companies.

55. The liberalizing process has led mostly to strategic agreements between (i) TOs, and (ii) TOs and other companies. These agreements usually take the form of joint ventures.

56. (ba) Agreements between TOs

The scope of these agreements, in general, is the provision by each partner of a value-added service including the management of the service. Those agreements are mostly based on the 'one-stop shopping' principle, i.e. each partner offers to the customer the entire package of services which he needs. These managed services are called managed data network services (MDNS). An MDNS essentially consists of a broad package of services including facilities, value-added services and management; the agreements may also concern such basic services as satellite uplink.

57. These agreements could restrict competition in the MDNS market and also in the markets for a service or a group of services included in the MDNS:

(i) between the participating TOs themselves;

and

(ii) *vis-à-vis* other actual or potential third-party providers.

58. (i) Restrictions of competition between TOs

Cooperation between TOs could limit the number of potential individual MDNS offered by each participating TO. The agreements may affect competition at least in certain aspects which are contemplated as specific examples of prohibited practices pursuant to Article 53 (1) (a) to (c), in the event that:

- they fix or recommend, or at least lead (through the exchange of price information) to coordination of prices charged by each participant to customers,
- they provide for joint specification of MDNS products, quotas, joint delivery, specification of customers' systems; all this would amount to controlling production, markets, technical development and investments,
- they contemplate joint purchase of MDNS hardware and/or software, which would amount to sharing markets or sources of supply.

59. (ii) Restrictive effects on third party undertakings

Third parties' market entry could be precluded or hampered if the participating TOs:

- refuse to provide facilities to third party suppliers of services,
- apply usage restrictions only to third parties and not to themselves (e.g. a private provider is precluded from placing multiple customers on a leased line facility to obtain lower unit costs),

- favour their MDNS offerings over those of private suppliers with respect to access, availability, quality and price of leased circuits, maintenance and other services,
- apply especially low rates to their MDNS offerings, cross-subsidizing them with higher rates for monopoly services.

Examples of this could be the restrictions imposed by the TOs on private network operators as to the qualifications of the users, the nature of the messages to be exchanged over the network or the use of international private leased circuits.

60. Finally, as the participating TOs hold, individually or collectively, a dominant position for the creation and the exploitation of the network in each national market, any restrictive behaviour described in paragraph 59 could amount to an abuse of a dominant position pursuant to Article 54 (see Section V).

61. On the other hand, agreements between TOs may bring economic benefits which could be taken into account for the possible granting of an exemption pursuant to Article 53 (3). *Inter alia*, the possible benefits could be as follows:

- a European-wide service and 'one-stop shopping' could favour business in Europe. Large multinational undertakings are provided with a European communication service using only a single point of contact,
- the cooperation could lead to a certain amount of European-wide standardization even before further EEA legislation on this matter is adopted,
- the cooperation could bring a cost reduction and consequently cheaper offerings to the advantage of consumers,
- a general improvement of public infrastructure could arise from a joint service provision.

62. Only by notification of the cases in question, in accordance with the appropriate procedures under Chapter II of Protocol 4 to the Surveillance and Court Agreement, will the EFTA Surveillance Authority be able, where requested, to ascertain, on the merits, whether these benefits outweigh the competition restrictions. But in any event, restrictions on access for third parties seem likely to be considered as not indispensable and to lead to the elimination of competition for a substantial part of the products and services concerned within the meaning of Article 53 (3), thus excluding the possibility of an exemption. Moreover, if an MDNS agreement strengthens appreciably a dominant position which a participating TO holds in the market for a service included in the MDNS, this is also likely to lead to a rejection of the exemption.

63. The EC Commission has outlined the conditions for exempting such forms of cooperation in a case concerning a proposed joint venture between 22 TOs for the provision of a Europe-wide MDNS, later abandoned for commercial reasons⁽¹⁾, the Commission considered that the MDNS project presented the risk of restriction of competition between the operators themselves and private service suppliers but it accepted

that the project also offered economic benefits to telecommunications users such as access to Europe-wide services through a single operator. Such cooperation could also have accelerated European standardization, reduced costs and increased the quality of the services. The Commission had informed the participants that approval of the project would have to be subject to guarantees designed to prevent undue restriction of competition in the telecommunications services markets, such as discrimination against private services suppliers and cross-subsidization. Such guarantees would be essential conditions for the granting of an exemption under the competition rules to cooperation agreements involving TOs. The requirement for an appropriate guarantee of non-discrimination and non-cross-subsidization will be specified in individual cases according to the examples of discrimination indicated in Section V concerning the application of Article 54.

64. (bb) Agreements between TOs and other service providers

Cooperation between TOs and other operators is increasing in telecommunications services. It frequently takes the form of a joint venture. The EFTA Surveillance Authority recognizes that it may have beneficial effects. However, this cooperation may also adversely affect competition and the opening up of services markets. Beneficial and harmful effects must therefore be carefully weighed.

65. Such agreements may restrict competition for the provision of telecommunications services:

(i) between the partners;

and

(ii) from third parties.

66. (i) Competition between the partners may be restricted when these are actual or potential competitors for the relevant telecommunications service. This is generally the case, even when only the other partners and not the TOs are already providing the service. Indeed, TOs may have the required financial capacity, technical and commercial skills to enter the market for non-reserved services and could reasonably bear the technical and financial risk of doing it. This is also generally the case as far as private operators are concerned, when they do not yet provide the service in the geographical market covered by the cooperation, but do provide this service elsewhere. They may therefore be potential competitors in this geographic market.

67. (ii) The cooperation may restrict competition from third parties because:

- there is an appreciable risk that the participant TO, i.e. the dominant network provider, will give more favourable network access to its cooperation

⁽¹⁾ Commission press release IP(89) 948 of 14 December 1989.

partners than to other service providers in competition with the partners,

- potential competitors may refrain from entering the market because of this objective risk or, in any event, because of the presence on the market-place of a cooperation involving the monopolist for the network provision. This is especially the case when market entry barriers are high: the market structure allows only few suppliers and the size and the market power of the partners are considerable.

68. On the other hand, the cooperation may bring economic benefits which outweigh its harmful effect and therefore justify the granting of an exemption pursuant to Article 53 (3). The economic benefits can consist, *inter alia*, of the rationalization of the production and distribution of telecommunications services, in improvements in existing services or development of new services, or transfer of technology which improves the efficiency and the competitiveness of the European industrial structures.

69. In the absence of such economic benefits a complementarity between partners, i.e. between the provision of a reserved activity and that of a service under competition, is not a benefit as such. Considering it as a benefit would be equal to justifying an involvement through restrictive agreements of TOs in any non-reserved service provision. This would be to hinder a competitive structure in this market.

In certain cases, the cooperation could consolidate or extend the dominant position of the TOs concerned to a non-reserved services market, in violation of Article 54.

70. The imposition or the proposal of cooperation with the service provider as a condition for the provision of the network may be deemed abusive (see paragraph 98 (vi)).

71. (bc) Agreements between service providers other than TOs

The EFTA Surveillance Authority will apply the same principles indicated in (ba) and (bb) also to agreements between private service providers, *inter alia*, agreements providing quotas, price fixing, market and/or customer allocation. In principle, they are unlikely to qualify for an exemption. The EFTA Surveillance Authority will be particularly vigilant in order to avoid cooperation on services leading to a strengthening of dominant positions of the partners or restricting competition from third parties. There is a danger of this occurring for example when an undertaking is dominant with regard to the network architecture and its proprietary standard is adopted to support the service contemplated by the cooperation. This architecture enabling interconnection between computer systems of the partners could attract some partners to the dominant partner. The dominant position for the network architecture will be strengthened and Article 54 may apply.

72. In any exemption of agreements between TOs and other services and/or equipment providers, or between these providers, the EFTA Surveillance Authority will require from the partners appropriate guarantees of non-cross-subsidization and non-discrimination. The risk of cross-subsidization and discrimination is higher when the TOs or the other partners provide both services and equipment, whether within or outside the territory covered by the EEA Agreement.

C. Agreements on research and development (R&D)

73. As in other high technology based sectors, R&D in telecommunications is essential for keeping pace with technological progress and being competitive on the market-place to the benefit of users. R&D requires more and more important financial, technical and human resources which only few undertakings can generate individually. Cooperation is therefore crucial for attaining the above objectives.

74. The act referred to in point 7 of Annex XIV to the EEA Agreement provides for a block exemption pursuant to Article 53 (3) of R&D agreements in all sectors, including telecommunications.

75. Agreements which are not covered by this act (or the other block exemptions) could still obtain an individual exemption from the EFTA Surveillance Authority if Article 53 (3) requirements are met individually. However, not in all cases do the economic benefits of an R&D agreement outweigh its competition restrictions. In telecommunications, one major asset, enabling access to new markets, is the launch of new products or services. Competition is based not only on price, but also on technology. R&D agreements could constitute the means for powerful undertakings with high market shares to avoid or limit competition from more innovative rivals. The risk of excessive restrictions of competition increases when the cooperation is extended from R&D to manufacturing and even more to distribution.

76. The EFTA Surveillance Authority attaches great importance to R&D and innovation. The importance that also the EC Commission has attached to these fields is demonstrated by the fact that it has launched several programmes for this purpose. The joint companies' activities which may result from these programmes are not automatically cleared or exempted as such in all aspects from the application of the competition rules. However, most of those joint activities may be covered by the block exemptions. If not, the joint activities in question may be exempted, where required, in accordance with the appropriate criteria and procedures.

77. Joint distribution linked to joint R&D which is not covered by the act on R&D does not play the crucial role in the exploitation of the results of R&D. Nevertheless in individual cases, provided that a competitive environment is maintained, the EFTA Surveillance Authority is prepared to consider full-range cooperation even between large firms. This should lead to improving the structure of European industry and thus

enable it to meet strong competition in the world market place.

V. Application of Article 54

78. Article 54 applies when:

- (i) the undertaking concerned holds an individual or a joint dominant position;
 - (ii) it commits an abuse of that dominant position;
- and
- (iii) the abuse may affect trade between Contracting Parties to the EEA Agreement.

Dominant position

79. In many national markets the TOs hold individually or collectively a dominant position for the creation and the exploitation of the network, since they are protected by exclusive or special rights granted by the State. Moreover, the TOs may hold a dominant position for some telecommunications services, in so far as they hold exclusive or special rights with respect to those services ⁽¹⁾.

80. The TOs may also hold dominant positions on the markets for certain equipment or services, even though they no longer hold any exclusive rights on those markets. After the elimination of these rights, they may have kept very important market shares in this sector. When the market share in itself does not suffice to give the TOs a dominant position, it could do it in combination with the other factors such as the monopoly for the network or other related services and a powerful and wide distribution network. As to the equipment, for example terminal equipment, even if the TOs are not involved in the equipment manufacturing or in the services provision, they may hold a dominant position in the market as distributors.

81. Also, firms other than TOs may hold individual or collective dominant positions in markets where there are no exclusive rights. This may be the case especially for certain non-reserved services because of either the market shares alone of those undertakings, or because of a combination of several factors. Among these factors, in addition to the market shares, two of particular importance are the technological advance and the holding of the information concerning access protocols or interfaces necessary to ensure interoperability of software and hardware. When this information is covered by intellectual property rights this is a further factor of dominance.

82. Finally, the TOs hold, individually or collectively, dominant positions in the demand for some telecommunication equipment, works or software services. Being dominant for the network and other services provisions they may account for a purchaser's share high enough to give them dominance as to the demand, i.e. making suppliers dependent on them. Dependence could exist when the supplier cannot sell to other customers a substantial part of its production or change a production. In

certain national markets, for example in large switching equipment, big purchasers such as the TOs face big suppliers. In this situation, it should be weighed up case by case whether the supplier or the customer position will prevail on the other to such an extent as to be considered dominant pursuant to Article 54.

With the liberalization of services and the expansion of new forces on the services markets, dominant positions of undertakings other than the TOs may arise for the purchasing of equipment.

Abuse

83. The EFTA Surveillance Authority's activity may concern mainly the following broad areas of abuses:

A. TOs' abuses:

in particular, they may take advantage of their monopoly or at least dominant position to acquire a foothold or to extend their power in non-reserved neighbouring markets, to the detriment of competitors and customers.

B. Abuses by undertaking other than TOs:

these may take advantage of the fundamental information they hold, whether or not covered by intellectual property rights, with the object and/or effect of restricting competition.

C. Abuses of a dominant purchasing position:

for the time being this concerns mainly the TOs, especially to the extent that they hold a dominant position for reserved activities in the national market. However, it may also increasingly concern other undertakings which have entered the market.

A. TOs' abuses

84. The EFTA Surveillance Authority recognizes the central role of the TOs, which may be considered to justify the maintenance of certain monopolies to enable them to perform their public task. This public task consists in the provision and exploitation of a universal network or, where appropriate, universal service, i.e. one having general coverage and available to all users (including service providers and the TOs themselves) upon request on reasonable and non-discriminatory conditions. This fundamental obligation could justify the benefit of the exception provided in Article 59 (2) under certain circumstances, as laid down in the services Directive.

85. In most cases, however, the competition rules, far from obstructing the fulfilment of this obligation, contribute to ensuring it. In particular, Article 54 can apply to behaviour of dominant undertakings resulting in a refusal to supply, discrimination, restrictive tying clauses, unfair prices or other inequitable conditions.

⁽¹⁾ Reference is made to the Commission Decision 82/861/EEC in the 'British Telecommunications' case, point 26 (OJ No L 360, 21. 12. 1982, p. 36), confirmed in the judgment of the Court of Justice of the European Communities of 20 March 1985 in Case 41/83, Italian Republic v. Commission, [1985] ECR, p. 873 ('British Telecom').

If one of these types of behaviour occurs in the provision of one of the monopoly services, the fundamental obligation indicated above is not performed. This could be the case when a TO tries to take advantage of its monopoly for certain services (for instance network provision) in order to limit the competition they have to face in respect of non-reserved services, which in turn are supported by those monopoly services.

It is not necessary for the purpose of the application of Article 54 that competition be restricted as to a service which is supported by the monopoly provision in question. It would suffice that the behaviour results in an appreciable restriction of competition in whatever way. This means that an abuse may occur when the company affected by the behaviour is not a service provider but an end user who could himself be disadvantaged in competition in the course of his own business.

86. The Court of Justice of the European Communities has set out this fundamental principle of competition in telecommunications in one of its judgments ⁽¹⁾. An abuse within the meaning of Article 86 of the EEC Treaty (corresponds to Article 54 of the EEA Agreement) is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

The EFTA Surveillance Authority believes that this principle applies, not only when a dominant undertaking monopolizes other markets, but also when by anti-competitive means it extends its activity to other markets.

Hampering the provision of non-reserved services could limit production, markets and above all the technical progress which is a key factor of telecommunications. The EC Commission has already shown these adverse effects of usage restrictions on monopoly provision in its decision in the 'British Telecom' case ⁽²⁾. In this Decision it was found that the restrictions imposed by British Telecom on telex and telephone networks usage, namely on the transmission of international messages on behalf of third parties:

- (i) limited the activity of economic operators to the detriment of technological progress;
 - (ii) discriminated against these operators, thereby placing them at a competitive disadvantage *vis-à-vis* TOs not bound by these restrictions;
- and
- (iii) made the conclusion of the contracts for the supply of telex circuits subject to acceptance by the other parties of supplementary obligations which had no connection with such contracts. These were considered abuses of a dominant position identified respectively in Article 86 (b), (c) and (d) of the EEC Treaty (corresponds to Article 54 (b), (c) and (d) of the EEA Agreement).

⁽¹⁾ Case 311/84, Centre belge d'études de marché Télémarketing (CBEM) SA v. Compagnie luxembourgeoise de télédiffusion SA and Information Publicité Benelux SA of 3 October 1985, [1985] ECR, p. 3261, grounds 26 and 27.

⁽²⁾ See footnote 1, p. 46.

This could be done:

- (a) as above, by refusing or restricting the usage of the service provided under monopoly so as to limit the provision of non-reserved services by third parties;

or

- (b) by predatory behaviour, as a result of cross-subsidization.

87. The separation of the TOs' regulatory power from their business activity is a crucial matter in the context of the application of Article 54. This separation is provided in the Directive on terminals and the services Directive.

- (a) Usage restrictions

88. Usage restrictions on provisions of reserved services are likely to correspond to the specific examples of abuses indicated in Article 54. In particular:

- they may limit the provision of telecommunications services in free competition, the investments and the technical progress, to the prejudice of telecommunications consumers (Article 54 (b)),
- to the extent that these usage restrictions are not applied to all users, including the TOs themselves as users, they may result in discrimination against certain users, placing them at a competitive disadvantage (Article 54 (c)),
- they may make the usage of the reserved services subject to the acceptance of obligations which have no connection with this usage (Article 54 (d)).

89. The usage restrictions in question mainly concern public networks (public switched telephone network (PSTN) or public switched data networks (PSDN)) and especially leased circuits. They may also concern other provisions such as satellite uplink, and mobile communication networks. The most frequent types of behaviour are as follows:

- (i) prohibition imposed by TOs on third parties:

- (a) to connect private leased circuits by means of concentrator, multiplexer or other equipment to the public switched network;

or

- (b) to use private leased circuits for providing services, to the extent that these services are not reserved, but under competition.

90. To the extent that the user is granted a licence by State regulatory authorities under national law in compliance with the EEA rules, these prohibitions limit the user's freedom of access to the leased circuits, the provision of which is a public service. Moreover, it discriminates between users, depending upon the usage (Article 54 (c)). This is one of the most serious restrictions and could substantially hinder the development of international telecommunications services (Article 54 (b)).

91. When the usage restriction limits the provision of non-reserved service in competition with that provided by the

TO itself the abuse is even more serious and the principles of the abovementioned 'Télémarketing' judgment apply (see footnote 1, page 47).

92. In individual cases, the EFTA Surveillance Authority will assess whether the service provided on the leased circuit is reserved or not, on the basis of the EEA regulatory acts interpreted in the technical and economic context of each case. Even though a service could be considered reserved according to the law, the fact that a TO actually prohibits the usage of the leased circuit only to some users and not to others could constitute a discrimination pursuant to Article 54 (c).

93. When applying the EEC rules, the EC Commission has taken action in respect of the Belgian Régie des télégraphes et téléphones after receiving a complaint concerning an alleged abuse of dominant position from a private supplier of value-added telecommunications services relating to the conditions under which telecommunications circuits were being leased. Following discussions with the Commission, the RTT authorized the private supplier concerned to use the leased telecommunications circuits subject to no restrictions other than that they should not be used for the simple transport of data.

Moreover, pending the possible adoption of new rules in Belgium, and without prejudice to any such rules, the RTT undertook that all its existing and potential clients for leased telecommunications circuits to which third parties may have access shall be governed by the same conditions as those which were agreed with the private sector supplier mentioned above ⁽¹⁾.

(ii) Refusal by TOs to provide reserved services (in particular the network and leased circuits) to third parties

94. Refusal to supply has been considered an abuse by the EC Commission and the Court of Justice of the European Communities ⁽²⁾. This behaviour would make it impossible or at least appreciably difficult for third parties to provide non-reserved services. This, in turn, would lead to a limitation of services and of technical development (Article 54 (b)) and, if applied only to some users, result in discrimination (Article 54 (c)).

(iii) Imposition of extra charges or other special conditions for certain usages of reserved services

95. An example would be the imposition of access charges to leased circuits when they are connected to the public switched network or other special prices and charges for services provision to third parties. Such access charges may discriminate between users of the same service (leased circuits provision) depending upon the usage and result in imposing unfair trading conditions. This will limit the usage of leased circuits and finally non-reserved service provision. Conversely, it does not constitute an abuse provided that it is shown, in each specific case, that the

access charges correspond to costs which are entailed directly for the TOs for the access in question. In this case, access charges can be imposed only on an equal basis to all users, including TOs themselves.

96. Apart from these possible additional costs which should be covered by an extra charge, the interconnection of a leased circuit to the public switched network is already remunerated by the price related to the use of this network. Certainly, a leased circuit can represent a subjective value for a user depending on the profitability of the enhanced service to be provided on that leased circuit. However, this cannot be a criterion on which a dominant undertaking, and above all a public service provider, can base the price of this public service.

97. The EFTA Surveillance Authority appreciates that the substantial difference between leased circuits and the public switched network causes a problem of obtaining the necessary revenues to cover the costs of the switched network. However, the remedy chosen must not be contrary to law, i.e. the EEA Agreement, as discriminatory pricing between customers would be.

(iv) Discriminatory price or quality of the service provided

98. This behaviour may relate, *inter alia*, to tariffs or to restrictions or delays in connection to the public switched network or leased circuits provision, in installation, maintenance and repair, in effecting interconnection of systems or in providing information concerning network planning, signalling protocols, technical standards and all other information necessary for an appropriate interconnection and interoperation with the reserved service and which may affect the interworking of competitive services or terminal equipment offerings.

(v) Tying the provision of the reserved service to the supply by the TOs or others of terminal equipment to be interconnected or interoperated, in particular through imposition, pressure, offer of special prices or other trading conditions for the reserved service linked to the equipment.

(vi) Tying the provision of the reserved service to the agreement of the user to enter into cooperation with the reserved service provider himself as to the non-reserved service to be carried on the network.

(vii) Reserving to itself or to other service providers — for the purpose of the provision of a non-reserved service — information obtained in the exercise of a reserved service, in particular information concerning users of a reserved service and their needs; reserving to itself or to other service providers more favourable conditions for the supply of this information.

This latter information could be important for the provision of services under competition to the extent that it permits the targeting of customers of those services and the definition of business strategy. The behaviour indicated above could result in a discrimination against undertakings to which the use of this

⁽¹⁾ Commission press release IP(90) 67 of 29 January 1990.

⁽²⁾ Cases 6 and 7/73; Commercial Solvents v. Commission, [1974] ECR, p. 223; United Brands v. Commission (see footnote 2, p. 39).

527 information is denied in violation of Article 54 (c). The
 528 information in question can only be disclosed with the
 529 agreement of the users concerned and in accordance with
 530 relevant data protection legislation.

531 (viii) Imposition of unneeded reserved services by supplying
 532 reserved and or non-reserved services when the former
 533 reserved services are reasonably separable from the
 534 others.

535 99. The practices under (v), (vi), (vii) and (viii) result in
 536 applying conditions which have no connection with the reserved
 537 service, contravening Article 54 (d).

538 100. Most of these practices were in fact identified in the
 539 service Directive as restrictions on the provision of services
 540 within the meaning of Article 36 of the EEA Agreement and
 541 Article 54 brought about by State measures. They are therefore
 542 covered by the broader concept of 'restrictions' which pursuant
 543 to Article 6 of the said Act have to be removed by Contracting
 544 Parties to the EEA Agreement.

545 101. The EFTA Surveillance Authority believes that the
 546 Directive on terminals and the services Directive also clarify
 547 some principles of application of Articles 53 and 54 in the
 548 sector.

549 The services Directive does not apply to important sectors such
 550 as mobile communications and satellites; however, competition
 551 rules apply fully to these sectors. Moreover, as to the services
 552 covered by the Directive it will depend very much on the degree
 553 of precision of the licences given by the regulatory body whether
 554 the TOs still have a discretionary margin for imposing
 555 conditions which should be scrutinized under competition rules.
 556 Not all the conditions can be regulated in licences: consequently,
 557 there could be room for discretionary action. The application of
 558 competition rules to companies will therefore depend very much
 559 on a case-by-case examination of the licences. Nothing more
 560 than a class licence can be required for terminals.

561 (b) Cross-subsidization

562 102. Cross-subsidization means that an undertaking allocates
 563 all or part of the costs of its activity in one product or
 564 geographic market to its activity in another product or
 565 geographic market. Under certain circumstances, cross-subsidization
 566 in telecommunications could distort competition, i.e. lead to beating other competitors with offers
 567 which are made possible not by efficiency and performance but
 568 by artificial means such as subsidies. Avoiding cross-subsidization
 569 leading to unfair competition is crucial for the development of
 570 service provision and equipment supply.
 571

572 103. Cross-subsidization does not lead to predatory pricing
 573 and does not restrict competition when it is the costs of reserved
 574 activities which are subsidized by the revenue generated by other
 575 reserved activities since there is no competition possible as to
 576 these activities. This form of subsidization is even necessary, as it
 577 enables the TOs holders of exclusive rights to perform their

obligation to provide a public service universally and on the same conditions to everybody. For instance, telephone provision in unprofitable urban areas is subsidized through revenues from telephone provision in profitable urban areas or long-distance calls. The same could be said of subsidizing the provision of reserved services through revenues generated by activities under competition. The application of the general principle of cost-orientation should be the ultimate goal in order, *inter alia*, to ensure that prices are not inequitable as between users.

104. Subsidizing activities under competition, whether concerning services or equipment, by allocating their costs to monopoly activities, however, is likely to distort competition in violation of Article 54. It could amount to an abuse by an undertaking holding a dominant position within the territory covered by the EEA Agreement. Moreover, users of activities under monopoly have to bear unrelated costs for the provision of these activities. Cross-subsidization can also exist between monopoly provision and equipment manufacturing and sale. Cross-subsidization can be carried out through:

- funding the operation of the activities in question with capital remunerated substantially below the market rate,

- providing for those activities premises, equipment, experts and/or services with a remuneration substantially lower than the market price.

105. As to funding through monopoly revenues or making available monopoly material and intellectual means for the starting up of new activities under competition, this constitutes an investment whose costs should be allocated to the new activity. Offering the new product or service should normally include a reasonable remuneration of such investment in the long run. If it does not, the EFTA Surveillance Authority will assess the case on the basis of the remuneration plans of the undertaking concerned and of the economic context.

106. Transparency in the TOs accounting should enable the EFTA Surveillance Authority to ascertain whether there is cross-subsidization in the cases in which this question arises. The act referred to in point 2 of Annex XI to the EEA Agreement (the ONP Directive) provides in this respect for the definition of harmonized tariff principles which should lessen the number of these cases.

This transparency can be provided by an accounting system which ensures the fully proportionate distribution of all costs between reserved and non-reserved activities. Proper allocation of costs is more easily ensured in cases of structural separation, i.e. creating distinct entities for running each of these two categories of activities.

An appropriate accounting system approach should permit the identification and allocation of all costs between the activities which they support. In this system all products and services should bear proportionally all the relevant costs, including costs of research and development, facilities and overheads. It should enable the production of recorded figures which can be verified by accountants.

107. As indicated above (paragraph 59), in cases of cooperation agreements involving TOs a guarantee of no cross-subsidization is one of the conditions required by the EFTA Surveillance Authority for exemption pursuant to Article 53 (3). In order to monitor properly compliance with that guarantee, the EFTA Surveillance Authority envisages requesting the parties to ensure an appropriate accounting system as described above, the accounts being regularly submitted to the EFTA Surveillance Authority. Where the accounting method is chosen, the EFTA Surveillance Authority will reserve the possibility of submitting the accounts to independent audit, especially if any doubt arises as to the capability of the system to ensure the necessary transparency or to detect any cross-subsidization. If the guarantee cannot be properly monitored the EFTA Surveillance Authority may withdraw the exemption.

108. In all other cases, the EFTA Surveillance Authority does not envisage requiring such transparency of the TOs. However, if in a specific case there are substantial elements converging in indicating the existence of an abusive cross-subsidization and/or predatory pricing, the EFTA Surveillance Authority could establish a presumption of such cross-subsidization and predatory pricing. An appropriate separate accounting system could be important in order to counter this presumption.

109. Cross-subsidization of a reserved activity by a non-reserved one does not in principle restrict competition. However, the application of the exception provided in Article 59 (2) to this non-reserved activity could not as a rule be justified by the fact that the financial viability of the TO in question rests on the non-reserved activity. Its financial viability and the performance of its task of general economic interest can only be ensured by the State where appropriate by the granting of an exclusive or special right and by imposing restrictions on activities competing with the reserved ones.

110. Also cross-subsidization by a public or private operator outside the territory covered by the EEA Agreement may be deemed abusive in terms of Article 54 if that operator holds a dominant position for equipment or non-reserved services within the said territory. The existence of this dominant position, which allows the holder to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers, will be assessed in the light of all elements in the territory covered by the EEA Agreement and outside.

B. Abuses by undertakings other than the TOs

111. Further to the liberalization of services, undertakings other than the TOs may increasingly extend their power to acquire dominant positions in non-reserved markets. They may already hold such a position in some services markets which had not been reserved. When they take advantage of their dominant position to restrict competition and to extend their power, Article 54 may also apply to them. The abuses in which they might indulge are broadly similar to most of those previously described in relation to the TOs.

112. Infringements of Article 54 may be committed by the abusive exercise of industrial property rights in relation with standards, which are of crucial importance for telecommunications. Standards may be either the results of international standardization, or *de facto* standards and the property of undertakings.

113. Producers of equipment or suppliers of services are dependent on proprietary standards to ensure the interconnectivity of their computer resources. An undertaking which owns a dominant network architecture may abuse its dominant position by refusing to provide the necessary information for the interconnection of other architecture resources to its architecture products. Other possible abuses — similar to those indicted as to the TOs — are, *inter alia*, delays in providing the information, discrimination in the quality of the information, discriminatory pricing or other trading conditions, and making the information provision subject to the acceptance by the producer, supplier or user of unfair trading conditions.

114. On 1 August 1984, the EC Commission accepted a unilateral undertaking from IBM to provide other manufacturers with the technical interface information needed to permit competitive products to be used with IBM's then most powerful range of computers, the System/370. The Commission thereupon suspended the proceedings pursuant to Article 86 of the EEC Treaty which it had initiated against IBM in December 1980. The IBM undertaking ⁽¹⁾ also contains a commitment relating to SNA formats and protocols.

115. The question how to reconcile copyrights on standards with the competition requirements is particularly difficult. In any event, copyright cannot be used unduly to restrict competition.

C. Abuses of dominant purchasing position

116. Article 54 also applies to behaviour of undertakings holding a dominant purchasing position. The examples of abuses indicated in that Article may therefore also concern that behaviour.

117. The act referred to in point 8 of Annex XVI to the EEA Agreement (Directive 90/531/EEC) on the procurement procedures of entities operating in, *inter alia*, the telecommunications sector regulates essentially:

(i) procurement procedures in order to ensure on a reciprocal basis non-discrimination on the basis of nationality;

and

(ii) for products or services for use in reserved markets, not in competitive markets. That act, which is addressed to States,

⁽¹⁾ Reproduced in full in EC Bulletin 10-1984 (point 3.4.1). As to its continued application, see Commission press release No IP(88) 814 of 15 December 1988.

does not exclude the application of Article 54 to the purchasing of products within the scope of the act. The EFTA Surveillance Authority will decide case by case how to ensure that these different sets of rules are applied in a coherent manner.

118. Furthermore, both in reserved and competitive markets, practices other than those covered by the act may be established in violation of Article 54. One example is taking advantage of a dominant purchasing position for imposing excessively favourable prices or other trading conditions, in comparison with other purchasers and suppliers (Article 54 (a)). This could result in discrimination pursuant to Article 54 (c). Also obtaining, whether or not through imposition, an exclusive distributorship for the purchased product by the dominant purchaser may constitute an abusive extension of its economic power to other markets (see 'Télémarketing', judgment of the Court of Justice of the European Communities (see footnote 1, page 47)).

119. Another abusive practice could be that of making the purchase subject to licensing by the supplier of standards for the product to be purchased or for other products, to the purchaser itself, or to other suppliers (Article 54 (d)).

120. Moreover, even in competitive markets, discriminatory procedures on the basis of nationality may exist, because national pressures and traditional links of non-economic nature do not always disappear quickly after the liberalization of the markets. In this case, a systematic exclusion or considerably unfavourable treatment of a supplier, without economic necessity, could be examined under Article 54, especially (b) (limitation of outlets) and (c) (discrimination): In assessing the case, the EFTA Surveillance Authority will substantially examine whether the same criteria for awarding the contract have been followed by the dominant undertaking for all suppliers.

The EFTA Surveillance Authority will normally take into account criteria similar to those indicated in Article 27 (1) of the act⁽¹⁾. The purchases in question being outside the scope of the act, the EFTA Surveillance Authority will not require that transparent purchasing procedures be pursued.

D. Effect on trade between Contracting Parties to the EEA Agreement

121. The same principle outlined regarding Article 53 applies here. Moreover, in certain circumstances, such as the case of the elimination of a competitor by an undertaking holding a dominant position, although trade between Contracting Parties to the EEA Agreement is not directly affected, for the purposes of Article 54 it is sufficient to show that there will be

repercussions on the competitive structure of the market covered by the EEA Agreement.

VI. Application of Articles 53 and 54 in the field of satellites

122. Due to the increasing importance of satellites and the particular uncertainty among undertakings as to the application of competition rules to individual cases in this sector, it is appropriate to address the sector in a distinct section in these guidelines.

123. State regulations on satellites are not covered by the Directive on terminals and the services Directive mentioned above except in the Directive on terminals which contemplates receive-only satellite stations not connected to a public network.

124. In any event the EEA competition rules fully apply to the satellites domain, *inter alia*, Articles 53 and 54 to undertakings. Below is indicated how the principles set out above, in particular in Sections IV and V, apply to satellites.

125. Agreements between European TOs in particular within international conventions may play an important role in providing European satellites systems and a harmonious development of satellite services throughout the territory covered by the EEA Agreement. These benefits are taken into consideration under competition rules, provided that the agreements do not contain restrictions which are not indispensable for the attainment of these objectives.

126. Agreements between TOs concerning the operation of satellite systems in the broadest sense may be caught by Article 53. As to space segment capacity, the TOs are each other's competitors, whether actual or potential. In pooling together totally or partially their supplies of space segment capacity they may restrict competition between themselves. Moreover, they are likely to restrict competition *vis-à-vis* third parties to the extent that their agreements contain provisions with this object or effect; for instance provisions limiting their supplies in quality and/or quantity, or restricting their business autonomy by imposing directly or indirectly a coordination between these third parties and the parties to the agreements. It should be examined whether such agreements could qualify for an exemption pursuant to Article 53 (3) provided that they are notified. However, restrictions on third parties' ability to compete are likely to preclude such an exemption. It should also be examined whether such agreements strengthen any individual or collective dominant position of the parties, which also would exclude the granting of an exemption. This could be the case in particular if the agreement provides that the parties are exclusive distributors of the space segment capacity provided by the agreement.

127. Such agreements between TOs could also restrict competition as to the uplink with respect to which TOs are

⁽¹⁾ See footnote 1, page 48. Article 27 (1) (a) and (b): The criteria on which the contracting entities shall base the award of the contracts shall be: (a) the most economically advantageous tender involving various criteria such as delivery date, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales services and technical assistance, commitments with regard to spare parts, security of supplies and price; or (b) the lowest price only.

competitors. In certain cases the customer for satellite communication has the choice between providers in several countries, and his choice will be substantially determined by the quality, price and other sales conditions of each provider. This choice will be even ampler since uplink is being progressively liberalized and to the extent that the application of EEA rules to State legislation will open up the uplink markets. EEA-wide agreements providing directly or indirectly for coordination as to the parties' uplink provision are therefore caught by Article 53.

128. Agreements between TOs and private operators on space segment capacity may be also caught by Article 53, as that provision applies, *inter alia*, to cooperation, and in particular joint venture agreements. These agreements could be exempted if they bring specific benefits such as technology transfer, improvement of the quality of the service or enabling better marketing, especially for a new capacity, outweighing the restrictions. In any event, imposing on customers the bundled uplink and space segment capacity provision is likely to exclude an exemption since it limits competition in uplink provision to the detriment of the customer's choice, and in the current market situation will almost certainly strengthen the TOs' dominant position in violation of Article 54. An exemption is unlikely to be granted also when the agreement has the effect of reducing substantially the supply in an oligopolistic market, and even more clearly when an effect of the agreement is to prevent the only potential competitor of a dominant provider in a given market from offering its services independently. This could amount to a violation of Article 54. Direct or indirect imposition of any kind of agreement by a TO, for instance by making the uplink subject to the conclusion of an agreement with a third party, would constitute an infringement of Article 54.

VII. Restructuring in telecommunications

129. Deregulation, the objective of a single market for 1992 and the fundamental changes in the telecommunications technology have caused wide strategic restructuring in Europe and throughout the world as well. They have mostly taken the form of mergers and joint ventures.

(a) Mergers

130. In assessing telecom mergers in the framework of the act referred to in point 1 of Annex XIV to the EEA Agreement (Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, hereinafter referred to as 'Regulation (EEC) No 4064/89') the EFTA Surveillance Authority will take into account, *inter alia*, the following elements.

131. Restructuring moves are in general beneficial to the European telecommunications industry. They may enable the companies to rationalize and to reach the critical mass necessary to obtain the economies of scale needed to make the important investments in research and development. These are necessary to

develop new technologies and to remain competitive in the world market.

However, in certain cases they may also lead to the anti-competitive creation or strengthening of dominant positions.

132. The economic benefits resulting from critical mass must be demonstrated. The concentration operation could result in a mere aggregation of market shares, unaccompanied by restructuring measures or plans. This operation may create or strengthen EEA-wide or national dominant positions in a way which impedes competition.

133. When concentration operations have this sole effect, they can hardly be justified by the objective of increasing the competitiveness of EEA industry in the world market. This objective, strongly emphasized by the EFTA Surveillance Authority, rather requires competition in domestic markets in the territory covered by the EEA Agreement in order that the undertakings located within this territory acquire the competitive structure and attitude needed to operate in the world market.

134. In assessing concentration cases in telecommunications, the EFTA Surveillance Authority will be particularly vigilant to avoid the strengthening of dominant positions through integration. If dominant service providers are allowed to integrate into the equipment market by way of mergers, access to this market by other equipment suppliers may be seriously hindered. A dominant service provider is likely to give preferential treatment to its own equipment subsidiary.

Moreover, the possibility of disclosure by the service provider to its subsidiary of sensitive information obtained from competing equipment manufacturers can put the latter at a competitive disadvantage.

The EFTA Surveillance Authority will examine case by case whether vertical integration has such effects or rather is likely to reinforce the competitive structure in the territory covered by the EEA Agreement.

135. The EC Commission has enforced principles on restructuring in a case concerning the GEC and Siemens joint bid for Plessey⁽¹⁾.

136. Article 53 (1) applies to the acquisition by an undertaking of a minority shareholding in a competitor where, *inter alia*, the arrangements involve the creation of a structure of cooperation between the investor and the other undertakings, which will influence these undertakings' competitive conduct⁽²⁾.

⁽¹⁾ Commission decision rejecting Plessey's complaint against the GEC-Siemens bid (Case IV/33.018 GEC-Siemens/Plessey) (OJ No C 239, 25. 9. 1990, p. 2).

⁽²⁾ Reference is made to the Judgment of the Court of Justice of the European Communities in application of Article 85 (1) of the EEC Treaty, British American Tobacco Company Ltd and RJ Reynolds Industries Inc. v. Commission (Joined Cases 142 and 156/84) of 17 November 1987 [1987] ECR, p. 4487.

(b) *Joint ventures*

137. A joint venture can be of a cooperative or a concentrative nature. It is of a cooperative nature when it has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent. The principles governing cooperative joint ventures are to be set out in EFTA Surveillance Authority guidelines to that effect. Concentrative joint ventures fall under the abovementioned Regulation (EEC) No 4064/89 on concentrations.

138. In some of the latest joint venture cases the EEC Commission granted an exemption pursuant to Article 85 (3) of the EEC Treaty (corresponds to Article 53 (3) of the EEA Agreement) on grounds which are particularly relevant to telecommunications. Precisely in a decision concerning telecommunications, the 'Optical Fibres' case ⁽¹⁾, the Commission considered that the joint venture enabled European companies to produce a high technology product, promoted technical progress, and facilitated technology transfer. Therefore, the joint venture permits European companies to withstand competition from non-Community producers, especially in the USA and Japan, in an area of fast-moving technology

characterized by international markets. The Commission confirmed this approach in the 'Canon-Olivetti' case ⁽²⁾.

VIII. Impact of the international conventions on the application of EEA competition rules to telecommunications

139. International conventions (such as the Convention of international telecommunication union (ITU) or Conventions on satellites) play a fundamental role in ensuring worldwide cooperation for the provision of international services. All the EFTA States participate in ITU and its committees. The application of the provisions of the international conventions on telecommunications has to be assessed in the light of the principle of loyal cooperation. In accordance with Article 3 (2) of the EEA Agreement the EFTA States must abstain from any measure which could jeopardize the attainment of the objectives of the Agreement, when applying these conventions. In this context, the EFTA Surveillance Authority will pay particular attention to the general objective laid down in Article 1 (2) (e) of the EEA Agreement, namely the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected.

⁽¹⁾ Decision 86/405/EEC (OJ No L 236, 22. 8. 1986, p. 30).

⁽²⁾ Decision 88/88/EEC (OJ No L 52, 26. 2. 1988, p. 51).