II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 April 2003

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

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

(notified under document number C(2003) 1385)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/777/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area (hereinafter referred to as the EEA Agreement), and in particular Article 57 thereof,

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

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

Having regard to the opinion of the Advisory Committee on Concentrations [3],

Whereas:

(1) On 6 December 2002, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (the Merger Regulation). The proposed concentration consists of the following: the German undertakings Siemens AG (Siemens) and Drägerwerk AG (Dräger) are to acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, joint control of Dräger Medical AG & Co. KGaA, Germany (JV), currently controlled by Dräger alone, through the acquisition of equity interests.

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

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

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[1] OJ L 395, 30.12.1989, p. 1 (corrigendum OJ L 257, 21.9.1990, p. 13).
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 269, 8.11.2003.

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

I. THE PARTIES

(5) Siemens supplies products and services throughout the world, mainly in information and communications, automation and control, power supply, transportation, medical technology, lighting, financial services and real estate. Its 'Medical Solutions' division covers a wide range of products, services and integrated solutions for clinics and medical practices.

(6) Dräger operates worldwide in the fields of medical technology, safety technology and aerospace. The JV covers the area of medical technology within the Dräger Group. Complete system solutions for hospitals and health care are developed, produced and marketed throughout the world. The main focus is on critical patient care, particularly anaesthesia and ventilation equipment and accessories.

II. THE PROPOSED TRANSACTION

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

III. CONCENTRATION

(8) Siemens will acquire voting rights in the JV that go beyond the usual legal protection for minority shareholders and will thus acquire control of the JV jointly with Dräger. The JV will perform all the functions which are similarly performed by other independent undertakings on the relevant markets. In particular, the JV will have its own management and sufficient financial and staffing resources and assets to cover its activities. The distribution of the products developed and manufactured by the JV will basically be carried out by its own distribution and servicing organisation. The JV will, however, also be able to make use of the distribution systems of Siemens and Dräger. Cooperation with the JV's parent companies will allow it to supply integrated medical and technological solutions to customers. This means that, in addition to the JV's products and services, Siemens's IT solutions (hospital IT systems, function-supporting IT) are also to be supplied. In addition, the JV will in certain instances act as an agent for Siemens, supplying certain medical products outside its own range.

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

IV. COMMUNITY DIMENSION

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

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

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

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

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

A. *THE RELEVANT PRODUCT MARKETS*

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

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

— ventilation equipment,

— anaesthesia equipment,

— patient monitors,

— ventilation equipment accessories,

— anaesthesia equipment accessories.

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

1. VENTILATION EQUIPMENT

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

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

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

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

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

2. ANAESTHESIA EQUIPMENT

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

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

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

([5]) Form CO notification, p. 20.

3. PATIENT MONITORS

(23) Patient monitors measure patients' vital functions (blood pressure, heartbeat, breathing, etc.), which are displayed on the screen. They are used in various clinical departments such as OP, cardiology, intensive care units and paediatrics. Whenever anaesthesia equipment or critical-care ventilation equipment is used, patient monitoring is also required. The transaction covers critical-care patient monitors, which involve a broad spectrum of parameters.

(24) Ventilation equipment and anaesthesia equipment (jointly referred to as therapy equipment) may be connected up with patient monitors via interfaces so as to allow data flow from the therapy equipment to the monitor. The data from the therapy equipment and the patient data can then be displayed on the monitor. So as to allow connection between the therapy equipment and the monitor, the communication protocol of the therapy equipment must be known to the monitor manufacturer and the communication protocol of the monitor must be known to the supplier of hospital IT (data-management systems) or to the manufacturer of third-party equipment. Customers increasingly wish to have the possibility of transferring data to other equipment and data-management systems in the hospital. If system compatibility is assured, following successful completion of tests, a certificate is issued by the relevant manufacturers. In addition to this electronic compatibility, the mechanical compatibility of the connection between the monitor and the therapy equipment must also be assured. For reasons of liability (e.g. as regards resistance to tilting/stability of the monitor design), customers demand that the mechanical compatibility be tested and similarly certified.

(25) Anaesthesia and ventilation equipment on the one hand and patient monitors on the other are thus complementary products. In so far as the appliances are connected for data transfer purposes, it can also be said that there is a vertical link, though this distinction is of only subsidiary importance for the competition assessment.

(26) Patient monitors have, on average, a shorter life than therapy equipment. Customers stated that they replace their monitors in the critical care sphere every eight to 10 years or so, while therapy equipment has an average life of 10 to 15 years. Despite these differences in lifespan, therapy equipment is often put up for tender and purchased at the same time as patient monitors.

(27) The parties start from the assumption of an overall product market for patient monitors. Some market participants think it necessary to have a further subdivision into further product markets on the basis of performance, type of use and/or underlying technology.

(28) The parties' activities do not overlap at production level in the case of patient monitors. Only Siemens produces patient monitors. Dräger used to sell GE/Marquette patient monitors together with its own therapy equipment to its own customers solely on the basis of a distribution agreement concluded with General Electrics (GE). [...]*. Furthermore, Dräger manufactures only integrated monitors which are a component part of the anaesthesia and ventilation equipment. Dräger has no other activities in this area. For the purposes of the competition assessment of the transaction, therefore, only the complementary and vertical connection of the patient monitors with the therapy equipment is relevant.

(29) The market investigation had not yet been completed as regards the precise product market definition for patient monitors at the time when the commitments were submitted (see recital 4). However, the question of the precise product market definition can be left open, since, even if a product market comprising all patient monitors, as suggested by the parties, were applied, the notified concentration raises serious doubts as to its compatibility with the common market.

4. ACCESSORIES FOR VENTILATION EQUIPMENT AND ACCESSORIES FOR ANAESTHESIA EQUIPMENT

(30) Accessories are, on the one hand, parts that are necessary for the operation of the therapy equipment and, on the other, parts which may be used in the application of the main equipment. Accessories include one-off parts and reusable parts.

(31) The accessory parts supplied by the parties are distributed as by-products of the therapy equipment business proper, though for the most part they are not manufactured by the parties themselves, but procured from other suppliers. Accessories for therapy equipment distributed by the parties are functionally related to the sale of such equipment.

(32) As is the case with other manufacturers of therapy equipment, accessories are supplied as original equipment as part of ready-to-operate therapy equipment and may also be supplied at a subsequent stage at the customer's request. The Commission's market investigation showed that the parties are not perceived as independent suppliers of accessories for equipment of third-party manufacturers, but operate as suppliers of accessories in connection with the acquisition of new therapy equipment. The parties understand this as a kind of necessary service related to their main business.

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

5. SUMMARY OF THE DEFINITION OF THE PRODUCT MARKET

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

B. *THE RELEVANT GEOGRAPHIC MARKETS*

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

1. THERAPY EQUIPMENT

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

(36) In the case of ventilation equipment, according to their own figures, the parties' market penetration differs very widely from one Member State to another. For example, Siemens has very high market shares in Portugal [55 to 65]* %, Ireland [55 to 65]* %, Sweden [45 to 55]* % and Italy [35 to 45]* %, while in other Member States it has relatively low market shares, for example France [5 to 15]* %, Germany [5 to 15]* %, Austria [5 to 15]* % and the United Kingdom [5 to 15]* %. Dräger's market shares vary in the individual Member States, according to its own figures, between [65 to 75]* % in Austria, [35 to 45]* % in Belgium, [35 to 45]* % in Denmark and [35 to 45]* % in Germany on the one hand and [5 to 15]* % in Greece and [15 to 25]* to [15 to 25]* % in Ireland, Portugal and Norway on the other. If the parties' market shares in ventilation equipment are combined, the picture varies widely from high market shares of almost [85 to 95]* % in some Member States to barely [25 to 35]* % in others.

(37) Furthermore, the parties face different competitors in ventilation equipment in individual Member States. Although the competitors Tyco/Puritan Benett, Viasys and Hamilton are broadly represented throughout the EEA (though with widely different market presence in individual Member States), all the other competitors, such as Stephan, Respironics, Taema, Kontron, Siare and Datex Ohmeda, operate in only one or a few Member States ([6]).

(38) The market structure is also very heterogeneous in the case of anaesthesia equipment. According to the parties' own figures, Siemens' market shares in the individual Member States range from [45 to 55]* % in Sweden and [25 to 35]* % in Portugal to [0 to 5]* % in the United Kingdom, [0 to 5]* % in Spain and [0 to 5]* % in Germany. Dräger's market shares in individual Member States vary from [55 to 65]* % in Germany, [25 to 35]* % in Belgium and [25 to 35]* % in Austria to [0 to 5]* % in Ireland and [5 to 15]* % in Sweden. If the parties' market shares are combined, national market shares within the EEA range from [5 to 15]* % to [55 to 65]* %.

(39) The only competitor operating throughout the EEA as a supplier of anaesthesia equipment is Datex Ohmeda. All the other manufacturers are for the most part present in only one or two countries ([7]).

(40) The fact that the market presence of ventilation and anaesthesia equipment manufacturers is not homogeneous and, in most cases, not EEA-wide, is due to the market structures and mechanisms analysed below, which taken as a whole point to the conclusion that the relevant geographic markets must be assumed to be national.

Distribution and servicing structure for therapy equipment

(41) The parties submit that, although the main market participants have their own distribution channels in all the EEA countries, this does not preclude the assumption of a single European market. Indeed, the main suppliers distribute their equipment throughout the world.

(42) The Commission's market investigation showed that the successful distribution and servicing of therapy equipment depends quite decisively on the distribution and servicing staff of the therapy equipment manufacturers being available to hospitals, immediately access-

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

([7]) Footnote 7, loc. cit.

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

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

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

(45) A look at the parties' turnover in the servicing area shows that, alongside sales of therapy equipment, after-sales service represents a major item. Siemens estimates its worldwide turnover in 'after-sales service' in the critical-care area (Electromedical Systems) for 2001 at EUR [...]*, which is considerable in relation to the turnover of EUR [...]* in ventilation equipment and EUR [...]* in anaesthesia equipment ([13]). Dräger had a worldwide turnover in 2001 in the 'service' area of EUR [...]* compared with EUR [...]* in anaesthesia equipment and EUR [...]* in ventilation equipment. [...]*also shows that a large part [...]* of the relevant unit costs is accounted for by, on the one hand, research and development and, on the other, distribution and servicing.

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

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

Tendering market, EEA-wide standards and low transport costs

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

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

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

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

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

([12]) Notification, Form CO, p. 27.

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

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

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

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

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

(52) The assumption of national markets is not called into question by the fact that transport costs and national medical or technical standards do not pose any major obstacles to supplying therapy equipment internationally from one or more central production sites, as Siemens and Dräger do. Dräger has production sites in Lübeck, Germany, in Telford, the United States of America, and in Shanghai, China. Siemens produces its therapy equipment in Solna, Sweden, and its patient monitors in Danvers, the United States of America. Nor are there any significant barriers to international trade.

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

Price differences in individual Member States

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

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

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

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

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

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

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

Differing customer preferences

(59) The parties submit that the supply of the relevant products by the main market participants is comparable in terms of type and characteristics at least throughout the EEA.

(60) The market investigation has shown, however, that there are differing customer preferences and differing national approaches in anaesthesia and ventilation and that there is a demand for therapy equipment designed to meet these preferences and approaches.

(61) Narcosis can in principle be carried out using a rebreathing system or a non-rebreathing system. In a rebreathing system, the expired air is fed back to the patient, without carbon dioxide and with added fresh oxygen. In non-rebreathing systems, the expired air is eliminated, and fresh gas must be used to prolong the narcosis. In the latter method, gas consumption is considerably higher than in the case of rebreathing systems.

(62) The market investigation showed, and this was confirmed by the information provided by the parties ([17]), that national preferences still exist for one or other of the systems. Use of the non-rebreathing system is insignificant in France, the United Kingdom and the Netherlands.

(63) In the case of ventilation too, preferences as to ventilation modes differ between countries, though ventilation equipment has in recent years increasingly become convertible for use with differing ventilation modes.

(64) According to the information provided by the parties, volume-controlled ventilation is preferred in Spain, Portugal, Ireland and Greece, whereas pressure-controlled ventilation is preferred in Belgium, Denmark, Germany, Italy, Austria and Sweden. Volume-controlled ventilation with support of spontaneous breathing also has its adherents with some overlaps in individual Member States.

(65) The overall conclusion, therefore, is that, because of its technical design and application philosophy, therapy equipment cannot automatically be distributed successfully in one Member State by suppliers operating in another Member State.

2. PATIENT MONITORS

(66) The parties start from the assumption that the geographic market for patient monitors is EEA-wide. In the case of monitors too, however, Siemens' market shares vary considerably between EEA members. The parties put their market share EEA-wide at [15 to 25]* %. In individual EEA members, according to its own figures, Siemens has market shares of up to [35 to 45]* %.

(67) The market investigation showed, furthermore, that prices for patient monitors differ in the individual Member States and that the distribution and servicing structure is comparable with the distribution and servicing structure for therapy equipment described at recitals 41 to 47 above. This also applies to the launch of products and to the role of doctors in purchasing decisions. There is clear evidence from the market investigation that smaller, i.e. national geographic markets apply.

(68) In this instance, the precise definition of the geographic market for patient monitors can be left open, since the competition assessment leads to the same conclusion both for an EEA-wide market and for national markets.

3. SUMMARY OF THE DEFINITION OF THE RELEVANT GEOGRAPHIC MARKETS

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

(70) In the case of patient monitors, the precise market definition can be left open. It is EEA-wide at most, with some indicators suggesting that here too the markets are national.

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

C. *COMPATIBILITY OF THE CONCENTRATION WITH THE COMMON MARKET*

C1. HORIZONTAL EFFECTS

(71) The concentration leads to significant additions of market shares in most national markets for ventilation equipment and in those for anaesthesia equipment.

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

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

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

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

1. ***Ventilation equipment***

Market shares

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

Ventilation equipment: parties' data on Form CO

(%)

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

([18]) Form CO, p. 57.

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

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

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

Ventilation equipment: parties' data, as adjusted

(%)

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

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

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

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

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

Ventilation equipment for critical care units: T for G

(%)

	Europe	D	F	UK	I	E	NL
Siemens	33	33	14	8	54	52	69
Dräger	37	37	39	41	22	41	31
Combined	70	70	53	49	76	93	100
Tyco/ Puritan Bennett	17	17	17	42	15	5	
Taema	6	6	21	< 1	7	—	
Viasys	2	2	7	< 1	1	—	
Hamilton	2	2	—	9	< 1	2	

(81) Siemens's Electromedical Systems division estimates in its own internal documents: [...]*

(82) The parties' market share estimates on Form CO therefore portray their own market position as being significantly weaker than the position portrayed by the authors of external studies on the European market known to the Commission and identified by the parties as being authoritative. [...]*

(83) As a result, the Commission has done its own market share calculations based on the turnover data of leading competitors. The table below relies on figures communicated by Siemens, Dräger, Tyco, Viasys, Hamilton, Respironics, Taema, Penlon and Stephan concerning their own turnover. The market shares of Kontron, Newport and Siare are based on the parties' estimates on Form CO.

The following picture emerges:

Ventilation equipment: Commission's findings [a]

(%)

2001	EEA	B	DK	D	FI	F	GR	UK	IRL	I	NL	A	P	E	S	N
Siemens	[15-25]*	[25-35]*	[35-45]*	[15-25]*	[5-15]*	[5-15]*	[25-35]*	[15-25]*	[35-45]*	[35-45]*	[35-45]*	[15-25]*	[55-65]*	[25-35]*	[55-65]*	[35-45]*
Dräger	[35-45]*	[55-65]*	[45-55]*	[55-65]*	[25-35]*	[35-45]*	[15-25]*	[35-45]*	[5-15]*	[25-35]*	[25-35]*	[75-85]*	[15-25]*	[35-45]*	[25-35]*	[25-35]*
Combined	[65-75]*	[85-95]*	[85-95]*	[65-75]*	[35-45]*	[45-55]*	[45-55]*	[45-55]*	[45-55]*	[55-65]*	[65-75]*	[95-100]*	[75-85]*	[65-75]*	[85-95]*	[65-75]*
Tyco/Puritan Bennett																
Viasys [b]																
Hamilton																
Respironics																
Taema																
Penlon																
Stephan																

(%)

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

([a]) The turnover figures for competitors obtained in the course of the market investigation are business secrets of the undertakings concerned.
([b]) Contains, according to the undertaking, a 'small' proportion of accessories.

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

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

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

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

(i) Survey of customers and competitors

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

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

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

(ii) Internal documents of the parties

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

(92) Siemens [...]*

(93) Dräger [...]*

(iii) Tender documents

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

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

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

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

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

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

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

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

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

Conclusion

(103) The customer survey, the parties' internal documents and the data on tender procedures confirm the view formed on the basis of market shares that Siemens and Dräger produce the closest substitutes from the customer's point of view. The merging of the two product ranges within the joint venture would enable the parties to charge higher prices inasmuch as a large part of the customers lost as a result of a price increase by one of the parties would switch to products made by the other party. The elimination, due to the concentration, of by far the most important competitor would thus enable Siemens/Dräger to behave, when setting prices, to a considerable extent independently of customers and competitors.

(104) Market entry barriers are deemed by market participants to be high inasmuch as customers have a strong preference for products and manufacturers that have stood the test of time. According to the Commission's information, a well-developed distribution and servicing network is also a prerequisite for successful market entry. An installed base, in neighbouring clinical fields at least, likewise makes for substantially easier market entry. Market entry requires considerable sunk costs in the form of R & D expenditure and expenditure on setting up a distribution and customer service network.

(105) A repositioning of existing competitors into a market position comparable to that of the JV is likewise unrealistic. The next largest competitor after Siemens/Dräger, Tyco, currently achieves only a fraction of the parties' combined market share and would have to improve the positioning of its products from the customer's point of view as well as its distribution and servicing network dramatically in order to attain this end. Over the one- to two-year time horizon relevant for the competition assessment, this is not likely to occur, at least not on the basis of market developments so far. On the contrary, Tyco's market position has been eroded in recent years. Several of the remaining fringe competitors fear that their market position will deteriorate in the years ahead owing to the JV's broad product range, given in particular its presence in the vertically adjacent market for patient monitors. The JV would consequently lead to higher, rather than lower, barriers to expansion by fringe competitors.

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

2. ***Anaesthesia equipment***

Market shares

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

Anaesthesia equipment: parties' data on Form CO

(%)

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

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

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

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

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

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

Anaesthesia equipment: parties' data, as adjusted

(%)

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

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

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

Anaesthesia equipment: T for G

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

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

(115) The parties' market share estimates on Form CO therefore portray their own market position as being significantly weaker than the position portrayed by the authors of external studies known to the Commission and identified by the parties as being authoritative. [...]*

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

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

Anaesthesia equipment: Commission's findings [a]

(%)

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

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

(117) In most national markets Dräger and Datex-Ohmeda are the two leading suppliers of anaesthesia equipment. According to the Commission's calculations and to F & S, T for G and Siemens EM, Europe-wide Dräger is the larger of the two suppliers. Both firms have significant market shares in all national markets except Ireland and Sweden, where Dräger achieves only small market shares.

(118) Europe-wide, Siemens is the third-largest supplier, albeit far behind the two market leaders, although its market position varies considerably from country to country. In Sweden, where the headquarters of Siemens Electromedical Systems are situated, the undertaking is the market leader. Siemens entered the anaesthesia equipment market only in 1997, with the Kion model. This is an integrated workstation with a built-in patient monitor. This innovative design was, according to market participants [...]*, beset with considerable technical problems during the first few years. Among other things, it was initially considered cumbersome and complex to operate. Problems subsequently arose with technical reliability. These have, so the Commission has been told, now been resolved, but the equipment's reputation with many customers has reportedly never recovered and, [...]*, the equipment has not been a success financially. T for G confirms this when it states with regard to therapy equipment that 'Siemens is perceived very differently in different countries and different departments. [...]* Dräger has a high image all over Europe' ([22]).

(119) In contrast to the niche suppliers, Siemens has a well-developed distribution network throughout Europe and, because of its broad range of medical technology products, enjoys a strong reputation in neighbouring clinical areas, two factors which enable it to place new anaesthesia products on the market. In the five years since it entered the market, Siemens has already established itself in most EEA countries as a significant, and in Sweden as even the leading, supplier of anaesthesia equipment.

(120) The notified JV would therefore combine in several national markets the market leader (Dräger or, in Sweden, Siemens) with the third-largest competitor (Siemens or, in Sweden, Dräger). In Belgium, Denmark, France, Germany, Italy and the Netherlands, the high combined market shares and the horizontal overlaps alone lead to a presumption of a dominant market position.

(121) As in the case of ventilation equipment, it will be considered below to what extent Dräger's anaesthesia equipment is a close substitute for Siemens's equipment and hence restricts the price-setting freedom of Siemens in particular. As above, the analysis is based on: (i) a survey of customers and competitors; (ii) internal documents of the parties; and (iii) tender documents submitted by the parties.

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

(122) Owing to its currently smaller market share, Siemens may also have a stronger financial incentive than Dräger and Datex-Ohmeda to pursue as an independent supplier an aggressive, market-share-winning strategy in order to achieve economies of scale and build up an installed base. The notified JV would thus potentially eliminate a particularly aggressive competitor. This theory will be examined in the light of Siemens's business plans and strategy papers.

(i) Survey of customers and competitors

(123) As with ventilation equipment, customers and competitors were asked in the context of the market investigation to name three substitutes (first, second and third alternative) to Dräger, Siemens and Datex-Ohmeda anaesthesia equipment. Customers were asked to take the currently used models as a basis, while competitors were supplied with a list of the parties' main equipment (Dräger: Cicero, Cato, Primus; Siemens: Kion). A clear majority of the customers surveyed, particularly in Germany, Denmark, Belgium, France, Italy and the Netherlands, but also, for example, in Austria and Sweden, regarded Dräger products as being the best alternative to the Siemens Kion, although it should be pointed out that Siemens's product range for anaesthesia equipment is limited to this one model. The answers to the question concerning substitutes for Dräger are less clear-cut in this respect. Both Datex-Ohmeda and Siemens are named as the best alternatives. In the opinion of the customers participating in the market investigation, therefore, Dräger's product range is the nearest substitute for Siemens customers, but this is not entirely the case the other way round.

(124) The results of the market investigation show that customers generally rank the equipment of the niche suppliers as being of lower quality than that of the three market leaders. Several hospitals indicated that their equipment manufactured by niche suppliers tended to be technically antiquated and used, for example, as back-up or replacement equipment.

(125) Customers were also asked what price increases would lead them to change to the alternative equipment in question. Many of them either did not reply or indicated that price played only a minor role (compared, for example, with quality and customer service) in their selection of products. Otherwise, the answers given ranged between 10 % and 30 %. One Austrian hospital stated that there would have to be a 50 % increase before it would change its supplier. There were therefore no significant differences between ventilation and anaesthesia equipment as far as this question was concerned.

(126) Only a few competitors gave detailed answers to the question concerning substitutes for anaesthesia equipment. Their answers do not indicate any clear pattern.

(ii) Internal documents of the parties

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

(128) Siemens [...]*.

(129) Dräger [...]*.

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

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

(iii) Tender documents

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

C2. VERTICAL/CONGLOMERATE EFFECTS

3. ***Patient monitors***

Market shares

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

Patient monitors: Information provided by the parties in Form CO

(%)

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

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

(149) Apart from the horizontal effects described at recitals 71 to 146, the JV would significantly broaden the product range which Siemens can supply as integrated solutions for hospitals. In addition to the anaesthesia equipment, ventilation equipment and patient monitors included in the notified JV, Siemens is also active on other medical-technology markets, in particular capital-intensive imaging systems (ultrasound, computed tomography, radiography, magnetic resonance, etc.) and IT systems for hospitals. GE and Philips in particular seem to be pursuing a similar strategy, but Siemens together with the JV would have access to the broadest product portfolio of all competitors on the market and would thus be in a position to offer the most comprehensive 'one-stop-shop' solutions. In view of the parties' strong market positions and the close complementarity of their equipment, vertical aspects in particular between anaesthesia equipment and ventilation equipment on the one hand and patient monitors on the other are of relevance to the competitive assessment of the notified joint venture.

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

(151) While closer integration of various equipment components is thus welcomed by many customers, the dominant positions in the case of anaesthesia and ventilation equipment resulting from the horizontal effects described at recitals 71 to 146 would enable the JV to prevent competing manufacturers of patient monitors from having effective access to anaesthesia and ventilation equipment (foreclosure), for example by making access to interfaces more difficult or by designing anaesthesia and ventilation equipment in such a way that it can be combined only with Siemens monitors. Hospitals would then no longer be able (or only with greater difficulty) to combine the best components of different manufacturers available on the market with one another for the relevant area of application.

(152) Even though the market investigation had not been terminated at the time when the commitments were entered into, there are still serious concerns, as expressed when the proceedings were initiated, that, as a result of the abovementioned market-foreclosure effect, the JV would achieve a dominant position for patient monitors both at EEA level and, more particularly, in those member countries in which the JV would achieve a dominant position for anaesthesia or ventilation equipment. Moreover, it cannot be ruled out that the dominant position for anaesthesia and ventilation equipment arising as a result of the creation of the JV would be strengthened by its market position for patient monitors.

(153) The commitments entered into by the parties, as described in detail at recitals 154, 155 and 156, eliminate the horizontal overlaps for ventilation and anaesthesia equipment. Only the Dräger therapy equipment is included in the JV. However, Dräger alone achieves market shares in several Member States which already in themselves give grounds for serious doubts as to the possibility of a dominant position emerging. In the case of ventilation equipment, this is particularly true for Belgium (market share of [55 to 65]* %), Denmark ([45 to 55]* %), Germany ([55 to 65]* %) and Austria ([75 to 85]* %). For anaesthesia equipment, the countries concerned are Denmark ([55 to 65]* %), Germany ([75 to 85]* %), Finland ([65 to 75]* %), France ([45 to 55]* %), the Netherlands ([45 to 55]* %) and Norway ([75 to 85]* %). The serious doubts as to compatibility with the common market are thus not entirely removed by the elimination of horizontal effects.

VI. COMMITMENTS

(154) By letter of 6 March 2003, the notifying parties submitted commitments pursuant to Article 8(2) of the Merger Regulation with a view to removing the Commission's abovementioned competition-related doubts. The commitments were slightly amended by letter of 14 March 2003.

(155) The commitments are essentially as follows: the parties undertake to ensure that Siemens sells its entire Life Support Systems (LSS) Division, i.e. all of its activities worldwide in the area of ventilation and anaesthesia equipment for hospitals and clinics, to a buyer which is independent of the parties. These activities include R & D, production, marketing, distribution and maintenance/servicing in respect of ventilation and anaesthesia equipment. These business activities are at present pursued at Siemens Elema AB at Solna in Sweden and within several regional companies belonging to Siemens and are to be sold as a going concern, i.e. including all tangible and intangible assets existing at the time the commitment was entered into and the entire workforce. Siemens undertakes to maintain fully the viability and competitiveness of the business to be sold. The parties further undertake to operate the business separately up to the time at which it is sold.

(156) In order to dispel the Commission's doubts concerning the vertical aspects of the concentration, i.e. the interoperability between anaesthesia and ventilation equipment on the one hand and patient monitors on the other, and their interoperability with data-management systems in hospitals, the parties have, in addition to the abovementioned sale, also offered to enter into commitments concerning the continued interoperability of their equipment. These commitments include an undertaking to maintain and make available all existing and future interfaces and communications protocols of all existing and future equipment for the patient monitors of third-party suppliers in the area of critical care and for connecting them to the data-management systems of third-party suppliers in hospitals. All information concerning interfaces and communications protocols will be made available on request and, in the event of modifications, automatically to third parties. In either case, this will occur without delay, on a non-discriminatory basis and free of charge (or with a charge to cover documentation costs). Any reasonable technical explanations regarding this information will, on request, be provided without delay. Moreover, the parties will cooperate regarding certification of the mechanical and electrical interoperability of their equipment with the patient monitors (and data-management systems) of third-party suppliers at the request of such suppliers or a customer.

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

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

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

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

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

VIII. CONDITIONS AND OBLIGATIONS

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

(161) Measures that give rise to a structural change of the market must be made subject to conditions, while the implementing steps which are necessary to achieve this result constitute obligations on the parties. Where a condition is not fulfilled, the Commission decision declaring the merger to be compatible with the common market is void. Where the parties commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5)(b) of the Merger Regulation; the parties may also be subject to fines and periodic penalty payments under Articles 14(2)(a) and 15(2)(a) of the Merger Regulation.

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

(a) the commitment concerning the sale as a going concern within the extended time limit laid down in paragraph 1 of the Annex;

(b) the commitment entered into by Siemens to the effect that it will sell its entire Life Support Systems (LSS) Division, i.e. all of the activities in the area of ventilation and anaesthesia in hospitals and clinics described in paragraph 4 of the Annex, to a suitable buyer;

(c) the commitments to preserve the viability, competitiveness and marketability of the business in accordance with paragraph 5 of the Annex, to continue operating the business separately, and to ensure a flow of information in accordance with paragraphs 6, 7 and 8 of the Annex;

(d) the commitment concerning non-solicitation of key personnel in accordance with paragraph 9 of the Annex;

(e) the commitment concerning a suitable buyer in accordance with paragraphs 13, 14 and 15 of the Annex;

(f) the commitment to implement any measures imposed by the monitoring trustee which are deemed necessary by the latter to ensure compliance with the above commitments in accordance with paragraph 23(c) of the Annex;

(g) the commitments concerning the maintenance of interoperability in accordance with paragraphs 35, 36, 37, 38 and 39 of the Annex.

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

IX. **CONCLUSION**

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

HAS ADOPTED THE FOLLOWING DECISION:

Article 1

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

Article 2

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

Article 3

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

Article 4

This Decision is addressed to:

Siemens AG
CFL
Wittelsbacherplatz 2
D-80333 Munich

Drägerwerk AG
Moislinger Allee 53-55
D-23542 Lübeck

Done at Brussels, 30 April 2003.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

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