

**COMMISSION REGULATION (EC) No 1033/2008**  
**of 20 October 2008**  
**amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the**  
**control of concentrations between undertakings**

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) <sup>(1)</sup>, and in particular Article 23(1) thereof,

After consulting the Advisory Committee on Concentrations,

Whereas:

(1) Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings <sup>(2)</sup> sets out procedural rules for the notification and examination of concentrations. In order to take account of the accession of Bulgaria and Romania to the European Union it is necessary to update the notification form used for concentrations which requires certain information based on a list of all Member States.

(2) In relation to the submission of documents or statements made by persons, undertakings or associations of undertakings within the procedure, it appears advisable to clarify the procedure whereby such documents or statements can be considered as non-confidential.

(3) On 8 June 2004 the EEA Joint Committee adopted Decision No 78/2004 and Decision No 79/2004. These decisions incorporate Regulation (EC) No 139/2004 into the EEA Agreement. In order to take account of these

decisions and for reasons of legal clarity and transparency adaptations need to be introduced into the notification forms, in particular the Form RS relating to reasoned submissions (Form RS), which deals with information requirements for pre-notification referrals under Article 4(4) and Article 4(5) of Regulation (EC) No 139/2004.

(4) In order to ensure that the Commission is in a position to carry out a proper assessment of commitments offered by the notifying parties pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 with a view to rendering a concentration compatible with the common market, the notifying parties should be required to submit detailed information concerning the commitments offered and, in particular, to submit specific information if the commitments offered consist in the divestiture of a business.

(5) In order to satisfy the Commission that the commitments will be implemented in due time and manner it seems appropriate to clarify that the commitments may include details on the appropriate mechanisms proposed by the parties, including the appointment of a trustee to assist the Commission in overseeing compliance.

(6) Regulation (EC) No 802/2004 should therefore be amended accordingly.

HAS ADOPTED THIS REGULATION:

*Article 1*

Regulation (EC) No 802/2004 is amended as follows:

1. In Article 18, the following paragraph 4 is added:

‘4. If persons, undertakings or associations of undertakings fail to comply with paragraphs 2 or 3, the Commission may assume that the documents or statements concerned do not contain confidential information.’

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

<sup>(2)</sup> OJ L 133, 30.4.2004, p. 1.

2. In Article 20, the following paragraph 1a is inserted:

'1a. In addition to the requirements set out in paragraph 1, the undertakings concerned shall, at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004, submit one original and 10 copies of the information and documents prescribed by the Form RM relating to remedies (Form RM) as set out in Annex IV to this Regulation. The information submitted shall be correct and complete.'

3. The following Article 20a is inserted:

*'Article 20a*

#### **Trustees**

1. The commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 may include, at the own expense of the undertakings concerned, the appointment of an independent trustee (or trustees) assisting the

Commission in overseeing the parties' compliance with the commitments or having a mandate to implement the commitments. The trustee may be appointed by the parties, after the Commission has approved its identity, or by the Commission. The trustee shall carry out its tasks under the supervision of the Commission.

2. The Commission may attach such trustee-related provisions of the commitments as conditions and obligations pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004.'

4. The Annexes are amended in accordance with the Annex to this Regulation.

#### *Article 2*

#### **Entry into force**

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

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

Done at Brussels, 20 October 2008.

*For the Commission*

Neelie KROES

*Member of the Commission*

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## ANNEX

The Annexes to Regulation (EC) No 802/2004 are amended as follows:

1. Annex I is amended as follows:

(a) In point 1.1, the first paragraph is replaced by the following:

'This Form specifies the information that must be provided by notifying parties when submitting a notification to the European Commission of a proposed merger, acquisition or other concentration. The merger control system of the European Union is laid down in Council Regulation (EC) No 139/2004 (hereinafter referred to as "the EC Merger Regulation"), and in Commission Regulation (EC) No 802/2004 (hereinafter referred to as "the Implementing Regulation"), to which this Form CO is annexed (\*). The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site. Your attention is drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as "the EEA Agreement") (\*\*).

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(\* ) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

(\*\*) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the "Surveillance and Court Agreement"). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.'

(b) In point 1.1, the last sentence of the second paragraph is replaced by the following:

'Mergers which do not meet the turnover thresholds may fall within the competence of the Member States' and/or the EFTA States' authorities in charge of merger control.'

(c) Footnote 1 referred to in subsection 3.5 is replaced by the following:

'<sup>(1)</sup> See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.'

(d) In Section 10, point (b) is replaced by the following:

'(b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, and, where applicable, the corresponding provisions of the EEA Agreement (\*), give your reasons.'

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(\* ) See Article 53(1) of the EEA Agreement.'

(e) In Section 10, the introductory wording of point (c) is replaced by the following:

'Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement (\*) apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation:

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(\*) See Article 53(3) of the EEA Agreement.'

## 2. Annex II is amended as follows:

- (a) In point 1.1, the second paragraph is replaced by the following:

In completing this Form, your attention is drawn to Council Regulation (EC) No 139/2004 (hereinafter referred to as "the EC Merger Regulation"), and Commission Regulation (EC) No 802/2004 (hereinafter referred to as "the Implementing Regulation"), to which this Form is annexed (\*). The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as "the EEA Agreement") (\*\*).

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(\*) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

(\*\*) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the "Surveillance and Court Agreement"). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.'

- (b) In point 1.2, the fourth indent of the second paragraph is replaced by the following:

— a Member State or an EFTA State expresses substantiated competition concerns about the notified concentration within 15 working days of receipt of the copy of the notification; or'

- (c) Footnote 3 referred to in subsection 3.5 is replaced by the following:

(<sup>3</sup>) See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies to be treated as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.'

- (d) In Section 8, point (b) is replaced by the following:

(b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, and, where applicable, the corresponding provisions of the EEA Agreement (\*), give your reasons.

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(\*) See Article 53(1) of the EEA Agreement.'

- (e) In Section 8, the introductory wording of point (c) is replaced by the following:

'Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement (\*) apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation:

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(\*) See Article 53(3) of the EEA Agreement.'

## 3. Annex III is amended as follows:

- (a) Section A of the Introduction is replaced by the following:

**'A. The purpose of this Form**

This Form specifies the information that requesting parties should provide when making a reasoned submission for a pre-notification referral under Article 4(4) or (5) of Council Regulation (EC) No 139/2004 (hereinafter referred to as "the EC Merger Regulation") (\*).

Your attention is drawn to the EC Merger Regulation and to Commission Regulation (EC) No 802/2004 (hereinafter referred to as "the EC Merger Implementing Regulation"), to which this Form RS is annexed. The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission's Europa web site. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as "the EEA Agreement") (\*\*).

Experience has shown that prior contacts are extremely valuable to both the parties and the relevant authorities in determining the precise amount and type of information required. Accordingly, parties are encouraged to consult the Commission and the relevant Member State/s or EFTA State/s regarding the adequacy of the scope and type of information on which they intend to base their reasoned submission.

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(\*) Council Regulation (EC) No 139/2004 of 20 January 2004 (OJ L 24, 29.1.2004, p. 1).

(\*\*) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the "Surveillance and Court Agreement"). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.'

- (b) In Section B of the Introduction, the last sentence of the third paragraph is replaced by the following:

'Finally, parties should also be aware that, if a referral is made on the basis of incorrect, misleading or incomplete information included in Form RS, the Commission and/or the Member States and the EFTA States may consider making a post-notification referral rectifying any referral made at pre-notification.'

- (c) In Section B of the Introduction, the first and the second sentences of point (a) are replaced by the following:

'In accordance with Articles 4(4) and (5) of the EC Merger Regulation, the Commission is obliged to transmit reasoned submissions to the Member States and the EFTA States without delay. The time limits for considering a reasoned submission will begin upon receipt of the submission by the relevant Member State/s or EFTA State/s.'

- (d) In Section B of the Introduction, the last sentence of point (d) is replaced by the following:

'Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission or the relevant Member State/s and EFTA State/s should also be provided.'

- (e) In Section B of the Introduction, point (e) is replaced by the following:

'(e) You may request that the Commission accept that the reasoned submission is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information requested by this Form may not be necessary for the Commission's or the relevant Member State/s' or EFTA State/s' examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to dealing with your request for a pre-notification referral. You should explain this during your prior contacts with the Commission and with the relevant Member State/s and EFTA State/s, and submit a written request for a waiver asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the EC Merger Implementing Regulation. The Commission may consult with the relevant Member State or EFTA State authority or authorities before deciding whether to accede to such a request.'

- (f) In Section D of the Introduction, the second paragraph is replaced by the following:

'In order to facilitate treatment of Form RS by Member State and EFTA State authorities, parties are strongly encouraged to provide the Commission with a translation of their reasoned submission in a language or languages which will be understood by all addressees of the information. As regards requests for referral to (a) Member State/s or (an) EFTA State/s, the requesting parties are strongly encouraged to include a copy of the request in the language/s of the Member State/s and EFTA State/s to which referral is being requested.'

- (g) In Section E of the Introduction, the first paragraph is replaced by the following:

‘Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation, as well as the corresponding provisions of the EEA Agreement (\*) require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

(\*) See, in particular, Article 122 of the EEA Agreement, Article 9 of Protocol 24 to the EEA Agreement and Article 17(2) of Chapter XIII of Protocol 4 to the Surveillance and Court Agreement.’

- (h) In Section 2, the following subsection 2.4.2 is added:

‘2.4.2. Provide a breakdown of the EFTA-wide turnover achieved by the undertakings concerned, indicating, where applicable, the EFTA State, if any, in which more than two-thirds of this turnover is achieved.’

- (i) In Section 4, the introductory wording of Section III is replaced by the following:

‘For the purposes of the information required in this Form, affected markets consist of relevant product markets where, in the EEA territory, in the Community, in the territory of the EFTA States, in any Member State or in any EFTA State.’

- (j) In Section 4, subsection 4.1 is replaced by the following:

‘4.1. Identify each affected market within the meaning of Section III:

- (a) at the EEA, Community or EFTA level;
- (b) in the case of a request for referral pursuant to Article 4(4) of the EC Merger Regulation, at the level of each individual Member State or EFTA State;
- (c) in the case of a request for referral pursuant to Article 4(5) of the EC Merger Regulation, at the level of each Member State or EFTA State identified at Section 6.3.1 of this Form as capable of reviewing the concentration.’

- (k) In the first paragraph of Section 5, the introductory wording and points (a), (b) and (c) are replaced by the following:

‘For each affected relevant product market, for the last financial year,

- (a) for the EEA territory, for the Community as a whole and for the EFTA States as a whole;
- (b) in the case of a request for referral pursuant to Article 4(4) of the EC Merger Regulation, individually for each Member State/EFTA State where the parties to the concentration do business; and
- (c) in the case of a request for referral pursuant to Article 4(5) of the EC Merger Regulation, individually for each Member State/EFTA State identified at Section 6.3.1 of this Form as capable of reviewing the concentration where the parties to the concentration do business; and’

- (l) In Section 6, subsection 6.2.1 is replaced by the following:

‘6.2.1. Identify the Member State/s and EFTA State/s which, pursuant to Article 4(4) of the EC Merger Regulation, you submit should examine the concentration, indicating whether or not you have made informal contact with this Member State/s and/or EFTA State/s.’

(m) In Section 6, the third paragraph of subsection 6.2.2 is replaced by the following:

'If you are requesting referral of the whole of the case, you must confirm that there are no affected markets outside the territory of the Member State/s and EFTA State/s to which you request the referral to be made.'

(n) In Section 6, subsection 6.2.3 is replaced by the following:

'6.2.3. Explain in what way each of the affected markets in the Member State/s and EFTA State/s to which referral is requested presents all the characteristics of a distinct market within the meaning of Article 4(4) of the EC Merger Regulation.'

(o) In Section 6, subsection 6.2.5 is replaced by the following:

'6.2.5. In the event of a Member State/s and/or EFTA State/s becoming competent to review the whole or part of the case following a referral pursuant to Article 4(4) of the EC Merger Regulation, do you consent to the information contained in this Form being relied upon by the Member State/s and/or EFTA State/s in question for the purpose of its/their national proceedings relating to that case or part thereof? YES or NO'

(p) In Section 6, subsection 6.3.1 is replaced by the following:

'6.3.1. For each Member State and/or EFTA State, specify whether the concentration is or is not capable of being reviewed under its national competition law. You must tick one box for each and every Member State and/or EFTA State.

Is the concentration capable of being reviewed under the national competition law of each of the following Member States and/or EFTA States? You must reply for each Member State and/or EFTA State. Only indicate YES or NO for each Member State and/or EFTA State. Failure to indicate YES or NO for any Member State and/or EFTA State shall be deemed to constitute an indication of YES for that Member State and/or EFTA State.

Belgium:	YES	NO
Bulgaria:	YES	NO
Czech Republic:	YES	NO
Denmark:	YES	NO
Germany:	YES	NO
Estonia:	YES	NO
Ireland:	YES	NO
Greece:	YES	NO
Spain:	YES	NO
France:	YES	NO
Italy:	YES	NO
Cyprus:	YES	NO
Latvia:	YES	NO
Lithuania:	YES	NO
Luxembourg:	YES	NO
Hungary:	YES	NO
Malta:	YES	NO
Netherlands:	YES	NO
Austria:	YES	NO
Poland:	YES	NO
Portugal:	YES	NO

Romania:	YES	NO
Slovenia:	YES	NO
Slovakia:	YES	NO
Finland:	YES	NO
Sweden:	YES	NO
United Kingdom:	YES	NO
Iceland:	YES	NO
Norway:	YES	NO
Liechtenstein:	YES	NO'

(q) In Section 6, subsection 6.3.2 is replaced by the following:

'6.3.2. For each Member State and/or EFTA State, provide sufficient financial or other data to show that the concentration meets or does not meet the relevant jurisdictional criteria under the applicable national law.'

(r) In Section 6, the following subsection 6.3.3 is added:

'6.3.3. Explain why the case should be examined by the Commission. Explain in particular whether the concentration might affect competition beyond the territory of one Member State and/or EFTA State.'

(s) In Section 6, subsection 6.3.4 is deleted.

4. The following Annex IV is added:

#### 'ANNEX IV

### **Form RM relating to the information concerning commitments submitted pursuant to Article 6(2) and Article 8(2) of Regulation (EC) No 139/2004**

#### FORM RM RELATING TO REMEDIES

#### INTRODUCTION

This form specifies the information and documents to be submitted by the undertakings concerned at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004. The information requested is necessary to allow the Commission to examine whether the commitments are capable of rendering the concentration compatible with the common market in that they will prevent a significant impediment to effective competition. The Commission may dispense with the obligation to provide any particular information in respect of the commitments offered, including documents, or with any other requirement laid down in this form where it considers that compliance with those obligations or requirements is not necessary for the examination of the commitments offered. The level of information required will vary according to the type and structure of the remedy proposed. For example, carve-out remedies will typically require more detailed information than divestitures of stand-alone businesses. The Commission is available to discuss the scope of the information required with the parties upfront. If you consider that any particular information requested by this Form may not be necessary for the Commission's assessment, you may approach the Commission asking to dispense with certain requirements, giving adequate reasons why that information is not relevant.

#### SECTION 1

#### **Description of the commitment**

1.1. Provide detailed information on

- (i) the object of the commitments offered, and
- (ii) the conditions for their implementation.



- 1.2. Where the commitments offered consist in the divestiture of a business, Section 5 provides for the specific information required.

#### SECTION 2

##### **Suitability to remove competition concerns**

2. Provide information showing the suitability of the commitments offered to remove the significant impediment of effective competition identified by the Commission.

#### SECTION 3

##### **Deviation from Model Texts**

3. Identify any deviations of the commitments offered from the pertinent Model Commitments texts published by the Commission's services, as revised from time-to-time, and explain the reasons for the deviations.

#### SECTION 4

##### **Summary of the commitments**

4. Provide a non-confidential summary of the nature and scope of the commitments offered and why, in your view, they are suitable to remove any significant impediment to effective competition. The Commission may use this summary for the market test of the commitments offered with third parties.

#### SECTION 5

##### **Information on a business to be divested**

5. Where the commitments offered consist in the divestiture of a business, provide the following information and documents.

###### *General information on the business to be divested*

The following information should be provided as to the current operation of the business to be divested and changes already planned for the future:

- 5.1. Describe the business to be divested generally, including the entities belonging to it, their registered place of business and place of management, other locations for production or provisions of services, the general organisational structure and any other relevant information relating to the administrative structure of the business to be divested.
- 5.2. State whether there are and describe any legal obstacles for the transfer of the business to be divested or the assets, including third party rights and administrative approvals required.
- 5.3. List and describe the products manufactured or services provided, in particular their technical and other characteristics, the brands involved, the turnover generated with each of these products or services, and any innovations or new products or services planned.
- 5.4. Describe the level on which the essential functions of the business to be divested are operated if they are not operated on the level of the business to be divested itself, including such functions as research and development, production, marketing and sales, logistics, relations with customers, relations with suppliers, IT systems, etc. The description should contain the role performed by those other levels, the relations with the business to be divested and the resources (personnel, assets, financial resources, etc.) involved in the function.
- 5.5. Describe in detail the links between the business to be divested and other undertakings controlled by the notifying parties (irrespective of the direction of the link), such as:
  - supply, production, distribution, service or other contracts,
  - shared tangible or intangible assets,
  - shared or seconded personnel,
  - shared IT systems or other systems, and
  - shared customers.

- 5.6. Describe in general terms all relevant tangible and intangible assets used and/or owned by the business to be divested, including, in any case, IP rights and brands.
- 5.7. Submit an organisational chart identifying the number of personnel currently working in each of the functions of the business to be divested and a list of those employees who are indispensable for the operation of the business to be divested, describing their functions.
- 5.8. Describe the customers of the business to be divested, including a list of customers, a description of the corresponding records available, and provide the total turnover generated by the business to be divested with each of these customers (in EUR and as percentage of the total turnover of business to be divested).
- 5.9. Provide financial data for the business to be divested, including the turnover and the EBITDA achieved in the last two years, and the forecast for the next two years.
- 5.10. Identify and describe any changes that have occurred in the last two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.
- 5.11. Identify and describe any changes, planned for the next two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.

*General information on the business to be divested as described in the commitments*

- 5.12. Describe any areas where the business to be divested as set out in the commitments offered differs from the nature and scope of the business as currently operated.

*Acquisition by a suitable purchaser*

- 5.13. Explain the reasons why, in your view, the business will be acquired by a suitable purchaser in the time-frame proposed in the commitments offered.
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