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ANNEX III: FORM RS
(RS = reasoned submission pursuant to Article 4(4) and (5) of Council Regulation (EC) No 139/2004)

FORM RS RELATING TO REASONED SUBMISSIONS

PURSUANT TO ARTICLES 4(4) AND 4(5) OF REGULATION (EC) No 139/2004

INTRODUCTION

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 [.../2004] (hereinafter referred to as “the EC Merger Implementing Regulation”).¹ 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.

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 regarding the adequacy of the scope and type of information on which they intend to base their reasoned submission.

¹ **Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.01.2004, p. 1. Your attention is drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as “the EEA Agreement”). See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement and Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, as well as Protocols 21 and 24 to the EEA Agreement and Article 1 and the Agreed Minutes of the Protocol adjusting the EEA 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. The requirement for a reasoned submission to be correct and complete

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate section of this Form.

Incorrect or misleading information in the reasoned submission will be considered to be incomplete information (Article 5(4) of the EC Merger Implementing Regulation).

If parties submit incorrect information, the Commission will have the power to revoke any Article 6 or 8 decision it adopts following an Article 4(5) referral, pursuant to Article 6(3)(a) or 8(6)(a) of the EC Merger Regulation. Following revocation, national competition laws would once again be applicable to the transaction. In the case of referrals under Article 4(4) made on the basis of incorrect information, the Commission may require a notification pursuant to Article 4(1). In addition, the Commission will have the power to impose fines for submission of incorrect or misleading information pursuant to Article 14(1)(a) of the EC Merger Regulation. (See point d below). 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 may consider making a post-notification referral rectifying any referral made at pre-notification.

In particular you should note that:

(a) In accordance with Articles 4(4) and (5) of the EC Merger Regulation, the Commission is obliged to transmit reasoned submissions to Member States without delay. The time-limits for considering a reasoned submission will begin upon receipt of the submission by the relevant Member State or States. The decision whether or not to accede to a reasoned submission will normally be taken on the basis of the information contained therein, without further investigation efforts being undertaken by the authorities involved.

(b) The submitting parties should therefore verify, in the course of preparing their reasoned submission, that all information and arguments relied upon are sufficiently supported by independent sources.

(c) Under Article 14(1)(a) of the EC Merger Regulation, parties making a reasoned submission who, either intentionally or negligently, provide incorrect or misleading information, may be liable to fines of up to 1% of the aggregate turnover of the undertaking concerned.

(d) You may request in writing that the Commission accept that the reasoned submission is complete notwithstanding the failure to provide information required by this Form, if such information is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid).

The Commission will consider such a request, provided that you give reasons for the non-availability of that information, and provide your best estimates for missing data together with the sources for the estimates. 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 should also be provided.

(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' 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 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 authority or authorities before deciding whether to accede to such a request.

C. Persons entitled to submit a reasoned submission

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the Merger Regulation, the reasoned submission must be completed jointly by the parties to the merger or by those acquiring joint control as the case may be.

In case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the reasoned submission.

In the case of a public bid to acquire an undertaking, the bidder must complete the reasoned submission.

Each party completing a reasoned submission is responsible for the accuracy of the information which it provides.

D. How to make a reasoned submission

The reasoned submission must be completed in one of the official languages of the European Union. This language will thereafter be the language of the proceedings for all submitting parties. **Where submissions are made in accordance with Article 12 of Protocol 24 to the EEA Agreement in an official language of an EFTA State which is not an official language of the Community, the submission must simultaneously be supplemented with a translation into an official language of the Community.**

In order to facilitate treatment of Form RS by Member 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 or States, the requesting parties are strongly encouraged to include a copy of the request in the language/s of the Member State/s to which referral is being requested.

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing the declaration at the end, and annexing supporting documentation. For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information are presented in the body of Form RS. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Supporting documents are to be submitted in their original language; where this is not an official language of the Community, they must be translated into the language of the proceeding.

Supporting documents may be originals or copies of the originals. In the latter case, the submitting party must confirm that they are true and complete.

One original and 35 copies of the Form RS and of the supporting documents must be submitted to the Commission. The reasoned submission shall be delivered to the address referred to in Article 23 (1) of the EC Merger Implementing Regulation and in the format specified by the Commission services.

The submission must be delivered to the address of the Commission's Directorate-General for Competition (DG Competition). This address is published in the Official Journal of the European

Union. The submission must be delivered to the Commission on working days as defined by Article 24 of the EC Merger Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the Official Journal of the European Union. The security instructions given on DG Competition's website must be adhered to.

E. Confidentiality

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation **as well as the corresponding provisions of the EEA Agreement²** require the Commission and the competent authorities of the Member States, **the EFTA Surveillance Authority and the EFTA States**, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States, not to disclose information of the kind covered by the obligation of professional secrecy and which they have acquired through the application of the Regulation. The same principle must also apply to protect confidentiality between submitting parties.

If you believe that your interests would be harmed if any of the information supplied were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked “Business Secrets”. You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the reasoned submission is completed by more than one of the parties, business secrets may be submitted in separate annexes, and referred to in the submission as an annex. All such annexes must be included in the reasoned submission.

F. Definitions and instructions for the purposes of this Form

Submitting party or parties: in cases where a reasoned submission is made by only one of the undertakings who is a party to an operation, “submitting parties” is used to refer only to the undertaking actually making the submission.

Party(ies) to the concentration or parties: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms “*submitting party(ies)*” and “*party(ies) to the concentration*” include all the undertakings which belong to the same groups as those “parties”.

Affected markets: Section 4 of this Form requires the submitting parties to define the relevant product markets, and further to identify which of those relevant markets are likely to be affected by the operation. This definition of affected market is used as the basis for requiring information for a number of other questions contained in this Form. The definitions thus submitted by the submitting parties are referred to in this Form as the affected market(s). This term can refer to a relevant market made up either of products or of services.

Year: all references to the word “year” in this Form should be read as meaning calendar year, unless otherwise stated. All information requested in this Form relates, unless otherwise specified, to the year preceding that of the reasoned submission.

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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 Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (ESA Agreement).

The financial data requested in this Form must be provided in Euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant Articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

SECTION 1

Background information

1.0 Indicate whether the reasoned submission is made under Article 4(4) or (5).

- Article 4(4) referral
- Article 4(5) referral

1.1. Information on the submitting party (or parties)

Give details of:

1.1.1. the name and address of undertaking;

1.1.2. the nature of the undertaking's business;

1.1.3. the name, address, telephone number, fax number and electronic address of, and position held by, the appropriate contact person; and

1.1.4. an address for service of the submitting party (or each of the submitting parties) to which documents and, in particular, Commission decisions may be delivered. The name, telephone number and e-mail address of a person at this address who is authorised to accept service must be provided.

1.2. Information on the other parties³ to the concentration

For each party to the concentration (except the submitting party or parties) give details of:

1.2.1. the name and address of undertaking;

1.2.2. the nature of undertaking's business;

1.2.3. the name, address, telephone number, fax number and electronic address of, and position held by the appropriate contact person;

1.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

1.3. Appointment of representatives

Where reasoned submissions are signed by representatives of undertakings, such

³ This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

representatives must produce written proof that they are authorized to act. The written proof must contain the name and position of the persons granting such authority.

Provide the following contact details of any representatives who have been authorized to act for any of the parties to the concentration, indicating whom they represent:

- 1.3.1. the name of the representative;
- 1.3.2. the address of the representative;
- 1.3.3. the name, address, telephone number, fax number and e-mail address of the person to be contacted; and
- 1.3.4. an address of the representative (in Brussels if available) to which correspondence may be sent and documents delivered.

SECTION 2

General background and details of the concentration

2.1 Describe the general background to the concentration. In particular, give an overview of the main reasons for the transaction, including its economic and strategic rationale.

Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, or joint venture.), the areas of activity of the submitting parties, the markets on which the concentration will have an impact (including the main affected markets⁴), and the strategic and economic rationale for the concentration.

2.2. Describe the legal nature of the transaction which is the subject of the reasoned submission. In doing so, indicate:

- (a) whether the whole or parts of the parties are subject to the concentration;
- (b) the proposed or expected date of any major events designed to bring about the completion of the concentration;
- (c) the proposed structure of ownership and control after the completion of the concentration; and
- (d) whether the proposed transaction is a concentration within the meaning of Article 3 of the EC Merger Regulation.

2.3. List the economic sectors involved in the concentration.

2.3.1 State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be).

2.4. Provide sufficient financial or other data to show that the concentration meets OR does not

⁴ See Section 4 for the definition of affected markets.

meet the jurisdictional thresholds under Article 1 of the EC Merger Regulation.

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

SECTION 3

Ownership and control⁵

For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

This list must include:

3.1. all undertakings or persons controlling these parties, directly or indirectly;

3.2. all undertakings active on any affected market⁶ that are controlled, directly or indirectly:

(a) by these parties;

(b) by any other undertaking identified in 3.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organization charts or diagrams to show the structure of ownership and control of the undertakings.

⁵ See Article 3(3), 3(4) and 3(5) and Article 5(4).

⁶ See Section 4 for the definition of affected markets.

SECTION 4

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed⁷.

The submitting party or parties must provide the data requested having regard to the following definitions:

I. Relevant product markets

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

⁷ See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

II. Relevant geographic markets

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas, or substantial price differences.

III. Affected markets

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**, or in any Member State **or in any EFTA State**⁸:

- (a) two or more of the parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15% or more. These are horizontal relationships;
- (b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares at either level is 25% or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration⁹. These are vertical relationships.

On the basis of the above definitions and market share thresholds, provide the following information:

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

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

⁸ **The parties may chose to seek an Article 4(5) referral only for the European Communities, in such case the EFTA States retain their jurisdiction over the case, and consequently no information needs to be submitted as regards the EFTA States or the EEA territory.**

⁹ For example, if a party to the concentration holds a market share larger than 25% in a market that is upstream to a market in which the other party is active, then both the upstream and the downstream markets are affected markets. Similarly, if a vertically integrated company merges with another party which is active at the downstream level, and the merger leads to a combined market share downstream of 25% or more, then both the upstream and the downstream markets are affected markets.

concentration.

- 4.2. In addition, explain the submitting parties' view as to the scope of the relevant geographic market within the meaning of Section II in relation to each affected market identified at 4.1 above.

SECTION 5

Information on affected markets

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

- (a) for the **EEA and the** Community as a whole;
- (b) in the case of a request for referral pursuant to Article 4(4), individually for each **EFTA or** Member State where the parties to the concentration do business; and
- (c) in the case of a request for referral pursuant to Article 4(5), individually for each **EFTA or** Member 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
- (d) where in the opinion of the submitting parties, the relevant geographic market is different;

provide the following information:

- 5.1. an estimate of the total size of the market in terms of sales value (in Euros) and volume (units)¹⁰. Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

- 5.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;

- 5.3. an estimate of the market share in value (and where appropriate volume) of all competitors (including importers) having at least 5 % of the geographic market under consideration;

On this basis, provide an estimate of the HHI index¹¹ pre- and post-merger, and the difference between the two (the delta)¹². Indicate the proportion of market shares used as a

¹⁰ The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration.

¹¹ HHI stands for Herfindahl-Hirschman Index, a measure of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. For example, a market containing five firms with market shares of 40%, 20%, 15%, 15%, and 10%, respectively, has an HHI of 2550 ($40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2550$). The HHI ranges from close to zero (in an atomistic market) to 10000 (in the case of a pure monopoly). The post-merger HHI is calculated on the

	basis to calculate the HHI; Identify the sources used to calculate these market shares and provide documents where available to confirm the calculation;
5.4.	the five largest independent customers of the parties in each affected market and their individual share of total sales for such products accounted for by each of those customers;
5.5	the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors;
5.6.	identify the five largest independent ¹³ suppliers to the parties;
5.7.	Over the last five years, has there been any significant entry into any affected markets? In the opinion of the submitting parties are there undertakings (including those at present operating only in extra-Community markets) that are likely to enter the market? Please specify.
5.8.	To what extent do cooperative agreements (horizontal or vertical) exist in the affected markets?
5.9.	If the concentration is a joint venture, do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market? ¹⁴
5.10.	Describe the likely impact of the proposed concentration on competition in the affected markets and how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.
SECTION 6	
Details of the referral request and reasons why the case should be referred	
6.1	Indicate whether the reasoned submission is made pursuant to Article 4(4) or 4(5) of the EC Merger Regulation, and fill in <u>only</u> the relevant sub-section: <ul style="list-style-type: none"> ○ Article 4.4. referral

working assumption that the individual market shares of the companies do not change. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly.

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The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30% and 15% respectively would increase the HHI by 900 ($30 \times 15 \times 2 = 900$). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: $(a)^2 + (b)^2$. After the merger, the contribution is the square of their sum: $(a + b)^2$, which equals $(a)^2 + (b)^2 + 2ab$. The increase in the HHI is therefore represented by $2ab$.

¹³ That is suppliers which are not subsidiaries, agents or undertakings forming part of the group of the party in question. In addition to those five independent suppliers the notifying parties can, if they consider it necessary for a proper assessment of the case, identify the intra-group suppliers. The same applies in relation to customers.

¹⁴ For market definitions refer to Section 4.

- Article 4.5 referral

Sub-section 6.2

ARTICLE 4(4) REFERRAL

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

6.2.2 Specify whether you are requesting referral of the whole or part of the case.

If you are requesting referral of part of the case, specify clearly the part or parts of the case for which you request the referral.

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 to which you request the referral to be made.

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

6.2.4 Explain in what way competition may be significantly affected in each of the above-mentioned distinct markets within the meaning of Article 4(4).

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

Sub-section 6.3

ARTICLE 4(5) REFERRAL

6.3.1. For each Member 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.

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

Austria:	YES	NO
Belgium:	YES	NO
Cyprus:	YES	NO
Czech Republic:	YES	NO

Denmark:	YES	NO
Estonia:	YES	NO
Finland:	YES	NO
France:	YES	NO
Germany:	YES	NO
Greece:	YES	NO
Hungary:	YES	NO
Ireland:	YES	NO
Italy:	YES	NO
Latvia:	YES	NO
Lithuania:	YES	NO
Luxembourg:	YES	NO
Malta:	YES	NO
Netherlands:	YES	NO
Poland:	YES	NO
Portugal:	YES	NO
Slovakia:	YES	NO
Slovenia:	YES	NO
Spain:	YES	NO
Sweden:	YES	NO
United Kingdom:	YES	NO
Iceland	YES	NO
Liechtenstein	YES	NO
Norway	YES	NO

6.3.2 For each **EFTA or** Member 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 competition law.

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.

SECTION 7

Declaration

It follows from Articles 2(2) and 6(2) of the EC Merger Implementing Regulation that where reasoned submissions are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the submission.

The reasoned submission must conclude with the following declaration which is to be signed by or on behalf of all the submitting parties:

The submitting party or parties declare that, following careful verification, the information given in this reasoned submission is to the best of their knowledge and belief true, correct, and complete, that true and complete copies of documents required by Form RS, have been supplied, and that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of: