

Brussels, XXX
[...] (2022) XXX draft

SENSITIVE*
UNTIL ADOPTION

COMMISSION NOTICE

on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters)

(Text with EEA relevance)

* Distribution only on a 'Need to know' basis - Do not read or carry openly in public places. Must be stored securely and encrypted in storage and transmission. Destroy copies by shredding or secure deletion. Full handling instructions <https://europa.eu/db43PX>

COMMISSION NOTICE

on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters)

(Text with EEA relevance)

I. REGULATION 1/2003

1. Regulation 1/2003(1) sets up the enforcement system for Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”). While designed to enable the Commission to focus on its primary task of effective enforcement of the competition rules, Regulation 1/2003 also creates legal certainty inasmuch as it provides that agreements(2) which fall under Article 101(1) TFEU but fulfil the conditions in Article 101(3) TFEU are valid and fully enforceable without a prior decision by a competition authority (Article 1 of Regulation 1/2003).
2. The framework of Regulation 1/2003, while providing for parallel competence of the Commission, Member States' competition authorities and Member States' courts to apply Articles 101 and 102 TFEU in their entirety, limits risks of inconsistent application by a range of measures, thereby ensuring the primary aspect of legal certainty for companies as reflected in the case law of the Court of Justice of the European Union(3), i.e. that the competition rules are applied in a consistent way throughout the Union.
3. Undertakings are generally well placed to assess the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or unilateral practice and in what form. They are close to the facts and have at their disposal the framework of block exemption regulations, case law and existing Commission decisions as well as extensive guidance in Commission guidelines and notices, which have been provided in order to further assist self-assessment by undertakings(4). The Commission has also produced guidelines on the application of Article 101(3) TFEU (5). This allows undertakings in the vast majority of cases to reliably assess their agreements with regard to Article 101 TFEU.
4. Where cases, despite the above elements, give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 101 or 102 TFEU, individual undertakings may wish to seek informal guidance from the Commission.(6) In line with the principles set out in Section II of this Notice, a request for guidance will not entitle an applicant to receive any such guidance, as this Notice cannot re-introduce a system that would be inconsistent with the self-assessment framework of Regulation 1/2003. However, where it considers it appropriate and subject to its enforcement priorities, the Commission may provide such informal guidance concerning the interpretation of Articles 101 or 102 in a written statement (guidance letter). The present Notice sets out the details of this instrument.

II. FRAMEWORK FOR ASSESSING WHETHER TO ISSUE A GUIDANCE LETTER

5. Regulation 1/2003 confers powers on the Commission to effectively investigate and prosecute infringements of Articles 101 and 102 TFEU, and to impose sanctions(7). One major objective of Regulation 1/2003 is to ensure efficient enforcement of the Union competition rules by setting up a self-assessment system, thereby removing the former notification system and allowing the Commission to focus its enforcement policy on the most serious infringements of Articles 101 and 102 TFEU(8).
6. While Regulation 1/2003 is without prejudice to the ability of the Commission to issue informal guidance to individual undertakings(9), as set out in this Notice, this ability should not interfere with the primary objective of Regulation 1/2003, which is to ensure effective enforcement of Articles 101 and 102 TFEU. The Commission may therefore only provide informal guidance to individual undertakings in so far as this is compatible with its enforcement priorities.
7. Subject to point 6, the Commission, seized of a request for a guidance letter, will consider whether it is appropriate to process it. Issuing a guidance letter may only be considered if a prima facie assessment of the facts and legal considerations of the conduct or envisaged conduct suggests that, in the Commission's view, there are valid reasons to provide clarifications on the applicability of Articles 101 or 102 TFEU to the agreement or unilateral practice in question through a guidance letter. Such prima facie assessment will be based on the following two cumulative elements:
 - (a) Novel or unresolved questions: The substantive assessment of the agreement or unilateral practice with regard to Articles 101 or 102 TFEU poses a question of application of the law for which there is no sufficient clarity in the existing Union legal framework including the case law of the Court of Justice of the European Union, nor sufficient publicly available general guidance at Union level in decision-making practice or previous guidance letters; and
 - (b) Interest in providing guidance: The prima facie assessment of the agreement or unilateral practice suggests that a public clarification of the applicability of Articles 101 or 102 TFEU through a guidance letter would provide significant added value, taking into account one or more of the following elements:
 - the actual or potential economic importance of the goods or services concerned by the agreement or unilateral practice, in particular taking into account the consumers' interests;
 - whether the objectives of the agreement or unilateral practice are relevant for the achievement of the Commission's priorities or Union interest;
 - the magnitude of the investments made or to be made by the undertakings concerned, which are linked to the agreement or unilateral practice; and
 - the extent to which the agreement or practice corresponds or is liable to correspond to more widely spread usage.

8. The Commission will normally not consider a request for a guidance letter in either of the following circumstances:
- the questions raised in the request are identical or similar to issues raised in a case pending before the Court of Justice of the European Union; or
 - the agreement or unilateral practice to which the request refers is subject to proceedings pending with the Commission, a Member State court or Member State competition authority.
9. The Commission will not consider hypothetical questions and will not issue guidance letters on agreements or unilateral practices that are no longer being implemented by the parties. Undertakings may however present a request for a guidance letter to the Commission in relation to questions raised by an agreement or unilateral practice that they envisage, i.e. before the implementation of that agreement or unilateral practice. In this case, planning must have reached a sufficiently advanced stage for a request to be considered.

III. INDICATIONS ON HOW TO REQUEST GUIDANCE

10. A request can be presented by an undertaking or undertakings which have entered into or intend to enter into an agreement or unilateral practice that could fall within the scope of Articles 101 or 102 TFEU with regard to questions of interpretation raised by such agreement or unilateral practice.

11. A request for a guidance letter should be addressed to the following address:

European Commission
Directorate-General for Competition
For the attention of the Antitrust Registry
1049 Bruxelles/Brussel
Belgique/België

Or by email to comp-greffe-antitrust@ec.europa.eu

12. In the request for guidance letter, the applicant(s) should include:
- the identity of all undertakings concerned as well as a single address for contacts with the Commission;
 - the specific questions on which informal guidance is sought;
 - full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation, so as to allow the Commission to issue a guidance letter on the basis of the information provided;
 - the applicant(s)' own preliminary assessment, having regard to point 7 (a) of the present Notice, as to why the request presents novel or unresolved question(s) in view of the existing Union legal framework, including the case law of the Court of Justice of the European Union, publicly available general guidance at Union level in decision-making practice or previous guidance letters;
 - the applicant(s)' own preliminary assessment of the application of Articles 101 or 102 TFEU to the novel or unresolved question(s) raised by the agreement or unilateral

- practice;
- all other information that permits an evaluation of the request in the light of the aspects explained in points 7-9 of the present Notice, including in particular a declaration that the agreement or unilateral practice to which the request refers is not subject to proceedings pending before a Member State court or competition authority;
- where the request contains elements that are considered business secrets, a clear identification of these elements;
- any other information or documentation relevant for the assessment of the agreement or unilateral practice.

IV. PROCESSING OF THE REQUEST

13. The Commission will in principle evaluate the request on the basis of the information provided and not process applications which do not fulfil the requirements set out in point 12 of the present Notice. Nevertheless, the Commission may use additional information at its disposal from public sources, previous case-law, decision-making practice and guidance letters at Union level or any other source and may ask the applicant(s) or, in exceptional cases, other selected parties to provide supplementary information.
14. The Commission may share the information submitted to it with the Member States' competition authorities and receive input from them. It may discuss the substance of the request with the Member States' competition authorities before issuing a guidance letter.
15. With reference to points 13 and 14 of the present Notice, the rules on professional secrecy set out by Article 28 of Regulation 1/2003 apply to the information supplied by the applicant(s) or other selected third parties.
16. Where no guidance letter is issued, the Commission shall inform the applicant(s) accordingly in writing.
17. The applicant(s) can withdraw its/their request at any point in time. In such cases, no guidance letter will be issued. In any event, information supplied in the context of a request for informal guidance remains with the Commission and can be used in subsequent procedures under Regulation 1/2003.
18. A request for a guidance letter is without prejudice to the power of the Commission to open proceedings in accordance with Regulation 1/2003 with regard to the facts presented in the request.

V. GUIDANCE LETTERS

19. A guidance letter issued by the Commission sets out:
 - a summary description of the facts on which it is based;
 - the principal legal reasoning underlying the understanding of the Commission on the application of Articles 101 or 102 TFEU to the novel or unresolved questions raised by the agreement or unilateral practice.

20. A guidance letter may be limited to part of the question(s) raised in the request. It may also include additional aspects to those set out in the request. If appropriate, the Commission may set out in a guidance letter a time limit for its application or specify that the guidance letter is premised on the existence or absence of certain factual circumstances.
21. Guidance letters will be published on the Commission's website, having regard to the legitimate interest of the applicant(s) in the protection of their business secrets. The Commission will agree with the applicant(s) on a public version prior to the publication of the guidance letter.

VI. THE EFFECTS OF GUIDANCE LETTERS

22. Guidance letters are in the first place intended to help undertakings carry out themselves an informed assessment of their agreements or unilateral practices. Guidance letters will not be binding on the applicant(s) or any third party. In that respect, the applicant(s) remain(s) responsible to carry out their own self-assessment of the applicability of Articles 101 or 102 TFEU.
23. A guidance letter cannot prejudge the assessment of the same question by the Court of Justice of the European Union, Member States' competition authorities or Member States' courts.
24. Where an agreement or unilateral practice has formed the factual basis for a guidance letter, the Commission is not precluded from subsequently examining that same agreement or unilateral practice in a procedure under Regulation 1/2003. In that case, the Commission will take the previous guidance letter into account, subject in particular to changes in the underlying facts, to any new aspects discovered by the Commission or raised by a complaint, to developments in the case law of the Court of Justice of the European Union or wider changes of the Commission's policy and developments on the markets concerned.
25. The clarifications on the applicability of Articles 101 or 102 TFEU included in a guidance letter will be expressly conditioned on the accuracy and truthfulness of information provided by the applicant(s) and any material divergence from the information provided by the applicant(s) will render the guidance letter inoperative.
26. Guidance letters are not Commission decisions and do not bind Member States' competition authorities or courts that have the power to apply Articles 101 and 102 TFEU. However, it is open to Member States' competition authorities and Member States' courts to take account of guidance letters issued by the Commission as they see fit in the context of a case.

(1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pages 1-25). With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union. The two sets of provisions are, in substance, identical. For the purposes of this Notice, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Notice.

(2) In this Notice, the term "agreement" is used for agreements, decisions by associations of undertakings and concerted practices. The term "unilateral practices" refers to the conduct of dominant undertakings. The term "undertakings" equally covers "associations of undertakings".

(3) The Court of Justice of the European Union consists of two courts: the Court of Justice and the General Court.

(4) The Commission has issued block exemption regulations, guidelines and notices. In addition, the Commission publishes its decisions. All texts are available at: https://ec.europa.eu/competition-policy/index_en

(5) Commission Notice - Guidelines on the application of Article 81(3) of the Treaty (p. 97).

(6) Cf. Recital 38 of Regulation 1/2003.

(7) Cf. in particular Articles 7 to 9, 12, 17-24, 29 of Regulation 1/2003.

(8) Cf. in particular Recital 3 of Regulation 1/2003.

(9) Cf. Recital 38 of Regulation 1/2003.