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DIRECTORATE-GENERAL FOR COMPETITION

Antitrust Manual of Procedures

Informal Guidance

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Antitrust Manual of Procedures

Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU

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https://competition-policy.ec.europa.eu/antitrust-and-cartels/procedures_en

NOTICE

The public Antitrust Manual of Procedures aims to provide transparency about the Commission's procedures for applying Articles 101 and 102 TFEU.

It was originally published in 2012 as a booklet, with two modules added in 2019. In 2024, the Commission started to re-publish it in the form of self-standing modules, as part of an ongoing update process that will allow the Commission to reflect important developments and changes in its procedures.

The public Antitrust Manual of Procedures is based on DG Competition's Antitrust Manual of Procedures, which is an internal working tool intended to provide practical guidance to DG Competition's staff on how to conduct competition investigations in accordance with the applicable competition rules.

The public Antitrust Manual of Procedures does not create or alter any rights or obligations arising under EU competition rules. In cases of divergence between the EU competition rules and the public Antitrust Manual of Procedures, the former prevail.

The public Antitrust Manual of Procedures has not been formally adopted by the Commission and it does not contain binding instructions. It is not intended to provide complete or exhaustive guidance on every question that might arise. The guidance provided may have to be adapted to the circumstances and specificities of the case at hand. Terms used in the Manual are explained in this [Glossary](#).

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1. INTRODUCTION

- (1) The 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 (TFEU) that arise in individual cases (hereafter: "Notice on Informal Guidance (¹)") was published (²) on 4 October 2022. Under the Notice on Informal Guidance, undertakings (³) can ask the Commission for a guidance letter on a novel or unresolved issue of interpretation of Articles 101 or 102 TFEU. Guidance letters are not expressly provided for in the articles of Regulation 1/2003 but are nonetheless referred to in recital 38 of Regulation 1/2003. Recital 38 recognises that the Commission may provide informal guidance to individual undertakings in cases that give rise to genuine uncertainty because they present novel or unresolved questions for the application of EU competition rules.
- (2) Before the adoption of Regulation 1/2003, undertakings were required to notify both existing and contemplated agreements, decisions and concerted practices for assessment and approval by the Commission. (⁴) Regulation 1/2003 removed that notification system, and introduced the general principle that undertakings must self-assess their own compliance with EU competition law. Although the Notice on Informal Guidance gives the Commission more flexibility to assess agreements and unilateral practices of undertakings through the issuing of guidance letters, self-assessment remains the general rule, and guidance letters should only be issued in cases where genuine uncertainty exists, in line with the criteria set out in the Notice on Informal Guidance.
- (3) Requests by undertakings for guidance should be distinguished from suggestions by interested undertakings to the Commission to adopt a decision within the meaning of Article 10 of Regulation 1/2003 (see the relevant module on Decisions Finding Inapplicability). Both Article 10 decisions and guidance letters are to be adopted exceptionally, but Article 10 decisions are adopted on the Commission's own initiative and exclusively in the EU public interest relating to the application of Articles 101 and 102 TFEU. The latter notion refers to the need for the Commission to act in order to solve a problem of coherent application of

(¹) 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) 2022/C 381/07, C/2022/6925, OJ C 381, 4.10.2022, p. 9–13.

(²) The Notice on Informal Guidance updates the Commission's previous guidance on informal guidance, Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (OJ C 101, 27.4.2004, p.78).

(³) Requests by Member State governments or administrations do not fall within the scope of the Notice on Informal Guidance and are to be dealt with by different means than guidance letters. Member State courts can request information or an opinion from the Commission, cf. in this respect the Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.4.2004, p. 54).

(⁴) Regulation 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ 13, 21.2.1962, p.204). See Articles 4 and 5.

Articles 101 and 102 TFEU, or to make policy, ⁽⁵⁾ whereas guidance letters are issued in relation to particular agreements and/or practices contemplated by applicants, as well as the prevailing set of facts assessed by the Commission at the time of the application.

- (4) Whilst the Notice on Informal Guidance also takes into account the public interest (e.g. for the assessment of the interest in providing guidance, or when deciding whether to modify or revoke a previously issued guidance letter), guidance should only be issued when the criteria mentioned in section 3.1.2 below for issuing guidance under the Notice on Informal Guidance are met. The criteria require that the clarification sought by the applicant(s) concerns a novel or unresolved question relating to Articles 101 or 102 TFEU for which there is insufficient legal clarity or publicly available guidance at Union level, ⁽⁶⁾ and secondly that public clarification by the Commission would provide added value with respect to one or more elements listed within the Notice on Informal Guidance, ranging from the economic importance or magnitude of investments linked to the relevant agreement or practice, to the relevance of the agreement or practice's objectives to Commission priorities or Union interest. ⁽⁷⁾ Given the different objectives and assessment frameworks of Article 10 of Regulation 1/2003 and the Notice on Informal Guidance, guidance letters should clearly identify the criteria from the Notice on Informal Guidance that have been applied, ⁽⁸⁾ and should avoid using terminology relating to Article 10 of Regulation 1/2003. In specific circumstances, set out in section 3.1.2, the Commission will normally not consider a request for a guidance letter and will not issue guidance letters. ⁽⁹⁾
- (5) A request for a guidance letter is without prejudice to the power of the Commission to open proceedings pursuant to Regulation 1/2003 in relation to the facts presented in the request. ⁽¹⁰⁾ Therefore, information provided in guidance requests submitted by undertakings can in principle also serve as leads for starting ex officio proceedings under Article 7, 9 and 10 of Regulation 1/2003, provided the respective requirements for opening a case and the relevant priority-setting criteria are fulfilled. However, if an applicant has provided truthful and accurate information in the context of a request for a guidance letter, the Commission will in principle not impose fines for subsequent actions taken by the applicant relying in good faith on the relevant guidance letter. An applicant cannot rely in good faith on a guidance letter if the facts on which it was issued have materially changed. ⁽¹¹⁾

⁽⁵⁾ Cf. Recital 14 of Regulation 1/2003.

⁽⁶⁾ See point 7(a) of the Notice on Informal Guidance.

⁽⁷⁾ See point 7(b) of the Notice on Informal Guidance.

⁽⁸⁾ See point 7 of the Notice on Informal Guidance.

⁽⁹⁾ See points 8 and 9 of the Notice on Informal Guidance.

⁽¹⁰⁾ See point 19 of the Notice on Informal Guidance.

⁽¹¹⁾ See point 25 of the Notice on Informal Guidance.

2. CONTACTS BETWEEN DG COMPETITION AND MARKET PLAYERS

- (6) Undertakings may seek informal contacts with a view to discussing the possibility of obtaining a guidance letter. Under the Notice on Informal Guidance, undertakings may contact the services of the Commission to discuss their intended submission informally and in confidence. ⁽¹²⁾
- (7) In addition to requests for informal guidance in the format of a guidance letter, DG Competition receives numerous other solicitations for informal guidance, for example:
 - (a) Undertakings send information about and/or the text of their agreements and solicit a reaction from DG Competition;
 - (b) Undertakings ask for a meeting to discuss an agreement or practice;
 - (c) Undertakings ask for specific information or clarification on a competition law issue (in writing / orally).
- (8) When dealing with such requests or solicitations falling outside the context of Notice on Informal Guidance letters, it should be made clear from the outset that:
- (9) DG Competition may engage in the exchange of views about market developments and may provide general indications about its case practice and policy;
 - (a) No definitive views can be given on a particular agreement, decision or practice;
 - (b) An informal discussion with DG Competition cannot be construed as the Commission giving any form of 'clearance', and
 - (c) The fact of meeting DG Competition does not confer any rights or expectations on the relevant undertaking or any third party.

3. GUIDANCE LETTERS

3.1. Conditions for issuing a Guidance Letter

3.1.1. Formal conditions for requesting a Guidance Letter

- (10) Requests for a guidance letter can be presented by an undertaking or undertakings or associations of undertakings within the meaning of Articles 101 and 102 TFEU that have entered into or intend to enter into an agreement or unilateral practice that could fall within the scope of Articles 101 and/or 102 TFEU with regard to legal questions raised by such agreement or unilateral practice. Under the Notice on Informal Guidance, the term “agreement” is used for agreements, decisions by associations of undertakings and concerted practices. ⁽¹³⁾

⁽¹²⁾ See point 13 of the Notice on Informal Guidance.

⁽¹³⁾ See footnote 2 of the Notice on Informal Guidance.

- (11) There is no prescribed form for making a request. A request for a guidance letter should be presented to the Commission using the contact information provided on the DG Competition website. ⁽¹⁴⁾
- (12) The request should clearly state ⁽¹⁵⁾:
- (a) the identity of all the undertakings concerned, as well as a single address for contacts with the Commission;
 - (b) the specific questions on which guidance is sought;
 - (c) 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;
 - (d) the applicant(s)' own preliminary assessment on the following points:
 - (e) the first substantive criterion that must be met for the Commission to issue guidance: 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 and previous guidance letters, having regard to the criteria for issuing guidance under the Notice on Informal Guidance;
 - (f) the second substantive criterion: why a public clarification of the applicability of Articles 101 or 102 TFEU through a guidance letter would provide added value with respect to legal certainty, in relation to at least one of the factors listed in point 7(b) of the Notice on Informal Guidance; to the best of the applicant(s)' abilities, the application of Articles 101 or 102 TFEU to the novel or unresolved question(s) raised by the agreement or unilateral practice;
 - (g) any other information that allows the request to be assessed in the light of the criteria set out in the Notice on Informal Guidance, including in particular a declaration that, to the best of the applicant(s)' knowledge, the agreement or unilateral practice to which the request refers is not subject to proceedings pending before a Member State court or competition authority;
 - (h) where the request contains information that is considered business secrets, a clear identification of that information;
 - (i) any other information or documentation relevant for the assessment of the agreement or unilateral practice.
- (13) An undertaking may withdraw its request at any point in time. ⁽¹⁶⁾ In any case, information provided in the context of a request for guidance remains with the

⁽¹⁴⁾ See https://competition-policy.ec.europa.eu/antitrust/contact_en

⁽¹⁵⁾ In accordance with point 12 of the Notice on Informal Guidance.

⁽¹⁶⁾ See point 18 of the Notice on Informal Guidance.

Commission and can be used to launch subsequent proceedings under Regulation 1/2003. ⁽¹⁷⁾

3.1.2. *Substantive conditions for issuing a Guidance Letter*

- (14) According to the Notice on Informal Guidance, ⁽¹⁸⁾ issuing a guidance letter may only be considered if a prima facie assessment of the facts and legal considerations of the (envisaged) conduct suggests that, in the Commission's view, there are valid reasons to provide clarifications through a guidance letter. Such prima facie assessment should be based on the following cumulative criteria set out in point 7 of the Notice on Informal Guidance:
- (a) The substantive assessment of an agreement or practice with regard to Articles 101 and/or 102 TFEU poses a question of application of the law for which there is no sufficient clarity in the existing EU 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.
 - (b) A public clarification of the applicability of Articles 101 or 102 TFEU through a guidance letter would provide added value with respect to legal certainty, taking into account one or more of the following factors:
 - 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 economic usage in the Union.
- (15) It must also be possible to issue a guidance letter on the basis of the information provided, although 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. The Commission may also ask the applicant(s) or, in exceptional cases, third parties, to provide supplementary information in relation to the request, while safeguarding the confidentiality of the information provided by the applicant(s). ⁽¹⁹⁾

⁽¹⁷⁾ Ibid.

⁽¹⁸⁾ See Point 7 of the Notice on Informal Guidance.

⁽¹⁹⁾ See point 14 of the Notice on Informal Guidance.

- (16) Furthermore, the Commission will normally not consider a request for a guidance letter in either of the following circumstances: ⁽²⁰⁾
- (a) 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
 - (b) 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.
- (17) The Commission will not consider hypothetical questions and will not issue guidance letters in respect of agreements or unilateral practices that are no longer being implemented. Undertakings may however request a guidance letter in relation to questions raised by an agreement or unilateral practice that they envisage, i.e. before the implementation of the agreement or unilateral practice. In that case, in order for a request to be considered, planning must have reached a sufficiently advanced stage. ⁽²¹⁾

3.2. The effects of Guidance Letters

- (18) Guidance letters are primarily intended to help undertakings carry out, by themselves, an informed assessment of their agreements and unilateral practices. Guidance letters contain the Commission's observations on the facts presented to it and do not create rights or obligations for the applicant(s) or any third party. ⁽²²⁾
- (19) A guidance letter cannot prejudice the assessment of the same question by the Court of Justice of the European Union. ⁽²³⁾
- (20) Where an agreement or unilateral practice forms the factual basis for a guidance letter, the Commission is not precluded from subsequently examining the same agreement or practice in proceedings 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 in a complaint, to developments in the case law of the Court of Justice of the European Union, or wider changes in the Commission's policy and developments on the markets concerned. Where the public interest so requires, the Commission may also modify or revoke a guidance letter. ⁽²⁴⁾
- (21) In principle, the Commission will not impose fines on applicant(s) for guidance letters in respect of any action taken by the applicant(s) relying in good faith on the Commission's guidance letter. ⁽²⁵⁾ However, this is subject to the information

⁽²⁰⁾ See point 8 of the Notice on Informal Guidance.

⁽²¹⁾ See point 9 of the Notice on Informal Guidance.

⁽²²⁾ See point 23 of the Notice on Informal Guidance.

⁽²³⁾ See point 24 of the Notice on Informal Guidance.

⁽²⁴⁾ See point 25 of the Notice on Informal Guidance.

⁽²⁵⁾ See point 26 of the Notice on Informal Guidance.

provided by the applicant(s) to the Commission being accurate and truthful. ⁽²⁶⁾ Moreover, an applicant cannot rely in good faith on a guidance letter if the facts on which it was issued have materially changed. ⁽²⁷⁾

- (22) The clarifications on the applicability of Articles 101 or 102 TFEU included in a guidance letter are expressly conditioned on the accuracy and truthfulness of the information provided by the applicant(s); any material divergence between the information provided by the applicant(s) and the actual facts of the case will render the guidance letter inoperative. ⁽²⁸⁾
- (23) Guidance letters are not Commission decisions and do not bind Member State competition authorities or Member State courts. However, it is open to Member State competition authorities and Member State courts to take account of guidance letters issued by the Commission as they see fit in their assessment of a case. ⁽²⁹⁾

3.3. Processing of the request

3.3.1. Analysis of the request against criteria, priorities and facts

- (24) When the Commission is seized of a request for a guidance letter, it will consider whether it is appropriate to process it or not. A first reply should be sent by the unit dealing with the request to the applicant(s) within a reasonable time, depending on the particular circumstances of the case. ⁽³⁰⁾ The unit should use its best efforts not to delay this process unreasonably. Two answers are possible at that stage:
- (a) an administrative letter from the Commission, informing the applicant(s) that no guidance letter will be issued because the request does not fulfil the criteria for issuing a guidance letter set out in the Notice on Informal Guidance (see Section 3.3.3 below).
 - (b) a holding reply (which can be an email), if a prima facie assessment of the request under points 6, 7, 8 and 9 of the Notice on Informal Guidance indicates that the request may fulfil the criteria for issuing a guidance letter and merits further analysis. The reply will indicate that the Commission services are analysing the request and that the final assessment (issuance of an informal guidance letter or refusal) will follow.
- (25) In order to make this prima facie assessment of the request, the responsible unit should:
- (a) make a first assessment of the request against the conditions set out in the Notice on Informal Guidance;

⁽²⁶⁾ See point 26 of the Notice on Informal Guidance.

⁽²⁷⁾ See footnote 12 of the Notice on Informal Guidance.

⁽²⁸⁾ See point 26 of the Notice on Informal Guidance.

⁽²⁹⁾ See point 27 of the Notice on Informal Guidance.

⁽³⁰⁾ In accordance with Point 17 of the Notice on Informal Guidance.

- (b) check the facts set out by the applicant(s);
 - (c) make a first assessment of whether it is appropriate to issue a guidance letter, also taking into account DG Competition's enforcement priorities.
- (26) The Notice on Informal Guidance provides that the issuing of a guidance letter may only be considered if the two cumulative criteria listed in point 7 (a) and (b) of the Notice on Informal Guidance (listed in paragraph (12) above) are fulfilled.
- (27) If one of these two criteria are not fulfilled, the request should be rejected.

3.3.2. *Checking the facts*

- (28) The Notice on Informal Guidance provides that the Commission will in principle assess the request on the basis of the information provided by the applicant(s), which must satisfy all the requirements listed in point 12 of the Notice on Informal Guidance. ⁽³¹⁾ It follows that a request that is incomplete or that does not set out the facts in a conclusive manner can be rejected. ⁽³²⁾ However, the case team should always first give the applicant(s) an opportunity to complete/supplement their application.
- (29) As outlined above, the Commission may use additional information 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, third parties to provide supplementary information, while safeguarding the confidentiality of the information provided by the applicant(s).

3.3.3. *Refusal to issue a Guidance Letter*

- (30) If it is decided that no guidance letter will be issued because the request does not fulfil the criteria set out in the Notice on Informal Guidance, the Commission will inform the applicant(s) accordingly in writing. ⁽³³⁾ This will typically be done by an administrative letter. The letter rejecting the request will not refer to the substance but only to the fact that the Commission does not consider it as a priority, in light of the specific factors explained in the letter.

3.4. **Adoption of a Guidance Letter**

- (31) If it is decided to issue a guidance letter, it may be necessary to gather supplementary information, including through follow-up contacts with the applicant (while respecting the normal rules on professional secrecy in relation to the information supplied by the applicant(s)).
- (32) According to the Notice on Informal Guidance, ⁽³⁴⁾ a guidance letter sets out: a summary description of the facts on which it is based; the main legal reasoning

⁽³¹⁾ See point 14 of the Notice on Informal Guidance.

⁽³²⁾ Ibid.

⁽³³⁾ See point 17 of the Notice on Informal Guidance.

⁽³⁴⁾ See point 20 of the Notice on Informal Guidance.

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.

- (33) According to the Notice on Informal Guidance, a guidance letter may be limited to part of the questions raised in the request. It may also include additional aspects to those set out in the request. If appropriate, the Commission may also set out a time limit for the application of a guidance letter, or specify that the guidance letter is premised on the existence or absence of certain factual circumstances. ⁽³⁵⁾
- (34) The Commission may share the information submitted to it with the competition authorities of the Member States and receive input from them. It may also discuss the substance of the request with those authorities before issuing a guidance letter. ⁽³⁶⁾
- (35) The guidance letter will be adopted by the College following an inter-service consultation. Once adopted, the guidance letter is sent to the applicant(s).

3.4.1. *Publication on DG Competition's website*

- (36) In accordance with the Notice on Informal Guidance, the guidance letter will be published on DG Competition's website, having regard to the legitimate interest of undertakings in the protection of their business secrets. Before publishing a guidance letter, the Commission will agree a public version of the letter with the applicant(s) and any other parties that have provided information. ⁽³⁷⁾ Whilst the legitimate interest of applicant(s) in the protection of their business secrets should be respected, the published guidance should also remain meaningful so that it can be used by other parties.
- (37) It follows that the Commission service in charge of issuing the guidance letter should ask the relevant undertakings at an early stage to confirm whether their request contains business secrets or other confidential information that they do not wish to appear in the published guidance letter. The responsible unit should explore with the relevant undertakings the possibilities for protecting the information for which confidentiality is claimed, while ensuring that the published guidance remains meaningful. If the non-confidential version submitted by the applicant(s) makes guidance meaningless, the Commission should explore with the applicant(s) other possibilities to protect the information for which confidentiality is claimed, such as replacing confidential information with non-confidential summaries, or ranges for data instead of redactions.
- (38) The published guidance letter should be accompanied by a statement explaining that it has been published for information purposes only and should not be considered as an official publication.

⁽³⁵⁾ See point 21 of the Notice on Informal Guidance.

⁽³⁶⁾ See point 15 of the Notice on Informal Guidance.

⁽³⁷⁾ See point 22 of the Notice on Informal Guidance.