EU Competition Law

Rules Applicable to Antitrust Enforcement

Volume I:

General Rules

Situation as at
1st July 2013

Competition

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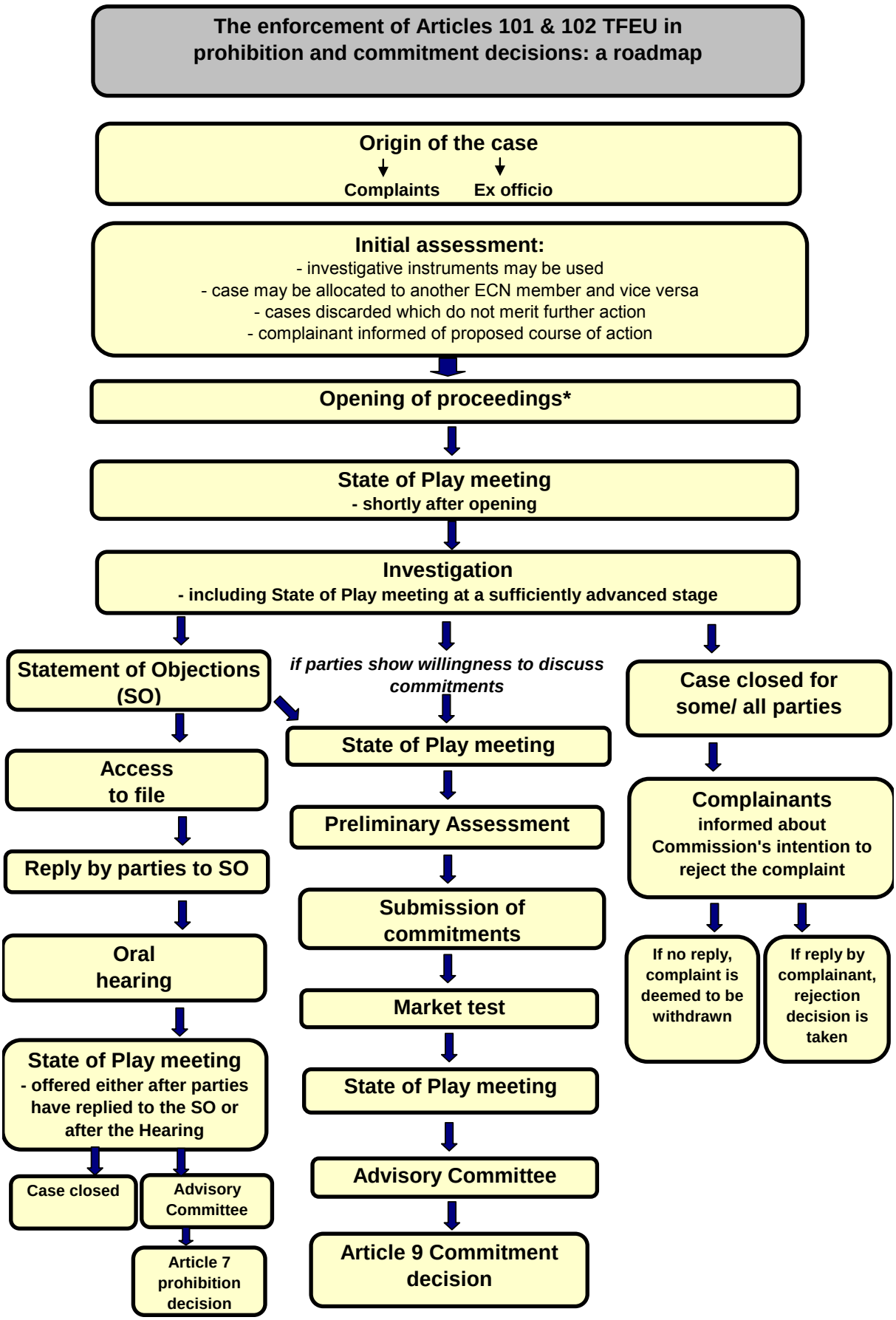

* With the exception of cartel proceedings, where the opening of proceedings normally takes place simultaneously with the adoption of the SO

I.B PROVISIONS OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) AND OF THE TREATY ON EUROPEAN UNION (TEU)

B.1 Core provisions

Article 101 (ex Article 81 TEC)

1.The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 106 (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

B.2 Other relevant provisions of the TFEU

Article 3

1.The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2.The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 14 (ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 37 (ex Article 31 TEC)

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably inf luences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

Article 103 (ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. 2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

Article 104 (ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105 (ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 119 (ex Article 4 TEC)

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

Article 339 (ex Article 287 TEC)

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Article 346 (ex Article 296 TEC)

1.The provisions of the Treaties shall not preclude the application of the following rules:

(f) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(g) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2.The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

B.3 Other relevant provisions of the TEU

Article 3 (ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which f low from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

B.4 Protocol 27

Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 27) on the internal market and competition

Official Journal 115 , 09/05/2008 P. 0309 - 0309

PROTOCOL (No 27)

ON THE INTERNAL MARKET AND COMPETITION

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,

HAVE AGREED that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

I.C GENERAL RULES

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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

(Text with EEA relevance)

(OJ L 1, 4.1.2003, p. 1)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Council Regulation (EC) No 411/2004 of 26 February 2004	L 68	1	6.3.2004
►**M2**	Council Regulation (EC) No 1419/2006 of 25 September 2006	L 269	1	28.9.2006

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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

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the opinion of the European Parliament ([2]),

Having regard to the opinion of the European Economic and Social Committee ([3]),

Whereas:

(1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 (*) of the Treaty ([4]), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.

(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.

(3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

(4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.

([1]) OJ C 365 E, 19.12.2000, p. 284.
([2]) OJ C 72 E, 21.3.2002, p. 305.
([3]) OJ C 155, 29.5.2001, p. 73.
(*) The title of Regulation No 17 has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty.
([4]) OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

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(5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

(8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

(9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible

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with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

(10) Regulations such as 19/65/EEC ([1]), (EEC) No 2821/71 ([2]), (EEC) No 3976/87 ([3]), (EEC) No 1534/91 ([4]), or (EEC) No 479/92 ([5]) empower the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called 'block' exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.

(11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings

([1]) Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices (OJ 36, 6.3.1965, p. 533). Regulation as last amended by Regulation (EC) No 1215/1999 (OJ L 148, 15.6.1999, p. 1).

([2]) Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.

([3]) Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 374, 31.12.1987, p. 9). Regulation as last amended by the Act of Accession of 1994.

([4]) Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).

([5]) Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (Consortia) (OJ L 55, 29.2.1992, p. 3). Regulation amended by the Act of Accession of 1994.

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or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.

(12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

(13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

(14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.

(15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.

(16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent.

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However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.

(19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.

(20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.

(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

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(22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

(23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

(24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.

(25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.

(26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.

(27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.

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(28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.

(29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.

(30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.

(31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74 ([1]), which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.

(32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.

(33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.

(34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.

([1]) Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

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(35) In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.

(36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17 ([1]) should therefore be repealed and Regulations (EEC) No 1017/68 ([2]), (EEC) No 4056/86 ([3]) and (EEC) No 3975/87 ([4]) should be amended in order to delete the specific procedural provisions they contain.

(37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(38) Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance,

([1]) OJ 124, 28.11.1962, p. 2751/62; Regulation as last amended by Regulation No 1002/67/EEC (OJ 306, 16.12.1967, p. 1).

([2]) Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1). Regulation as last amended by the Act of Accession of 1994.

([3]) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 (The title of the Regulation has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty) of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4). Regulation as last amended by the Act of Accession of 1994.

([4]) Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EEC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).

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HAS ADOPTED THIS REGULATION:

CHAPTER I

PRINCIPLES

Article 1

Application of Articles 81 and 82 of the Treaty

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.

3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2

Burden of proof

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3

Relationship between Articles 81 and 82 of the Treaty and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81 (3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition

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authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II

POWERS

Article 4

Powers of the Commission

For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

Article 5

Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

— requiring that an infringement be brought to an end,

— ordering interim measures,

— accepting commitments,

— imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6

Powers of the national courts

National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III

COMMISSION DECISIONS

Article 7

Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a

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legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8

Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 9

Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

(a) where there has been a material change in any of the facts on which the decision was based;

(b) where the undertakings concerned act contrary to their commitments; or

(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 10

Finding of inapplicability

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

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CHAPTER IV

COOPERATION

Article 11

Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29 (1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12

Exchange of information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and

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does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

— the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

— the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13

Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14

Advisory Committee

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.

3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.

4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall

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determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.

7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

Article 15

Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

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Article 16

Uniform application of Community competition law

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V

POWERS OF INVESTIGATION

Article 17

Investigations into sectors of the economy and into types of agreements

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply *mutatis mutandis*.

Article 18

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

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3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.

6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

Article 19

Power to take statements

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

Article 20

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

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(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

Article 21

Inspection of other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of

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transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20 (2)(a), (b) and (c). Article 20(5) and (6) shall apply *mutatis mutandis*.

Article 22

Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

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CHAPTER VI

PENALTIES

Article 23

Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;

(c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);

(d) in response to a question asked in accordance with Article 20(2)(e),

— they give an incorrect or misleading answer,

— they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or

— they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);

(e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require

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payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 24

Periodic penalty payments

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;

(b) to comply with a decision ordering interim measures taken pursuant to Article 8;

(c) to comply with a commitment made binding by a decision pursuant to Article 9;

(d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);

(e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII

LIMITATION PERIODS

Article 25

Limitation periods for the imposition of penalties

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

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(b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or by the competition authority of a Member State;

(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;

(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 26

Limitation period for the enforcement of penalties

1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted:

(a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;

(b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

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(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII

HEARINGS AND PROFESSIONAL SECRECY

Article 27

Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28

Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all represen-

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tatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX

EXEMPTION REGULATIONS

Article 29

Withdrawal in individual cases

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81 (3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81 (3) of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X

GENERAL PROVISIONS

Article 30

Publication of decisions

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

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Article 33

Implementing provisions

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, *inter alia*:

(a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;

(b) the practical arrangements for the exchange of information and consultations provided for in Article 11;

(c) the practical arrangements for the hearings provided for in Article 27.

2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

CHAPTER XI

TRANSITIONAL, AMENDING AND FINAL PROVISIONS

Article 34

Transitional provisions

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.

2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

Article 35

Designation of competition authorities of Member States

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.

2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different

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from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

Article 36

Amendment of Regulation (EEC) No 1017/68

Regulation (EEC) No 1017/68 is amended as follows:

1. Article 2 is repealed;

2. in Article 3(1), the words 'The prohibition laid down in Article 2' are replaced by the words 'The prohibition in Article 81(1) of the Treaty';

3. Article 4 is amended as follows:

   (a) In paragraph 1, the words 'The agreements, decisions and concerted practices referred to in Article 2' are replaced by the words 'Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty';

   (b) Paragraph 2 is replaced by the following:

   '2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease.'

4. Articles 5 to 29 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 30, paragraphs 2, 3 and 4 are deleted.

Article 37

Amendment of Regulation (EEC) No 2988/74

In Regulation (EEC) No 2988/74, the following Article is inserted:

'Article 7a

Exclusion

This Regulation shall not apply to measures taken under 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, p. 1.'

Article 38

Amendment of Regulation (EEC) No 4056/86

Regulation (EEC) No 4056/86 is amended as follows:

1. Article 7 is amended as follows:

   (a) Paragraph 1 is replaced by the following:

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'1. *Breach of an obligation*

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in 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 (*) adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed.

(*) OJ L 1, 4.1.2003, p. 1.'

(b) Paragraph 2 is amended as follows:

(i) In point (a), the words 'under the conditions laid down in Section II' are replaced by the words 'under the conditions laid down in Regulation (EC) No 1/2003';

(ii) The second sentence of the second subparagraph of point (c) (i) is replaced by the following:

'At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No 1/2003, whether to accept commitments offered by the undertakings concerned with a view, *inter alia*, to obtaining access to the market for non-conference lines.'

2. Article 8 is amended as follows:

(a) Paragraph 1 is deleted.

(b) In paragraph 2 the words 'pursuant to Article 10' are replaced by the words 'pursuant to Regulation (EC) No 1/2003'.

(c) Paragraph 3 is deleted;

3. Article 9 is amended as follows:

(a) In paragraph 1, the words 'Advisory Committee referred to in Article 15' are replaced by the words 'Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003';

(b) In paragraph 2, the words 'Advisory Committee as referred to in Article 15' are replaced by the words 'Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003';

4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81 (3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 26, the words 'the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)' are deleted.

Article 39

Amendment of Regulation (EEC) No 3975/87

Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

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Article 40

Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91

Article 7 of Regulation No 19/65/EEC, Article 7 of Regulation (EEC) No 2821/71 and Article 7 of Regulation (EEC) No 1534/91 are repealed.

Article 41

Amendment of Regulation (EEC) No 3976/87

Regulation (EEC) No 3976/87 is amended as follows:

1. Article 6 is replaced by the following:

'Article 6

The Commission shall consult the Advisory Committee referred to in Article 14 of 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 (*) before publishing a draft Regulation and before adopting a Regulation.

_____

(*) OJ L 1, 4.1.2003, p. 1.'

2. Article 7 is repealed.

Article 42

Amendment of Regulation (EEC) No 479/92

Regulation (EEC) No 479/92 is amended as follows:

1. Article 5 is replaced by the following:

'Article 5

Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of 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, p. 1.'

2. Article 6 is repealed.

Article 43

Repeal of Regulations No 17 and No 141

1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

2. Regulation No 141 is repealed.

3. References to the repealed Regulations shall be construed as references to this Regulation.

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Article 44

Report on the application of the present Regulation

Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17.

On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

Article 45

Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

It shall apply from 1 May 2004.

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

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COMMISSION REGULATION (EC) No 773/2004

of 7 April 2004

relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

(Text with EEA relevance)

(OJ L 123, 27.4.2004, p. 18)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Commission Regulation (EC) No 1792/2006 of 23 October 2006	L 362	1	20.12.2006
►**M2**	Commission Regulation (EC) No 622/2008 of 30 June 2008	L 171	3	1.7.2008

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COMMISSION REGULATION (EC) No 773/2004

of 7 April 2004

relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([1]), and in particular Article 33 thereof,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EC) No 1/2003 empowers the Commission to regulate certain aspects of proceedings for the application of Articles 81 and 82 of the Treaty. It is necessary to lay down rules concerning the initiation of proceedings by the Commission as well as the handling of complaints and the hearing of the parties concerned.

(2) According to Regulation (EC) No 1/2003, national courts are under an obligation to avoid taking decisions which could run counter to decisions envisaged by the Commission in the same case. According to Article 11(6) of that Regulation, national competition authorities are relieved from their competence once the Commission has initiated proceedings for the adoption of a decision under Chapter III of Regulation (EC) No 1/2003. In this context, it is important that courts and competition authorities of the Member States are aware of the initiation of proceedings by the Commission. The Commission should therefore be able to make public its decisions to initiate proceedings.

(3) Before taking oral statements from natural or legal persons who consent to be interviewed, the Commission should inform those persons of the legal basis of the interview and its voluntary nature. The persons interviewed should also be informed of the purpose of the interview and of any record which may be made. In order to enhance the accuracy of the statements, the persons interviewed should also be given an opportunity to correct the statements recorded. Where information gathered from oral statements is exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, that information should only be used in evidence to impose sanctions on natural persons where the conditions set out in that Article are fulfilled.

(4) Pursuant to Article 23(1)(d) of Regulation (EC) No 1/2003 fines may be imposed on undertakings and associations of undertakings where they fail to rectify within the time limit fixed by the Commission an incorrect, incomplete or misleading answer given by a member of their staff to questions in the course of inspections. It is therefore necessary to provide the undertaking concerned with a record of any explanations given and to

([1]) OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

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establish a procedure enabling it to add any rectification, amendment or supplement to the explanations given by the member of staff who is not or was not authorised to provide explanations on behalf of the undertaking. The explanations given by a member of staff should remain in the Commission file as recorded during the inspection.

(5) Complaints are an essential source of information for detecting infringements of competition rules. It is important to define clear and efficient procedures for handling complaints lodged with the Commission.

(6) In order to be admissible for the purposes of Article 7 of Regulation (EC) No 1/2003, a complaint must contain certain specified information.

(7) In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that form should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation (EC) No 1/2003.

(8) Natural or legal persons having chosen to lodge a complaint should be given the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement. However, they should not have access to business secrets or other confidential information belonging to other parties involved in the proceedings.

(9) Complainants should be granted the opportunity of expressing their views if the Commission considers that there are insufficient grounds for acting on the complaint. Where the Commission rejects a complaint on the grounds that a competition authority of a Member State is dealing with it or has already done so, it should inform the complainant of the identity of that authority.

(10) In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.

(11) Provision should also be made for the hearing of persons who have not submitted a complaint as referred to in Article 7 of Regulation (EC) No 1/2003 and who are not parties to whom a statement of objections has been addressed but who can nevertheless show a sufficient interest. Consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services. Where it considers this to be useful for the proceedings, the Commission should also be able to invite other persons to express their views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. Where appropriate, it should also be able to invite such persons to express their views at that oral hearing.

(12) To improve the effectiveness of oral hearings, the Hearing Officer should have the power to allow the parties concerned, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

(13) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The category of ‘other confidential information’ includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking or person. The Commission should be able to request undertakings or associations of undertakings

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that submit or have submitted documents or statements to identify confidential information.

(14) Where business secrets or other confidential information are necessary to prove an infringement, the Commission should assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

(15) In the interest of legal certainty, a minimum time-limit for the various submissions provided for in this Regulation should be laid down.

(16) This Regulation replaces Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ([1]), which should therefore be repealed.

(17) This Regulation aligns the procedural rules in the transport sector with the general rules of procedure in all sectors. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector ([2]) should therefore be repealed.

(18) Regulation (EC) No 1/2003 abolishes the notification and authorisation system. Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 ([3]) should therefore be repealed,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Subject-matter and scope

This regulation applies to proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty.

CHAPTER II

INITIATION OF PROCEEDINGS

Article 2

Initiation of proceedings

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1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation, a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.

([1]) OJ L 354, 30.12.1998, p. 18.
([2]) OJ L 354, 30.12.1998, p. 22.
([3]) OJ L 377, 31.12.1994, p. 28.

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2. The Commission may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.

3. The Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.

4. The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings.

CHAPTER III

INVESTIGATIONS BY THE COMMISSION

Article 3

Power to take statements

1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.

2. The interview may be conducted by any means including by telephone or electronic means.

3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

Article 4

Oral questions during inspections

1. When, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003, officials or other accompanying persons authorised by the Commission ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.

2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.

3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.

CHAPTER IV

HANDLING OF COMPLAINTS

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Article 5

Admissibility of complaints

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003.

Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.

2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the Commission. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.

3. Complaints shall be submitted in one of the official languages of the Community.

Article 6

Participation of complainants in proceedings

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1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections, except in cases where the settlement procedure applies, where it shall inform the complainant in writing of the nature and subject matter of the procedure. The Commission shall also set a time limit within which the complainant may make known its views in writing.

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2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

Article 7

Rejection of complaints

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

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Article 8

Access to information

1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.

2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

Article 9

Rejections of complaints pursuant to Article 13 of Regulation (EC) No 1/2003

Where the Commission rejects a complaint pursuant to Article 13 of Regulation (EC) No 1/2003, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

CHAPTER V

EXERCISE OF THE RIGHT TO BE HEARD

Article 10

Statement of objections and reply

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1. The Commission shall inform the parties concerned of the objections raised against them. The statement of objections shall be notified in writing to each of the parties against whom objections are raised.

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2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.

3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, ►M1 30 ◄ paper copies of their submission and of the documents attached to it. They may propose that the Commission hear persons who may corroborate the facts set out in their submission.

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Article 10a

Settlement procedure in cartel cases

1. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly

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introducing settlement submissions. The Commission shall not be obliged to take into account replies received after the expiry of that time limit.

If two or more parties within the same undertaking indicate their willingness to engage in settlement discussions pursuant to the first subparagraph, they shall appoint a joint representation to engage in discussions with the Commission on their behalf. When setting the time limit referred to in the first subparagraph, the Commission shall indicate to the relevant parties that they are identified within the same undertaking, for the sole purpose of enabling them to comply with this provision.

2. Parties taking part in settlement discussions may be informed by the Commission of:

(a) the objections it envisages to raise against them;

(b) the evidence used to determine the envisaged objections;

(c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and

(d) the range of potential fines.

This information shall be confidential vis-à-vis third parties, save where the Commission has given a prior explicit authorisation for disclosure.

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 81 of the Treaty as well as their liability. Before the Commission sets a time limit to introduce their settlement submissions, the parties concerned shall be entitled to have the information specified in Article 10a(2), first subparagraph disclosed to them, upon request, in a timely manner. The Commission shall not be obliged to take into account settlement submissions received after the expiry of that time limit.

3. When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the Commission, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions. The Commission may then proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation (EC) No 1/2003.

4. The Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties involved, if it considers that procedural efficiencies are not likely to be achieved.

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Article 11

Right to be heard

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1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.

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2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

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Article 12

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

2. However, when introducing their settlement submissions the parties shall confirm to the Commission that they would only require having the opportunity to develop their arguments at an oral hearing, if the statement of objections does not reflect the contents of their settlement submissions.

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Article 13

Hearing of other persons

1. If natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time-limit within which they may make known their views in writing.

2. The Commission may, where appropriate, invite persons referred to in paragraph 1 to develop their arguments at the oral hearing of the parties to whom a statement of objections has been addressed, if the persons referred to in paragraph 1 so request in their written comments.

3. The Commission may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. The Commission may also invite such persons to express their views at that oral hearing.

Article 14

Conduct of oral hearings

1. Hearings shall be conducted by a Hearing Officer in full independence.

2. The Commission shall invite the persons to be heard to attend the oral hearing on such date as it shall determine.

3. The Commission shall invite the competition authorities of the Member States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the Member States.

4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.

5. Persons heard by the Commission may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.

6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited

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to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

CHAPTER VI

ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

Article 15

Access to the file and use of documents

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.

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1a. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and in order to enable the parties willing to introduce settlement submissions to do so, the Commission shall disclose to them the evidence and documents described in Article 10a(2) upon request and subject to the conditions established in the relevant subparagraphs. In view thereof, when introducing their settlement submissions, the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement submissions.

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2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States. The right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.

3. Nothing in this Regulation prevents the Commission from disclosing and using information necessary to prove an infringement of Articles 81 or 82 of the Treaty.

4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

Article 16

Identification and protection of confidential information

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.

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3. Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.

The Commission may set a time-limit within which the undertakings and associations of undertakings are to:

(a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;

(b) provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted;

(c) provide a concise description of each piece of deleted information.

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

CHAPTER VII

GENERAL AND FINAL PROVISIONS

Article 17

Time-limits

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1. In setting the time limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2), Article 10a(1), Article 10a(2), Article 10a(3) and Article 16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.

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2. The time-limits referred to in Article 6(1), Article 7(1) and Article 10(2) shall be at least four weeks. However, for proceedings initiated with a view to adopting interim measures pursuant to Article 8 of Regulation (EC) No 1/2003, the time-limit may be shortened to one week.

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3. The time limits referred to in Article 4(3), Article 10a(1), Article 10a(2) and Article 16(3) shall be at least two weeks. The time limit referred to in Article 3(3) shall be at least two weeks, except for settlement submissions, for which corrections shall be made within one week. The time limit referred to in Article 10a(3) shall be at least two weeks.

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4. Where appropriate and upon reasoned request made before the expiry of the original time-limit, time-limits may be extended.

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Article 18

Repeals

Regulations (EC) No 2842/98, (EC) No 2843/98 and (EC) No 3385/94 are repealed.

References to the repealed regulations shall be construed as references to this regulation.

Article 19

Transitional provisions

Procedural steps taken under Regulations (EC) No 2842/98 and (EC) No 2843/98 shall continue to have effect for the purpose of applying this Regulation.

Article 20

Entry into force

This Regulation shall enter into force on 1 May 2004.

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

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ANNEX

FORM C

COMPLAINT PURSUANT TO ARTICLE 7 OF REGULATION (EC) No 1/2003

I. **Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint**

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.

2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

II. **Details of the alleged infringement and evidence**

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.

4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations…). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).

5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

III. **Finding sought from the Commission and legitimate interest**

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.

7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

IV. **Proceedings before national competition authorities or national courts**

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.

DECISIONS

DECISION OF THE PRESIDENT OF THE EUROPEAN COMMISSION

of 13 October 2011

on the function and terms of reference of the hearing officer in certain competition proceedings

(Text with EEA relevance)

(2011/695/EU)

THE PRESIDENT OF THE EUROPEAN COMMISSION,

Having regard to the Treaty on European Union,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to the Rules of Procedure of the Commission [1], and in particular Article 22 thereof,

Whereas:

(1) Under the system for competition law enforcement established under the Treaty on the Functioning of the European Union (hereinafter 'the Treaty'), the Commission investigates and decides on cases by administrative decision, subject to judicial review by the Court of Justice of the European Union (hereinafter 'the Court of Justice').

(2) The Commission has to conduct its competition proceedings fairly, impartially and objectively and must ensure respect of the procedural rights of the parties concerned as set out in 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 [2], Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [3], Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [4], and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [5], as well as in the relevant case-law of the Court of Justice. In particular, the right of the parties concerned to be heard before the adoption of any individual decision adversely affecting them is a fundamental right of European Union law recognised by the Charter of Fundamental Rights, and in particular Article 41 thereof [6].

(3) In order to ensure the effective exercise of the procedural rights of the parties concerned, other involved parties within the meaning of Article 11(b) of Regulation (EC) No 802/2004 (hereinafter 'other involved parties'), complainants within the meaning of Article 7(2) of Regulation (EC) No 1/2003 (hereinafter 'complainants') and persons other than those referred to in Articles 5 and 11 of Regulation (EC) No 773/2004 and third persons within the meaning of Article 11 of Regulation (EC) No 802/2004 (hereinafter 'third persons') involved in competition proceedings, responsibility for safeguarding the observance of such rights should be entrusted to an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings.

(4) The Commission created the function of hearing officer for these purposes in 1982, revised it in Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission [7] and in Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings [8]. It is now necessary to clarify and further strengthen the role of the hearing officer and to adapt the terms of reference of the hearing officer in the light of developments in Union competition law.

(5) The function of the hearing officer has been generally perceived as an important contribution to the competition proceedings before the Commission due to the independence and expertise that hearing officers have brought to these proceedings. In order to ensure the

[1] OJ L 308, 8.12.2000, p. 26.
[2] OJ L 1, 4.1.2003, p. 1.
[3] OJ L 24, 29.1.2004, p. 1.
[4] OJ L 123, 27.4.2004, p. 18.
[5] OJ L 133, 30.4.2004, p. 1.
[6] OJ C 303, 14.12.2007, p. 1.
[7] OJ L 330, 21.12.1994, p. 67.
[8] OJ L 162, 19.6.2001, p. 21.

continued independence of the hearing officer from the Directorate-General for Competition, he or she should be attached, for administrative purposes, to the member of the Commission with special responsibility for competition.

(6) The hearing officer should be appointed in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union. In accordance with those rules, consideration may also be given to candidates who are not officials of the Commission. Transparency as regards the appointment, termination of appointment and transfer of hearing officers should be ensured.

(7) The Commission may appoint one or more hearing officers and should provide for their supporting staff. Where the hearing officer perceives a conflict of interests in the performance of his or her functions, the hearing officer should cease from acting on a case. If the hearing officer is unable to act, his or her role should be carried out by another hearing officer.

(8) The hearing officer should operate as an independent arbiter who seeks to resolve issues affecting the effective exercise of the procedural rights of the parties concerned, other involved parties, complainants or interested third persons where such issues could not be resolved through prior contacts with the Commission services responsible for the conduct of competition proceedings, which must respect these procedural rights.

(9) The terms of reference of the hearing officer in competition proceedings should be framed in such a way as to safeguard the effective exercise of procedural rights throughout proceedings before the Commission pursuant to Articles 101 and 102 of the Treaty and Regulation (EC) No 139/2004, in particular the right to be heard.

(10) In order to strengthen this role, the hearing officer should be attributed with the function of safeguarding the effective exercise of procedural rights of undertakings and associations of undertakings in the context of the Commission's powers of investigation under Chapter V of Regulation (EC) No 1/2003, as well as pursuant to Article 14 of Regulation (EC) No 139/2004 which empowers the Commission to impose fines on undertakings and associations of undertakings. The hearing officer should also be attributed with specific functions during this investigative phase in relation to claims for legal professional privilege, the privilege against self-incrimination, deadlines for replying to decisions requesting information pursuant to Article 18(3) of Regulation (EC) No 1/2003, as well as with regard to the right of undertakings and associations of undertakings subject to an investigative measure by the Commission under Chapter V of Regulation (EC) No 1/2003 to be informed of their procedural status, namely whether they are subject to an investigation and, if so, the subject matter and purpose of that investigation. In assessing claims made in relation to privilege against self-incrimination, the hearing officer may consider whether undertakings make clearly unfounded claims for protection merely as a delaying tactic.

(11) The hearing officer should be able to facilitate the resolution of claims that a document is covered by legal professional privilege. To this end, if the undertaking or association of undertakings making the claim agrees, the hearing officer will be allowed to examine the document concerned and make an appropriate recommendation, referring to the applicable case-law of the Court of Justice.

(12) The hearing officer should be responsible for deciding whether a third person shows a sufficient interest to be heard. Consumer associations that apply to be heard should be generally regarded as having a sufficient interest, where the proceedings concern products or services used by end-consumers or products or services that constitute a direct input into such products or services.

(13) The hearing officer should decide whether to admit complainants and interested third persons to the oral hearing, taking into account the contribution they can make to the clarification of the relevant facts of the case.

(14) The right of the parties concerned to be heard before a final decision adversely affecting their interests is taken is guaranteed through their right to reply in writing to the preliminary position of the Commission, as set out in the statement of objections and their right to develop their arguments, if they so request, at the oral hearing. In order to exercise these rights effectively, parties to whom a statement of objections has been addressed have the right of access to the Commission's investigation file.

(15) In order to safeguard the effective exercise of the rights of defence of parties to whom a statement of objections has been addressed, the hearing officer should be responsible for ensuring that disputes about access to the file or about the protection of business secrets and other confidential information between those parties and the Commission's Directorate-General for Competition are resolved. In exceptional circumstances, the hearing officer may suspend the running of the time period in which an addressee of a statement of objections should reply to that statement until a dispute about access to file has been resolved, if the addressee would not be in a position to reply within the deadline granted and an extension would not be an adequate solution at that point in time.

(16) In order to safeguard the effective exercise of procedural rights while respecting the legitimate interests of confidentiality, the hearing officer should, where appropriate, be able to order specific measures for access to the Commission's file. In particular, the hearing officer should have the power to decide that parts of the file are made accessible to the party requesting access in a restricted manner, for example by limiting the number or category of persons having access, and the use of the information being accessed.

(17) The hearing officer should be responsible for deciding on requests for the extension of time limits set for the reply to a statement of objections, a supplementary statement of objections or a letter of facts or time limits within which other involved parties, complainants or interested third persons may make comments, in case of disagreement between any such person and the Directorate-General for Competition.

(18) The hearing officer should promote the effectiveness of the oral hearing, by, inter alia, taking all appropriate preparatory measures, including the circulation, in due time before the hearing, of a provisional list of participants and a provisional agenda.

(19) The oral hearing allows the parties to whom the Commission has addressed a statement of objections and other involved parties to further exercise their right to be heard by developing their arguments orally before the Commission, which should be represented by the Directorate-General for Competition as well as other services that contribute to the further preparation of a decision to be taken by the Commission. It should provide an additional opportunity to ensure that all relevant facts – whether favourable or unfavourable to the parties concerned, including the factual elements relating to the gravity and duration of the alleged infringement – are clarified as much as possible. The oral hearing should also allow the parties to present their arguments as to the matters that may be of importance for the possible imposition of fines.

(20) To ensure the effectiveness of oral hearings, the hearing officer may allow the parties to whom a statement of objections has been addressed, other involved parties, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing. The oral hearing should not be public so as to guarantee that all participants can express themselves freely. Therefore, information disclosed during the oral hearing should not be used for a purpose other than judicial and/or administrative proceedings for the application of Articles 101 and 102 of the Treaty. Where justified to protect business secrets and other confidential information, the hearing officer should be able to hear persons in a closed session.

(21) Parties to the proceedings which offer commitments pursuant to Article 9 of Regulation (EC) No 1/2003, as well as parties which engage in settlement procedures in cartel cases pursuant to Article 10a of Regulation (EC) No 773/2004, should be able to call upon the hearing officer in relation to the effective exercise of their procedural rights.

(22) The hearing officer should report on the respect for the effective exercise of procedural rights throughout competition proceedings. Moreover, and separately from his or her reporting function, the hearing officer should also be able to make observations on the further progress and objectivity of the proceedings and thereby contribute to ensuring that competition proceedings are concluded on the basis of a sound assessment of all relevant facts.

(23) When disclosing information about natural persons, the hearing officer should have regard, in particular, to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [1].

(24) Decision 2001/462/EC, ECSC should be repealed,

HAS DECIDED AS FOLLOWS:

CHAPTER 1

ROLE, APPOINTMENT AND DUTIES OF THE HEARING OFFICER

Article 1

The Hearing Officer

1. There shall be one or more hearing officers for competition proceedings, whose powers and functions are laid down in the present decision.

2. The hearing officer shall safeguard the effective exercise of procedural rights throughout competition proceedings before the Commission for the implementation of Articles 101 and 102 of the Treaty, and under Regulation (EC) No 139/2004 (hereinafter 'competition proceedings').

Article 2

Appointment, Termination of Appointment and Deputising

1. The Commission shall appoint the hearing officer. The appointment shall be published in the *Official Journal of the European Union*. Any interruption, termination or transfer of the hearing officer shall be the subject of a reasoned decision of the Commission. That decision shall be published in the *Official Journal of the European Union*.

[1] OJ L 8, 12.1.2001, p. 1.

2. The hearing officer shall be attached, for administrative purposes, to the member of the Commission with special responsibility for competition (hereinafter 'the competent member of the Commission').

3. Where the hearing officer is unable to act, his or her role shall be carried out by another hearing officer. If no hearing officer is able to act, the competent member of the Commission, where appropriate after consultation of the hearing officer, shall designate another competent Commission official, who is not involved in the case in question, to carry out the hearing officer's duties.

4. In case of an actual or potential conflict of interests, the hearing officer shall refrain from acting on a case. Paragraph 3 shall apply.

Article 3

Method of Operation

1. In exercising his or her functions, the hearing officer shall act independently.

2. In exercising his or her functions, the hearing officer shall take account of the need for effective application of the competition rules in accordance with Union legislation in force and the principles laid down by the Court of Justice.

3. In exercising his or her functions, the hearing officer shall have access to any files relating to competition proceedings.

4. The hearing officer shall be kept informed by the director responsible for investigating the case in the Directorate-General for Competition (hereinafter 'the director responsible') about the development of the procedure.

5. The hearing officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission.

6. If the hearing officer makes reasoned recommendations to the competent member of the Commission or takes decisions as foreseen in this decision, the hearing officer shall provide a copy of these documents to the director responsible and the Legal Service of the Commission.

7. Any issue regarding the effective exercise of the procedural rights of the parties concerned, other involved parties within the meaning of Article 11(b) of Regulation (EC) No 802/2004 (hereinafter 'the other involved parties'), complainants within the meaning of Article 7(2) of Regulation (EC) No 1/2003 (hereinafter 'complainants') and interested third persons within the meaning of Article 5 of this Decision involved in such proceedings shall first be raised by those persons with the Directorate-General for Competition. If the issue is not resolved, it may be referred to the hearing officer for independent review. Requests related to a measure for which a time limit applies must be made in due time, within the original time limit.

CHAPTER 2

INVESTIGATION

Article 4

Procedural rights in the investigation phase

1. The hearing officer shall safeguard the effective exercise of procedural rights which arise in the context of the exercise of the Commission's powers of investigation under Chapter V of Regulation (EC) No 1/2003 and in proceedings that can result in the imposition of fines pursuant to Article 14 of Regulation (EC) No 139/2004.

2. In particular, the hearing officer shall have the following functions, subject to Article 3(7):

(a) The hearing officer may be asked by undertakings or associations of undertakings to examine claims that a document required by the Commission in the exercise of powers conferred on it pursuant to Article 18, 20 or 21 of Regulation (EC) No 1/2003, in inspections pursuant to Article 13 of Regulation (EC) No 139/2004 or in the context of investigatory measures in proceedings that can result in the imposition of fines pursuant to Article 14 of Regulation (EC) No 139/2004 and which was withheld from the Commission is covered by legal professional privilege, within the meaning of the case-law of the Court of Justice. The hearing officer may only review the matter if the undertaking or association of undertakings making the claim consent to the hearing officer viewing the information claimed to be covered by legal professional privilege as well as related documents that the hearing officer considers necessary for his or her review. Without revealing the potentially privileged content of the information, the hearing officer shall communicate to the director responsible and the undertaking or association of undertakings concerned his or her preliminary view, and may take appropriate steps to promote a mutually acceptable resolution. Where no resolution is reached, the hearing officer may formulate a reasoned recommendation to the competent member of the Commission, without revealing the potentially privileged content of the document. The party making the claim shall receive a copy of this recommendation.

(b) Where the addressee of a request for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 refuses to reply to a question in such a request invoking the privilege against self-incrimination, as determined by the case-law of the Court of Justice, it may refer the matter, in due time following the receipt of the request, to the hearing officer. In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the hearing officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies and inform the director

responsible of the conclusions drawn, to be taken into account in case of any decision taken subsequently pursuant to Article 18(3) of Regulation (EC) No 1/2003. The addressee of the request shall receive a copy of the reasoned recommendation.

(c) Where the addressee of a decision requesting information pursuant to Article 18(3) of Regulation (EC) No 1/2003 considers that the time limit imposed for its reply is too short, it may refer the matter to the hearing officer, in due time before the expiry of the original time limit set. The hearing officer shall decide on whether an extension of the time limit should be granted, taking account of the length and complexity of the request for information and the requirements of the investigation.

(d) Undertakings or associations of undertakings subject to an investigative measure by the Commission under Chapter V of Regulation (EC) No 1/2003 shall have the right to be informed of their procedural status, namely whether they are subject to an investigation and, if so, the subject matter and purpose of that investigation. If such an undertaking or association of undertakings considers that it has not been properly informed by the Directorate-General for Competition of its procedural status, it may refer the matter to the hearing officer for resolution. The hearing officer shall take a decision that the Directorate-General for Competition will inform the undertaking or association of undertakings that made the request of their procedural status. This decision shall be communicated to the undertaking or association of undertakings that made the request.

CHAPTER 3

APPLICATIONS TO BE HEARD

Article 5

Interested third persons

1. Applications to be heard from persons other than those referred to in Articles 5 and 11 of Regulation (EC) No 773/2004 and third persons within the meaning of Article 11 of Regulation (EC) No 802/2004 (hereinafter 'third persons') shall be made in accordance with Article 13(1) of Regulation (EC) No 773/2004 and Article 16 of Regulation (EC) No 802/2004. Applications shall be submitted in writing and explain the applicant's interest in the outcome of the procedure.

2. The hearing officer shall decide as to whether third persons are to be heard after consulting the director responsible. In assessing whether a third person shows a sufficient interest, the hearing officer shall take into account whether and to what extent the applicant is sufficiently affected by the conduct which is the subject of the competition proceedings or whether the applicant fulfils the requirements of Article 18(4) of Regulation (EC) No 139/2004.

3. Where the hearing officer considers that an applicant has not shown a sufficient interest to be heard, he or she shall inform the applicant in writing of the reasons thereof. A time limit shall be fixed within which the applicant may make known its views in writing. If the applicant makes known its views in writing within the time limit set by the hearing officer and the written submission does not lead to a different assessment, that finding shall be stated in a reasoned decision which shall be notified to the applicant.

4. The hearing officer shall inform parties to competition proceedings as from the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 or Article 6(1)(c) of Regulation (EC) No 139/2004 of the identities of interested third persons to be heard, unless such disclosure would significantly harm a person or undertaking.

Article 6

Right to an oral hearing; participation of complainants and third persons in the oral hearing

1. At the request of parties to whom the Commission has addressed a statement of objections or other involved parties, the hearing officer shall conduct an oral hearing so that such parties can further develop their written submissions.

2. The hearing officer may, where appropriate and after consulting the director responsible, decide to afford complainants and interested third persons within the meaning of Article 5 the opportunity to express their views at the oral hearing of the parties to which a statement of objections has been issued, provided they so request in their written comments. The hearing officer may also invite representatives from competition authorities from third countries to attend the oral hearing as observers in accordance with agreements concluded between the Union and third countries.

CHAPTER 4

ACCESS TO FILE, CONFIDENTIALITY AND BUSINESS SECRETS

Article 7

Access to File and Access to Documents and Information

1. Where a party which has exercised its right of access to the file has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, it may make a reasoned request for access to these documents to the hearing officer, subject to Article 3(7).

2. Subject to Article 3(7), other involved parties, complainants and interested third persons within the meaning of Article 5 may make a reasoned request to the hearing officer in the circumstances listed hereafter:

(a) Other involved parties who have reason to believe that they have not been informed of the objections addressed to the notifying parties in accordance with Article 13(2) of Regulation (EC) No 802/2004.

(b) A complainant who has been informed by the Commission of its intention to reject a complaint pursuant to Article 7(1) of Regulation (EC) No 773/2004 and has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of its rights in accordance with Article 8(1) of Regulation (EC) No 773/2004.

(c) A complainant who considers that it has not received a copy of the non-confidential version of the statement of objections in accordance with Article 6(1) of Regulation (EC) No 773/2004 or that the non-confidential version of the statement of objections has not been established in a manner which enables it to exercise its rights effectively, with the exception of cases where the settlement procedure applies.

(d) An interested third person within the meaning of Article 5 of this Decision who has reason to believe that it has not been informed of the nature and subject matter of a procedure in accordance with Article 13(1) of Regulation (EC) No 773/2004 and Article 16(1) of Regulation (EC) No 802/2004. The same applies to a complainant in a case to which the settlement procedure applies who has reason to believe that it has not been informed of the nature and subject matter of the procedure in accordance with Article 6(1) of Regulation (EC) No 773/2004.

3. The hearing officer shall take a reasoned decision on a request addressed to him or her under paragraph 1 or 2 and communicate such decision to the person that made the request and to any other person concerned by the procedure.

Article 8

Business secrets and other confidential information

1. Where the Commission intends to disclose information which may constitute a business secret or other confidential information of any undertaking or person, the latter shall be informed in writing of this intention and the reasons thereof by the Directorate-General for Competition. A time limit shall be fixed within which the undertaking or person concerned may submit any written comments.

2. Where the undertaking or person concerned objects to the disclosure of the information it may refer the matter to the hearing officer. If the hearing officer finds that the information may be disclosed because it does not constitute a business secret or other confidential information or because there is an overriding interest in its disclosure that finding shall be stated in a reasoned decision which shall be notified to the undertaking or person concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than 1 week from the date of notification.

3. Paragraphs 1 and 2 shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Union*.

4. Where appropriate in order to balance the effective exercise of a party's rights of defence with legitimate interests of confidentiality, the hearing officer may decide that parts of the file which are indispensable for the exercise of the party's rights of defence will be made accessible to the party requesting access in a restricted manner, the details of which shall be determined by the hearing officer.

CHAPTER 5

EXTENSION OF TIME LIMITS

Article 9

Requests for extension of time limits

1. If an addressee of a statement of objections considers that the time limit imposed for its reply to the statement of objections is too short, it may seek an extension of that time limit by means of a reasoned request addressed to the director responsible. Such a request must be made in due time before the expiry of the original time limit in proceedings pursuant to Articles 101 and 102 of the Treaty and at least 5 working days before the expiry of the original time limit in proceedings under Regulation (EC) No 139/2004. If such a request is not granted or the addressee of the statement of objections making the request disagrees with the length of the extension granted, it may refer the matter to the hearing officer for review before the expiry of the original time limit. After hearing the director responsible, the hearing officer shall decide on whether an extension of the time limit is necessary to allow the addressee of a statement of objections to exercise its right to be heard effectively, while also having regard to the need to avoid undue delay in proceedings. In proceedings pursuant to Articles 101 and 102 of the Treaty, the hearing officer shall take into account, among others, the following elements:

(a) the size and complexity of the file;

(b) whether the addressee of the statement of objections making the request has had prior access to information;

(c) any other objective obstacles which may be faced by the addressee of the statement of objections making the request in providing its observations.

For the purposes of assessing point (a) of the first subparagraph, the number of infringements, the alleged duration of the infringement(s), the size and number of documents and the size and complexity of expert studies may be taken into consideration.

2. If other involved parties, a complainant or an interested third person within the meaning of Article 5 considers that the time limit to make its views known is too short, it may seek an extension of that time limit by means of a reasoned request addressed to the director responsible in due time before the expiry of the original time limit. If such a request is not granted or the other involved party, complainant or interested third person disagrees with this decision, it may refer the matter to the hearing officer for review. After hearing the director responsible, the hearing officer shall decide on whether an extension of the time limit should be granted.

CHAPTER 6

THE ORAL HEARING

Article 10

Organisation and function

1. The hearing officer shall organise and conduct the hearings provided for in the provisions implementing Articles 101 and 102 of the Treaty and Regulation (EC) No 139/2004.

2. The oral hearing shall be conducted by the hearing officer in full independence.

3. The hearing officer shall ensure that the hearing is properly conducted and shall contribute to the objectivity of the hearing itself and of any decision taken subsequently.

4. The hearing officer shall ensure that the oral hearing provides addressees of the statement of objections, other involved parties, as well as complainants and interested third persons within the meaning of Article 5 which have been admitted to the oral hearing, with sufficient opportunity to develop their views as to the preliminary findings of the Commission.

Article 11

Preparation of the oral hearing

1. The hearing officer shall be responsible for the preparation of the oral hearing and shall take all appropriate measures in that regard. In order to ensure the proper preparation of the oral hearing, the hearing officer may, after consulting the director responsible, supply in advance to the persons invited to the hearing a list of questions on which they are invited to make known their views. The hearing officer may also indicate to the persons invited to the hearing the focal areas for debate, having regard, in particular, to the facts and issues that the addressees of a statement of objections who have requested an oral hearing want to raise.

2. For this purpose, after consulting the director responsible, the hearing officer may hold a meeting with the persons invited to the hearing and, where appropriate, the Commission services, in order to prepare for the hearing itself.

3. The hearing officer may also ask for prior written notification of the essential contents of the intended statements of persons invited to the hearing.

4. The hearing officer may set a time limit for all persons invited to the oral hearing to provide a list of participants who will attend on their behalf. The hearing officer shall make this list available to all persons invited to the oral hearing in due time before the date of the hearing.

Article 12

Timing and conduct

1. After consulting the director responsible, the hearing officer shall determine the date, the duration and the place of the hearing. Where a postponement is requested, the hearing officer shall decide whether or not to allow it.

2. The hearing officer shall decide whether new documents should be admitted during the hearing and which persons should be heard on behalf of a party.

3. The hearing officer may allow the parties to whom a statement of objections has been addressed, other involved parties, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing. To the extent that, exceptionally, a question cannot be answered in whole or in part at the oral hearing, the hearing officer may allow the reply to be given in writing within a set time limit. Such written reply shall be distributed to all participants in the oral hearing, unless the hearing officer decides otherwise in order to protect the rights of defence of an addressee of a statement of objections or the business secrets or other confidential information of any person.

4. Where required by the need to ensure the right to be heard, the hearing officer may, after consulting the director responsible, afford the parties concerned, other involved parties, complainants or interested third persons within the meaning of Article 5 the opportunity to submit further written comments after the oral hearing. The hearing officer shall fix a date by which such submissions may be made. The Commission shall not be obliged to take into account written comments received after that date.

Article 13

Protection of business secrets and confidentiality at the oral hearing

Each person shall normally be heard in the presence of all other persons invited to attend the oral hearing. The hearing officer may also decide to hear persons separately in a closed session, having regard to their legitimate interest in the protection of their business secrets and other confidential information.

CHAPTER 7

INTERIM REPORT AND RIGHT TO MAKE OBSERVATIONS

Article 14

Interim report and observations

1. The hearing officer shall submit an interim report to the competent member of the Commission on the hearing and the conclusions he or she draws with regard to the respect for the effective exercise of procedural rights. The observations in this report shall concern procedural issues including the following:

(a) disclosure of documents and access to the file;

(b) time limits for replying to the statement of objections;

(c) the observance of the right to be heard;

(d) the proper conduct of the oral hearing.

A copy of the report shall be given to the Director-General for Competition, to the director responsible and to the other competent services of the Commission.

2. In addition to, and separately from, the report referred to in paragraph 1, the hearing officer may make observations on the further progress and impartiality of the proceedings. In so doing, the hearing officer shall seek to ensure in particular that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements relevant to the gravity and duration of any infringement. Such observations may relate to, inter alia, the need for further information, the withdrawal of certain objections, the formulation of further objections or suggestions for further investigative measures pursuant to Chapter V of Regulation (EC) No 1/2003.

The Director-General for Competition, the director responsible and the Legal Service shall be informed of such observations.

CHAPTER 8

COMMITMENTS AND SETTLEMENTS

Article 15

Commitments and settlements

1. Parties to the proceedings which offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment pursuant to Article 9 of Regulation (EC) No 1/2003 may call upon the hearing officer at any stage in the procedure pursuant to Article 9, in order to ensure the effective exercise of their procedural rights.

2. Parties to proceedings in cartel cases which engage in settlement discussions pursuant to Article 10a of Regulation (EC) No 773/2004 may call upon the hearing officer at any stage during the settlement procedure in order to ensure the effective exercise of their procedural rights.

CHAPTER 9

FINAL REPORT

Article 16

Content and transmission prior to the adoption of a decision

1. The hearing officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect for the effective exercise of procedural rights, as referred to in Article 14(1), at any stage of the proceedings. That report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views.

2. The final report shall be submitted to the competent member of the Commission, the Director-General for Competition, the director responsible and the other competent services of the Commission. It shall be communicated to the competent authorities of the Member States and, in accordance with the provisions on cooperation laid down in Protocols 23 and 24 of the EEA Agreement, to the EFTA Surveillance Authority.

Article 17

Submission to the Commission and publication

1. The hearing officer's final report shall be presented to the Commission together with the draft decision submitted to it, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as to the course of the procedure and that the effective exercise of procedural rights has been respected throughout the proceedings.

2. The final report may be modified by the hearing officer in the light of any amendments to the draft decision prior to its adoption by the Commission.

3. The Commission shall communicate the hearing officer's final report, together with the decision, to the addressees of the decision. It shall publish the hearing officer's final report in the *Official Journal of the European Union*, together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

CHAPTER 10

FINAL PROVISIONS

Article 18

Repeal and transitional provision

1. Decision 2001/462/EC, ECSC is repealed.

2. Procedural steps already taken under Decision 2001/462/EC, ECSC shall continue to have effect. In relation to investigatory measures that were taken before the entry into force of this Decision, the hearing officer may decline to exercise his or her powers pursuant to Article 4.

In cases where the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 or the initiation of proceedings pursuant to Article 6(1)(c) of Regulation (EC) No 139/2004 took place before the entry into force of the present Decision, the interim report pursuant to Article 14 of the present Decision and the final report pursuant to Article 16 shall not cover the investigation phase, unless the hearing officer decides otherwise.

Article 19

Entry into force

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

Done at Brussels, 13 October 2011.

For the Commission
The President
José Manuel BARROSO

8.6.71 Official Journal of the European Communities No L 124/1

REGULATION (EEC, EURATOM) No 1182/71 OF THE COUNCIL

of 3 June 1971

determining the rules applicable to periods, dates and time limits

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof;

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament[1];

Whereas numerous acts of the Council and of the Commission determine periods, dates or time limits and employ the terms 'working days' or 'public holidays';

Whereas it is necessary to establish uniform general rules on the subject;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules;

Whereas, to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods, dates and time limits;

Whereas no authority to establish such rules is provided for in the Treaties;

HAS ADOPTED THIS REGULATION:

Article 1

Save as otherwise provided, this Regulation shall apply to acts of the Council or Commission which have been or will be passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.

[1] OJ No C 51, 29.4.1970, p. 25.

CHAPTER I

Periods

Article 2

1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.

To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the *Official Journal of the European Communities* the lists transmitted by the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of this Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

Article 3

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question.

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4:

(a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period;

(b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;

(c) a period expressed in weeks, months or years shall start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;

(d) if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having thirty days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

This provision shall not apply to periods calculated retroactively from a given date or event.

5. Any period of two days or more shall include at least two working days.

CHAPTER II

Dates and time limits

Article 4

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply to the times and periods of entry into force, taking effect, application, expiry of validity, termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts.

2. Entry into force, taking effect or application of acts of the Council or Commission—or of provisions of such acts—fixed at a given date shall occur at the beginning of the first hour of the day falling on that date.

This provision shall also apply when entry into force, taking effect or application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

3. Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission—or of any provisions of such acts—fixed at a given date shall occur on the expiry of the last hour of the day falling on that date.

This provision shall also apply when expiry of validity, termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment.

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date, it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date.

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place.

Article 6

This Regulation shall enter into force on 1 July 1971.

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

Done at Luxembourg, 3 June 1971.

For the Council

The President

R. PLEVEN

►**B**

REGULATION No 1

determining the languages to be used by the European Economic Community

(OJ L 17, 6.10.1958, p. 385)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Council Regulation (EC) No 920/2005 of 13 June 2005	L 156	3	18.6.2005
►**M2**	Council Regulation (EC) No 1791/2006 of 20 November 2006	L 363	1	20.12.2006

Amended by:

►**A1**	Act of Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland	L 73	14	27.3.1972
	(adapted by Council Decision of 1 January 1973)	L 2	1	1.1.1973
►**A2**	Act of Accession of Greece	L 291	17	19.11.1979
►**A3**	Act of Accession of Spain and Portugal	L 302	23	15.11.1985
►**A4**	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995
►**A5**	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

▼B

REGULATION No 1

determining the languages to be used by the European Economic Community

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to Article 217 of the Treaty which provides that the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the rules of procedure of the Court of Justice, be determined by the Council, acting unanimously;

Whereas each of the four languages in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community;

HAS ADOPTED THIS REGULATION:

▼M2

Article 1

The official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

▼B

Article 2

Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

Article 3

Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

▼M2

Article 4

Regulations and other documents of general application shall be drafted in the official languages.

Article 5

The *Official Journal of the European Union* shall be published in the official languages.

▼B

Article 6

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

▼B

Article 7

The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.

Article 8

If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.

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

I.D NOTICES AND GUIDELINES

Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU

(Text with EEA relevance)

(2011/C 308/06)

TABLE OF CONTENTS

1. SCOPE AND PURPOSE OF THE NOTICE

1. The principal purpose of this notice is to provide practical guidance on the conduct of proceedings before the European Commission (Commission) concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) ([1]) in accordance with Regulation (EC) No 1/2003 ([2]), its Implementing Regulation ([3]) and the case law of the Court of Justice of the European Union. In this regard, the notice seeks to increase understanding of the Commission's investigation process ([4]) and thereby enhance the efficiency of investigations and ensure a high degree of transparency and predictability in the process. The notice covers the main proceedings ([5]) concerning alleged infringements of Articles 101 and 102 TFEU.

2. Infringement proceedings against Member States based notably on Article 106 TFEU in conjunction with Articles 101 and 102 TFEU fall outside the scope of this notice. Nor does it apply to proceedings under the Merger Regulation ([6]) or to State aid proceedings ([7]).

3. Proceedings concerning the application of Articles 101 and 102 TFEU (hereafter generally referred to as 'proceedings') are in particular regulated by Regulation (EC) No 1/2003 and the Implementing Regulation. The Commission's notices on access to file ([8]) and handling of complaints ([9]), as well as the terms of reference of the hearing officer ([10]) are also relevant for the conduct of proceedings. As regards submissions of reports of economic experts and submission of quantitative data, reference is made to the Best Practices on the submission of economic evidence ([11]). This notice should therefore not be taken as an exhaustive account of all measures governing proceedings before the Commission. The notice should be read in conjunction with other such instruments and any relevant jurisprudence.

([1]) With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 respectively of the TFEU. The two sets of provisions are in substance identical. For the purposes of this document, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate.

([2]) 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, p. 1), as amended by Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries (OJ L 68, 6.3.2004, p. 1) and Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (OJ L 269, 28.9.2006, p. 1).

([3]) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3).

([4]) This notice applies exclusively to the Commission's procedures for the enforcement of Articles 101 and 102 TFEU and does not concern the national competition authorities when they apply these provisions.

([5]) This notice does not deal with specific procedures, for example for imposing fines on undertakings having provided misleading information, refused to submit to inspections or breached seals affixed by officials (see Article 23(1) of Regulation (EC) No 1/2003). It covers neither decisions on interim measures pursuant to Article 8 of Regulation (EC) No 1/2003 nor decisions on finding of inapplicability pursuant to Article 10 of Regulation (EC) No 1/2003.

([6]) See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1). See in this respect the Directorate-General for Competition's Best Practices on the conduct of EC Merger Proceedings of 20 January 2004, published on the Directorate-General for Competition's website (http://ec.europa.eu/competition/mergers/legislation/proceedingspdf).

([7]) See Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 108 TFEU) of the EC Treaty (OJ L 83, 27.3.1999, p. 1). See in this respect the Commission notice on a Code of Best Practice for the conduct of State aid control procedures (OJ C 136, 16.6.2009, p. 13).

([8]) Commission notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ C 325, 22.12.2005, p. 7).

([9]) Commission notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004, p. 65).

([10]) Decision C(2011) 5742 of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings.

([11]) Staff working paper on Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and merger cases, http://ec.europa.eu/competition/index_en.html

4. The investigation of cartels, as defined in the Leniency Notice ([12]), may also be subject to the specific procedures on applications for leniency and on settlements ([13]). These specific procedures are not covered by this notice. Moreover, the particular nature of cartel proceedings in some circumstances requires special provisions, in order not to interfere with possible leniency applications ([14]) or settlement discussions ([15]). These special provisions are indicated where applicable.

5. This notice is structured in the following way. Section 2 sets out the procedure followed during the investigative phase. This part is relevant for any investigation regardless of whether it leads to a prohibition decision (Article 7 of Regulation (EC) No 1/2003), a commitment decision (Article 9 of Regulation (EC) No 1/2003) or a rejection of complaint decision (Article 7 of the Implementing Regulation). Section 3 describes the main procedural steps and rights of defence in the context of procedures leading to prohibition decisions. Section 4 describes the specific features of the commitment procedure. Section 5 covers rejection of complaints. The remaining sections are of general application: Section 6 describes the limits to use of information, Section 7 deals with the adoption, notification and publication of decisions and Section 8 with future revisions.

6. This notice is notably built upon the experience to date in the application of Regulation (EC) No 1/2003 and the Implementing Regulation. It reflects the views of the Commission at the time of publication and will be applied as from the date of publication for pending ([16]) and future cases. The specific features of an individual case may however require an adaptation of, or deviation from this notice, depending on the case at issue.

7. This notice does not create any new rights or obligations, nor alter, the rights or obligations which arise from the Treaty on the Functioning of the European Union (TFEU), Regulation (EC) No 1/2003, the Implementing Regulation and the case law of the Court of Justice of the European Union.

8. The Commission encourages the use of electronic information (e-mails or digital devices) for any case-related correspondence.

2. THE INVESTIGATIVE PHASE

2.1. Origin of cases

9. A case concerning an alleged infringement of Article 101 or 102 TFEU may be based on a complaint by undertakings, other natural and legal persons and even Member States.

([12]) Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17) (Leniency Notice), i.e. secret 'agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of (Article 101 TFEU)'.

([13]) Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3); Commission notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases OJ C 167, 2.7.2008, p. 1.

([14]) It should be noted that the Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued (see paragraphs 14 and 29 of the Leniency Notice).

([15]) The Commission may disregard any application for immunity from fines or reductions of fines under the Leniency Notice on the ground that it has been submitted after the expiry of the time limit set for parties to declare in writing whether they envisage engaging in settlement discussions (see paragraph 13 of the Settlement Notice).

([16]) With regard to cases which are pending at the time of the publication of this document, the latter will apply to any procedural steps that remain to be taken after publication.

10. Information from citizens and undertakings is important in triggering investigations by the Commission. The Commission therefore encourages citizens and undertakings to inform it about suspected infringements of the competition rules ([17]). This can be done either by lodging a formal complaint ([18]) or by simply providing market information to the Commission. Anyone who is able to show a legitimate interest as a complainant, and who submits a complaint in compliance with form C ([19]), enjoys certain procedural rights. The details of the procedure to be followed are set out in the Implementing Regulation and in the notice on the handling of complaints. Natural and legal persons, other than complainants, which show a sufficient interest to be heard and which are admitted to the proceedings by the hearing officer also enjoy certain procedural rights in accordance with Article 13 of the Implementing Regulation.

11. The Commission may also open a case on its own initiative (*ex officio*). It may do so when certain facts have been brought to its attention, or further to information gathered in the context of sector enquiries, informal meetings with industry, monitoring of markets or on the basis of information exchanged within the European Competition Network (ECN) or with competition authorities of third countries. Cartel cases can also be initiated on the basis of an application for leniency by one of the cartel members.

2.2. **Initial assessment and case allocation**

12. All cases, irrespective of their origin, are subject to an initial assessment phase. During this phase the Commission examines whether the case merits further investigation ([20]) and, if so, provisionally defines its focus, in particular with regard to the parties, the markets and the conduct to be investigated. During this phase, the Commission may make use of investigative measures such as requests for information in accordance with Article 18(2) of Regulation (EC) No 1/2003.

13. In practice, the system of initial assessment means that some cases will be discarded at a very early stage because they are not deemed to merit further investigation. In this regard, the Commission focuses its enforcement resources on cases where it appears likely that an infringement may be found, in particular on cases with the most significant impact on the functioning of competition in the internal market and risk of consumer harm, as well as on cases which are likely to contribute to defining EU competition policy and/or to ensuring the coherent application of Articles 101 and/or 102 TFEU ([21]).

14. This initial assessment phase also attempts to address, at an early stage, the allocation of cases within the ECN. Regulation (EC) No 1/2003 introduced the possibility of reallocating cases to other network members if they are well placed to deal with them. Accordingly, the Commission may reallocate a case to a national competition authority and vice versa ([22]).

15. When the first investigative measure is addressed to them (normally a request for information ([23]) or an inspection), addressees are informed of the fact that they are subject to a preliminary investigation and about the subject matter and purpose of such investigation. In the context of requests for information, they will further be reminded that if the behaviour under investigation is

([17]) Or, when appropriate, the relevant national competition authority.
([18]) Pursuant to Article 7(2) of Regulation (EC) No 1/2003. Under Articles 5 to 9 of the Implementing Regulation, formal complaints have to fulfil certain requirements. Information contained in submissions that do not respect these requirements may nevertheless be taken into account as market information.
([19]) See Article 5(1) of the Implementing Regulation.
([20]) The Court of Justice of the European Union has recognised that the Commission is entitled to give differing degrees of priority to the complaints that it receives. This is settled case law since Case T-24/90, *Automec* v *Commission* (hereinafter 'Automec II') (1992) ECR II-2223, para 85.
([21]) The Commission has made public a non-exhaustive list of criteria which it intends to use when examining whether or not complaints show a sufficient 'European Union interest'. The criteria were published in the Annual Report on Competition Policy 2005, adopted in June 2006. See as well paragraph 44 of the notice on handling of complaints.
([22]) See paragraphs 5 to 15 of the Commission notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43).
([23]) See Case T-99/04 *AC Treuhand* v *Commission* [2008] ECR II-1501, para. 56.

confirmed to have taken place this might constitute an infringement of Articles 101 and/or 102 TFEU. After having received a request for information or being subject to an inspection, parties ([24]) may at any time inquire with the Directorate-General for Competition about the status of the investigation, including before the opening of proceedings. If such an undertaking considers that it has not been properly informed by the Directorate-General for Competition of its procedural status, it may refer the matter to the hearing officer for resolution, after having raised the matter with the Directorate-General for Competition ([25]). The hearing officer shall take a decision that the Directorate-General for Competition will inform the undertaking or association of undertakings that made the request of their procedural status. This decision shall be communicated to the undertaking or association of undertakings that made the request. If at any stage during the initial assessment phase, the Commission decides not to investigate the case further (and thus not to open proceedings), the Commission will, at its own initiative, inform the party subject to the preliminary investigation thereof.

16. In cases based on a complaint, the Commission will endeavour to inform complainants within four months from the receipt of the complaint of the action that it proposes to take with regard to the complaint ([26]). This time frame is indicative and will depend on the circumstances of the individual case and whether the Directorate-General for Competition has received sufficient information from the complainant or third parties, notably in response to its requests for information, in order for it to decide whether or not to investigate the case further.

2.3. **Opening of proceedings**

17. The Commission will open proceedings ([27]) under Article 11(6) of Regulation (EC) No 1/2003 when the initial assessment leads to the conclusion that the case merits further investigation and where the scope of the investigation has been sufficiently defined.

18. The opening of proceedings determines the allocation of the case within the ECN ([28]) and in relation to the parties and the complainant, if applicable. It also signals a commitment on the part of the Commission to further investigate the case. The Commission will thus allocate resources to the case and will endeavour to deal with the case in a timely manner.

19. The decision to open proceedings identifies the parties subject to the proceedings and briefly describes the scope of the investigation. In particular, it sets out the behaviour constituting the alleged infringement of Articles 101 and/or 102 TFEU to be covered by the investigation and normally identifies the territory and sector(s) where that behaviour takes place.

20. Pursuant to Article 2 of the Implementing Regulation, the Commission may make the opening of proceedings public. The Commission's policy is to publish the opening of proceedings on the website of the Directorate-General for Competition and issue a press release, unless such publication may harm the investigation.

21. The parties subject to the investigation are informed orally or in writing of the opening of proceedings sufficiently in advance before the opening of proceedings is made public so as to enable them to prepare their own communication (in particular in relation to shareholders, the financial institutions and the press).

22. It should be emphasised that the opening of proceedings does not prejudge in any way the existence of an infringement. It merely indicates that the Commission will further pursue the case. This important clarification will be mentioned in the decision opening the proceedings (notified to the parties), as well as in all public communications concerning the opening of the case.

([24]) In this notice, 'parties' are defined as the parties subject to the investigation. If not explicitly mentioned, 'parties' does not include complainants and admitted third persons (also referred to as 'third parties' in this notice).
([25]) Article 4(2)(d) of the terms of reference of the hearing officer.
([26]) Notice on the handling of complaints, paragraph 61.
([27]) According to Article 2 of the Implementing Regulation, the Commission may decide to initiate proceedings with a view to adopting a decision (e.g. a decision finding an infringement or a commitment decision) at any point in time, but no later than the date on which it issues a statement of objections, a preliminary assessment (as referred to in Article 9(1) of Regulation (EC) No 1/2003) or a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, whichever is the earlier.
([28]) The opening of proceedings relieves the national competition authorities of their competence to apply Articles 101 and 102 TFEU, see Article 11(6) of Regulation (EC) No 1/2003.

23. The opening of proceedings does not limit the right of the Commission to extend the scope and/or the addressees of the investigation at a later point in time. In case of such an extension of the scope of the investigation, the measures in paragraphs (20) to (21) apply.

24. In cartel cases, the opening of proceedings normally takes place simultaneously with the adoption of the Statement of Objections (see paragraph (4) above), though it may take place earlier.

2.4. **Languages**

25. Pursuant to Article 3 of Regulation No 1 ([29]), documents which the Commission sends to an undertaking based in the European Union will be drafted in the language of the Member State in which the undertaking is based.

26. Pursuant to Article 2 of that same Regulation, documents which an undertaking sends to the Commission may be drafted in any one of the official languages of the European Union selected by the sender. The reply and subsequent correspondence will be drafted in the same language.

27. In order to avoid delays due to translation, the addressees may waive their right to receive the text in the language resulting from the above rule and opt for another language. Duly authorised language waivers can be given for some specific documents and/or for the whole procedure.

28. As regards simple requests for information it is standard practice to send the cover letter in the language of the addressee's location or in English (including a reference to Article 3 of Regulation No 1) and to attach the questionnaire in English. The addressee is also clearly informed — in the language of the addressee's location — of its right to obtain a translation of the cover letter and/or questionnaire into the language of the addressee's location, as well as the right to reply in that language. This practice allows for more expeditious treatment of information requests, while preserving the rights of addressees.

29. The Statement of Objections, Preliminary Assessment and decisions pursuant to Articles 7, 9 and 23(2) of Regulation (EC) No 1/2003 are notified in the authentic language of the addressee unless it has signed the above mentioned language waiver.

30. Pursuant to Article 2 of Regulation No 1, the reply and the subsequent correspondence addressed to the complainant will be in the language of their complaint.

31. Participants in the oral hearing may request to be heard in an EU official language other than the language of proceedings. In that case, interpretation will be provided during the oral hearing, as long as sufficient advance notice of this requirement is given to the hearing officer.

2.5. **Information requests**

32. Pursuant to Article 18 of Regulation (EC) No 1/2003, the Commission is empowered to require undertakings and associations of undertakings to provide it with all necessary information. Information can be requested by letter ('simple request' (Article 18(2)) or by decision (Article 18(3)) ([30]). It should be underlined that requests for information are regularly sent not only to the undertakings under investigation, but also to other undertakings or associations of undertakings which may have information relevant for the case.

([29]) EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385; Consolidated version of 1.1.2007).

([30]) Non-respect of an Article 18(3) decision requesting information (supplying incomplete information or not respecting the time limit set out) can lead to fines and periodic penalties, see Articles 23 and 24 of Regulation (EC) No 1/2003. Submitting incorrect or misleading information may lead to fines being imposed both in case of an Article 18(2) letter and an Article 18(3) decision (see Article 23 of Regulation (EC) No 1/2003).

2.5.1. *Scope of request for information*

33. Pursuant to Article 18 of Regulation (EC) No 1/2003, the Commission may require undertakings and associations of undertakings to provide all necessary information. Information is necessary, in particular, if it may enable the Commission to verify the existence of the alleged infringement referred to in the request. The Commission enjoys a margin of appreciation in this respect ([31]).

34. It is for the Commission to define the scope and the format of the request for information. Where appropriate, the Directorate-General for Competition might however discuss with the addressees the scope and the format of the request for information. This may be particularly useful in cases of requests concerning quantitative data ([32]).

35. When, in a reply to a request for information, undertakings submit manifestly irrelevant information (in particular documents which are clearly not related to the subject matter of the investigation), the Directorate-General for Competition may, in order not to unnecessarily burden the often voluminous administrative file, return such information to the addressee of the request as early as possible after having received the reply. A short notice reporting this fact will be put in the file.

2.5.2. *Self-incrimination*

36. Where the addressee of a request for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 refuses to reply to a question in such a request invoking the privilege against self-incrimination, as defined by the case law of the Court of Justice of the European Union ([33]), it may refer the matter in due time following the receipt of the request to the hearing officer, after having raised the matter with the Directorate-General for Competition before the expiry of the original time limit set ([34]). In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the hearing officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies and inform the director responsible of the conclusions drawn, to be taken into account in case of any decision taken subsequently pursuant to Article 18(3) of Regulation (EC) No 1/2003. The addressee of the request shall receive a copy of the reasoned recommendation. The addressee of an Article 18(3) decision will be reminded of the privilege against self-incrimination as defined by case law of the Court of Justice of the European Union ([35]).

2.5.3. *Time limits*

37. The request for information specifies which information is required and fixes the time limit within which the information is to be provided.

38. Addressees are given a reasonable time limit to reply to the request, according to the length and complexity of the request taking into account the requirements of the investigation. In general, this time limit will be at least two weeks from the receipt of the request. If from the outset, it is considered that a longer period is required, the time limit to reply to the request will be set accordingly. When the scope of the request is limited, for example if it only covers a short clarification of information previously provided or information readily available to the addressee of the request, the time limit will normally be shorter (one week or less).

([31]) As regards the Commission's discretion in shaping the enquiry, see Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 110; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 384; Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 212. In exercising its discretion, the Commission is bound by the principle of proportionality and, in relation to Article 18(3) decisions, must respect the privilege against self-incrimination.

([32]) See the Best Practices on the submission of economic evidence.

([33]) See for example Case C-301/04 P *Commission* v *SGL*, [2006] ECR I-5915, which specifies that addressees of an Article 18(3) decision may be required to provide pre-existing documents, such as minutes of cartel meetings, even if those documents may incriminate the party providing them.

([34]) Article 4(2)(b) of the terms of reference of the hearing officer.

([35]) See footnote 33.

39. If they have difficulties responding within the time limit set, addressees may ask for it to be extended. A reasoned request should be made or confirmed in writing (letter or e-mail), sufficiently in advance of the expiry of the time limit. If the Commission considers the request to be justified, additional time (depending on the complexity of the information asked and other factors) will be granted. The Commission may also agree with the addressee of the request that certain parts of the requested information that are of particular importance or easily available for the addressee will be supplied within a shorter time limit, whereas additional time will be granted for supplying the remaining information.

40. Where the addressee of a decision requesting information pursuant to Article 18(3) Regulation (EC) No 1/2003 is unable to resolve its concerns about the time limit through the procedure outlined above, it may refer the matter to the hearing officer. Such a request should be made in due time before the expiry of the original time limit set ([36]). The hearing officer shall decide on whether an extension of the time limit should be granted, taking account of the length and complexity of the request for information and the requirements of the investigation.

2.5.4. *Confidentiality*

41. The cover letter of the request for information also requires the addressee to indicate whether it considers that information provided in the reply is confidential. In that case, in accordance with Article 16(3) of the Implementing Regulation, the addressee must substantiate its claims individually with regard to each item of information and provide a non-confidential version of the information. Such a non-confidential version shall be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission. If undertakings fail to comply with these requirements, the Commission may assume that the documents or statements concerned do not contain confidential information pursuant to Article 16(4) of the Implementing Regulation.

2.5.5. *Meetings and other contacts with the parties and third parties*

42. During the investigative phase, the Directorate-General for Competition may hold meetings (or conduct phone calls) with the parties subject to the proceedings, complainants, or third parties. In particular, it will hold State of Play meetings or may hold triangular meetings as outlined in Sections 2.9 or 2.10 below.

43. When a meeting takes place at the request of the parties, complainants or third parties, they should as a general rule submit in advance a proposed agenda of topics to be discussed at the meeting, as well as a memorandum or a presentation which covers these issues in more detail. After meetings or phone calls on substantive issues, the parties, complainants or third parties may substantiate their statements or presentations in writing.

44. Any written documentation prepared by the undertakings which attended a meeting that is communicated to the Directorate-General for Competition will be put on the file. A non-confidential version of such documentation, together with a brief note prepared by the Directorate-General for Competition, will be made accessible to the parties subject to the investigation during their access to the file, if the case is further pursued. Subject to any anonymity requests ([37]) this note will mention the undertaking(s) attending the meeting (or participating in the phone call relating to substantive issues) and the timing and topic(s) covered by the meeting (or phone call) ([38]). Such a brief note will also be prepared when the meeting takes place on the Commission's initiative (e.g. State of Play meetings).

([36]) Article 4(2)(c) of the terms of reference of the hearing officer.
([37]) See paragraph 143 below.
([38]) The provisions of this section also apply to State of Play meetings and triangular meetings (see Section 2.10 below).

45. The Commission may, after a meeting or other informal contact with the parties, complainants or third parties, request that they provide information in writing pursuant to Article 18 of Regulation (EC) No 1/2003 or invite them to make a statement pursuant to Article 19 of that Regulation.

2.5.6. *Power to take statements (interviews)*

46. Regulation (EC) No 1/2003 and the Implementing Regulation establish a specific procedure for taking statements from natural or legal persons who may be in possession of useful information concerning an alleged infringement of Articles 101 and 102 TFEU (see Article 19 of Regulation (EC) No 1/2003 and Article 3 of the Implementing Regulation) ([39]).

47. The Commission may, under this procedure, interview by any means, such as by telephone or video conference, any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.

48. Before taking such statements, the Directorate-General for Competition will inform the interviewee of the legal basis of the interview, its voluntary nature and the right of the interviewee to consult a lawyer. The Directorate-General for Competition will further inform the interviewee of the purpose of the interview and of its intention to make a record of the interview. In practice this will be done by providing a document explaining the procedure to be signed by the interviewee. In order to enhance the accuracy of the statements, a copy of any recording will be made available shortly thereafter to the person interviewed for approval.

49. The procedure for taking statements pursuant to Article 19 of Regulation (EC) No 1/2003 and Article 3 of the Implementing Regulation applies only when it is expressly agreed between the interviewee and the Directorate-General for Competition that the conversation will be recorded as a formal interview under Article 19. It is within the discretion of the Commission to decide when to propose interviews. A party may however also make a request to the Directorate-General for Competition to have its statement recorded as an interview. Such a request will in principle be accepted, subject to the needs and requirements of the proper conduct of the investigation.

2.6. **Inspections**

50. In the context of an investigation the Commission has the power to conduct inspections at the premises of an undertaking and in certain circumstances at other premises, including private premises. The Commission's practice in relation to inspections at the premises of an undertaking is currently described in an explanatory note available on the website of the Directorate-General for Competition ([40]).

2.7. **Legal professional privilege**

51. According to the case law of the Court of Justice of the European Union ([41]), the main features of which are summarised below, certain communications between lawyer and client may, subject to strict conditions, be protected by legal professional privilege (also referred to as 'LPP') and thus

([39]) This power to take statements pursuant to Article 19 of Regulation (EC) No 1/2003 should be distinguished from the power of the Commission, during an inspection, to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003.

([40]) See: http://ec.europa.eu/competition/antitrust/legislation/legislation.html

([41]) The exclusion of certain communications between lawyers and clients from the Commission's powers of enquiry derives from the general principles of law common to the laws of the Member States as clarified by the Court of Justice of the European Union: Case 155/79 *AM&S Europe Limited* v *Commission* (hereinafter 'AM&S') [1982] ECR 1575; Order in Case T-30/89 *Hilti* v *Commission* (hereinafter 'Hilti') [1990] ECR II-163; Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (hereinafter 'Akzo') [2007] ECR II-3523, as confirmed by Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, judgment of 14 September 2010.

be confidential as regards the Commission, as an exception to the latter's powers of investigation and examination of documents ([42]). Communications between lawyer and client are protected by legal professional privilege provided that they are made for the purpose and interest of the exercise of the client's rights of defence in competition proceedings and that they emanate from independent lawyers ([43]).

52. It is for the undertaking claiming the protection of legal professional privilege with regard to a given document to provide the Commission with appropriate justification and relevant material to substantiate its claim, while not being bound to disclose the contents of such document ([44]). Redacted versions removing the parts covered by legal professional privilege should be submitted. Where the Commission considers that such evidence has not been provided, it may order production of the document in question and, if necessary, impose on the undertaking fines or periodic penalty payments for its refusal either to supply such additional necessary evidence or to produce the contested document ([45]).

53. In many cases, a mere cursory look by Commission officials, normally during an inspection, at the general layout, heading, title or other superficial features of a document will enable them to confirm or not the accuracy of the reasons invoked by the undertaking. However, an undertaking is entitled to refuse to allow the Commission officials to take even a cursory look, provided that it gives appropriate reasons to justify why such a cursory look would be impossible without revealing the content of the document ([46]).

54. Where, in the course of an inspection, the Commission officials consider that the undertaking has: (i) not substantiated its claim that the document concerned is covered by legal professional privilege; (ii) has only invoked reasons that, according to the case law, cannot justify such protection; or (iii) bases itself on factual assertions that are manifestly wrong, the Commission officials may immediately read the contents of the document and take a copy of it (without using the sealed envelope procedure).

([42]) The Court of Justice of the European Union has considered that the protection of the confidentiality of communications between lawyer and client is an essential corollary to the full exercise of the rights of defence (*AM&S*, paragraphs 18 and 23). In any event, the principle of legal professional privilege does not prevent a lawyer's client from disclosing the written communications between them if the client considers that it is in his interest to do so (*AM&S*, paragraph 28).

([43]) *AM&S*, paragraphs 21, 22 and 27. According to the case law, the substantive scope of the protection of legal professional privilege covers also, further to written communications with an independent lawyer made for the purposes of the exercise of the client's rights of defence, (i) internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice (*Hilti*, paragraphs 13, 16 to 18) and (ii) preparatory documents prepared by the client, even if not exchanged with a lawyer or not created for the purpose of being sent physically to a lawyer, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence (*Akzo*, paragraphs 120 to 123). As for the personal scope of the protection of legal professional privilege, it only applies to the extent that the lawyer is independent (i.e. not bound to his client by a relationship of employment); in-house lawyers are explicitly excluded from legal professional privilege, irrespective of their membership of a Bar or Law Society or their subjection to professional discipline and ethics or protection under national law: *AM&S*, paragraphs 21, 22, 24 and 27; *Akzo*, paragraphs 166 to 168; confirmed by ECJ in its judgment of 14 September 2010, Case C-550/07 P, paragraphs 44 to 51. Moreover, according to the case law, protection under legal professional privilege applies only to lawyers entitled to practise their profession in one of the EU Member States, regardless of the country in which the client lives (*AM&S*, paragraphs 25 and 26), and does not extend to other professional advisers such as patent attorneys, accountants, etc. Finally, it shall be observed that the protection of legal professional privilege covers, in principle, written communications exchanged after the initiation of the administrative procedure that may lead to a decision on the application of Articles 101 and/or 102 TFEU or to a decision imposing a pecuniary sanction on the undertaking; this protection can also extend to earlier written communications made for the purpose of exercising rights of the defence and which have a relationship to the subject matter of that procedure (*AM&S*, paragraph 23).

([44]) Hence, the mere fact that an undertaking claims that a document is protected by legal professional privilege is not sufficient to prevent the Commission from reading that document if the undertaking produces no relevant material of such a kind (*Akzo*, paragraph 80; see below). In order to substantiate its claim, the undertaking concerned may, in particular, inform the Directorate-General for Competition of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each, and refer to the objective and the context in which the document was drawn up. Similarly, it may also mention the context in which the document was found, the way in which it was filed and any related documents (*Akzo*, paragraph 80).

([45]) *AM&S*, paragraphs 29 to 31. The undertaking may subsequently bring an action for the annulment of such a decision, where appropriate, coupled with a request for interim relief (*AM&S*, paragraphs 32; see below).

([46]) *Akzo*, paragraphs 81 and 82.

However, where, in the course of an inspection, the Commission officials consider that the material presented by the undertaking is not of such a nature as to prove that the document in question is protected by legal professional privilege as defined by the case law of the Court of Justice of the European Union, in particular where that undertaking refuses to give the Commission officials a cursory look at a document, but where it cannot be excluded that the document may be protected, the officials may place a copy of the contested document in a sealed envelope and bring it to the Commission's premises, with a view to a subsequent resolution of the dispute.

55. The hearing officer may be asked by undertakings or associations of undertakings to examine claims that a document required by the Commission in the exercise of Articles 18, 20 or 21 of Regulation (EC) No 1/2003 and which was withheld from the Commission is covered by legal professional privilege, within the meaning of the case law, if the undertaking has been unable to resolve the matter with the Directorate-General for Competition ([47]). The undertaking making the claim may refer the matter to the hearing officer if they consent to the hearing officer viewing the information claimed to be covered by legal professional privilege and any other material necessary for the hearing officer's assessment. Without revealing the potentially privileged content of the information, the hearing officer shall communicate to the director responsible and the undertaking or association of undertakings concerned his or her preliminary view, and may take appropriate steps to promote a mutually acceptable resolution.

56. Where no resolution is reached, the hearing officer may formulate a reasoned recommendation to the competent member of the Commission, without revealing the potentially privileged content of the document. The party making the claim shall receive a copy of this recommendation. If the matter is not resolved on this basis, the Commission will examine the matter further. Where appropriate, it may adopt a decision rejecting the claim.

57. In cases where the undertaking has claimed the protection of legal professional privilege and has provided reasons substantiating its claims, the Commission (with the exception of the hearing officer if a claim has been referred to him or her on the basis of Article 4(2)(a) of the terms of reference of the hearing officer) will not read the contents of the document before it has adopted a decision rejecting this claim and allowed the undertaking concerned to refer the matter to the Court of Justice of the European Union. Thus, if the company brings an action for annulment and applies for interim relief within the specified time limit, the Commission will not open the sealed envelope and will not read the documents until the Court of Justice of the European Union has decided on this application for interim measures ([48]).

58. Undertakings making clearly unfounded claims for protection under legal professional privilege merely as delaying tactics or opposing, without objective justification, any cursory look at the documents during an investigation may be subject to fines pursuant to Article 23(1) of Regulation (EC) No 1/2003, if the other conditions of this provision are met. Similarly, such actions may be taken into account as aggravating circumstances in any decision imposing a fine for infringement of Articles 101 and/or 102 TFEU ([49]).

2.8. **Information exchange between competition authorities**

59. In the context of an investigation the Commission may also exchange information with national competition authorities pursuant to Article 12 of Regulation (EC) No 1/2003. The Commission's practice in relation to these exchanges is currently described in the Commission notice on cooperation within the Network of Competition Authorities ([50]).

2.9. **State of Play meetings**

60. Throughout the procedure the Directorate-General for Competition endeavours to give, on its own initiative or upon request, parties subject to the proceedings ample opportunity for open and frank discussions — taking into account the stage of the investigation — and to make their points of view known.

([47]) Article 4(2)(a) of the terms of reference of the hearing officer.
([48]) Thus, the Commission will wait until the time limit for bringing an action against the rejection decision has expired before reading the contents of the contested document. However, since such an action does not have suspensory effect, it is for the undertaking concerned to make a prompt application for interim relief seeking suspension of operation of the decision rejecting the request for legal professional privilege.
([49]) *Akzo*, paragraph 89.
([50]) OJ C 101, 27.4.2004, p. 43.

61. In this respect the Commission will offer State of Play meetings at certain stages of the procedure. State of Play meetings, which are completely voluntary in nature for the parties, can contribute to the quality and efficiency of the decision making process and to ensure transparency and communication between the Directorate-General for Competition and the parties, notably to inform them of the status of the proceedings at key points in the procedure. State of Play meetings will only be offered to the parties being investigated and not to the complainant (except where the Commission has opened proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and intends to inform the complainant that it will reject its complaint by formal letter under Article 7(1) of the Implementing Regulation) nor to third parties. Where several parties are investigated, State of Play meetings will be offered to each party separately. In cartel proceedings, a State of Play meeting will be offered as provided for in paragraph (65).

2.9.1. *Format of the State of Play meetings*

62. State of Play meetings are normally conducted at the Commission's premises, but if appropriate, they may also be held by telephone or videoconference. Senior management of the Directorate-General for Competition (Director or Deputy Director-General) will normally chair the meeting. However, in cases involving multiple parties, the meeting may be chaired by the responsible head of unit.

2.9.2. *Timing of the State of Play meetings*

63. The Directorate-General for Competition will offer State of Play meetings at several key stages of the case. These correspond, in principle (although not normally in the context of cartel proceedings), to the following events:

1) Shortly after the opening of proceedings: the Directorate-General for Competition will inform the parties subject to the proceedings of the issues identified at this stage and of the anticipated scope of the investigation. This meeting provides the parties with an opportunity to react initially to the issues identified and may also serve to assist the Directorate-General for Competition in deciding on the appropriate framework for its further investigation. This meeting may also be used to discuss with the parties any relevant language waivers that may be appropriate for the conduct of the investigation. The Directorate-General for Competition will normally at this stage indicate a tentative timetable for the case. Such tentative timetable will, if appropriate, be updated at following State of Play meetings.

2) At a sufficiently advanced stage in the investigation: this meeting gives the parties subject to the proceedings an opportunity to understand the Commission's preliminary views on the status of the case following its investigation and on the competition concerns identified. The meeting may also be used by the Directorate-General for Competition and by the parties to clarify certain issues and facts relevant for the outcome of the case.

64. Where a Statement of Objections is issued, the parties will also be offered a State of Play meeting after their reply to the Statement of Objections or after the Oral Hearing, should one be held: the parties will at this meeting normally be informed of the Commission's preliminary view on how it intends to pursue the case further.

65. In the context of cartel proceedings one State of Play meeting will be offered after the oral hearing. Furthermore, two specific State of Play Meetings will be offered in the context of procedures leading to commitment decisions (see Section 4 below) and to complainants where the Commission has opened proceedings under Article 11(6) of Regulation (EC) No 1/2003 and intends to inform the complainant that it will reject its complaint by formal letter under Article 7(1) of the Implementing Regulation (see Section 5 below).

66. State of Play meetings do not in any way preclude discussions between the parties, complainants or third parties and the Directorate-General for Competition on substance or on timing issues on other occasions throughout the procedure as appropriate.

2.10. **Triangular meetings**

67. In addition to bilateral meetings between the Directorate-General for Competition and each individual party such as the State of Play meetings, the Commission may exceptionally decide to invite the parties subject to the proceedings, and possibly also the complainant and/or third parties, to a so-called 'triangular' meeting. Such a meeting will be organised if the Directorate-General for Competition believes it to be in the interests of the investigation to hear the views on, or to verify the accuracy of, factual issues of all the parties in a single meeting. Such a meeting could be useful to the investigation, for example, where two or more opposing views or information have been put forward as to key data or evidence.

68. Any triangular meeting would normally take place at the initiative of the Commission and on a voluntary basis. Triangular meetings are normally chaired by senior management of the Directorate-General for Competition (Director or Deputy Director-General). A triangular meeting does not replace the formal Oral Hearing.

69. Where triangular meetings are held, this should be done as early as possible during the investigatory phase (after the opening of proceedings and before any issuing of Statement of Objections) in order to help the Commission reach a conclusion on substantive issues before the Commission decides whether to issue a Statement of Objections, although the holding of such meetings after the issue of the Statement of Objections in appropriate cases is not excluded. Triangular meetings should be prepared on the basis of an agenda established by the Directorate-General for Competition after consulting all parties that agree to attend the meeting. The preparation of the meeting may include a mutual exchange of non-confidential submissions between the attending parties sufficiently in advance of the meeting.

2.11. **Meetings with the Commissioner or the Director-General**

70. If the parties so request, it is normal practice to offer senior officers of the parties subject to the proceedings and the complainant an opportunity to discuss the case either with the Director-General for competition, the Deputy Director-General for antitrust, or if appropriate, with the Commissioner responsible for Competition. The senior officers may be accompanied by their legal and/or economic advisors.

2.12. **Review of key submissions**

71. In the spirit of encouraging an open exchange of views the Commission will, in cases based on formal complaints, provide the parties subject to the proceedings, at an early stage (unless such is considered to likely prejudice the investigation) and at the latest shortly after the opening of proceedings, with the opportunity of commenting on a non-confidential version of the complaint ([51]). However, this may not be the case where the complaint is rejected at an early stage without further in-depth investigation (e.g. based on 'insufficient grounds for acting', also known as 'lack of European Union interest').

72. Early access to the complaint may allow the parties to provide useful information at an early stage of the procedure and facilitate the assessment of the case.

73. In the same spirit, the Commission's objective will be to provide the parties subject to the proceedings shortly after the opening of proceedings with the opportunity to review non-confidential versions of other 'key submissions' already submitted to the Commission. This would include significant submissions of the complainant or interested third parties, but not, for example, replies to requests for information. After this early stage, other such submissions will only be shared with the parties if this is in the interest of the investigation and would not risk unduly slowing down the investigative phase. The Commission will respect justified requests by the complainant or interested third parties for non-disclosure of their submissions prior to the issuing of a Statement of Objections where they have genuine concerns regarding confidentiality, including fears of retaliation and the protection of business secrets.

([51]) A non-confidential version of the reply of the party subject to the investigation to the complaint may thereafter be provided to the complainant.

74. The review of key submissions will not be offered in the context of cartel proceedings (see paragraph (4) above).

2.13. **Possible outcomes of the investigation phase**

75. Once the Commission has reached a preliminary view of the main issues raised by a case, different procedural paths may be envisaged.

— The Commission may decide to proceed towards the adoption of a Statement of Objections with a view to adopting a prohibition decision relating to all or some of the issues identified at the opening of proceedings (see Section 3 below).

— The parties subject to the investigation may consider offering commitments which address the competition concerns arising from the investigation, or at least show their willingness to discuss such a possibility; in that case, the Commission may decide to engage in discussion with a view to a commitment decision (see Section 4 below).

— The Commission may decide that there are no grounds to continue the proceedings with regard to all or some of the parties and close the proceedings accordingly. If the case originated via a complaint, the Commission shall, before closing the case, give the complainant the possibility to express its views (see Section 5 on rejection of complaints).

76. When closing a case in relation to one or several parties in multi-party proceedings at an early stage after proceedings have been formally opened, the Commission will normally not only notify the decision to those parties but also in those cases where the opening of proceedings has been made public, note the closure on its website and/or issue a press release. The same applies in cases where proceedings have not been formally opened but the Commission has already made public its investigation (e.g. by having confirmed that inspections have taken place).

3. **PROCEDURES LEADING TO A PROHIBITION DECISION**

77. An important procedural step in procedures which may lead to a prohibition decision is the adoption of a Statement of Objections. However, the adoption of a Statement of Objections does not prejudge the final outcome of the investigation. It may well lead to the closing of the case without the adoption of a prohibition decision or a commitment decision.

3.1. **Right to be heard**

78. The right of the parties to the proceedings to be heard before a final decision adversely affecting their interests is taken is a fundamental principle of EU law. The Commission is committed to ensuring that the effective exercise of the right to be heard is respected in its proceedings ([52]).

79. The hearing officers have the function of safeguarding the effective exercise of procedural rights, in particular the right to be heard, in competition proceedings ([53]). The hearing officers carry out their tasks in full independence from the Directorate-General for Competition, and disputes arising between the latter and any party subject to the proceedings can be brought before the relevant hearing officer for resolution.

80. The hearing officer is directly involved throughout antitrust proceedings, including in particular the organisation and conduct of the oral hearing, if one is held. After the oral hearing, and taking into account the parties' written replies to the Statement of Objections, the hearing officer reports to the Commissioner responsible for Competition on the hearing and the conclusions to be drawn from it. Moreover, prior to a final decision being taken by the College of Commissioners, the hearing officer informs it whether the right to exercise procedural rights effectively has been respected throughout the administrative proceedings. The final report is sent to the parties subject to the proceedings, together with the Commission's final decision, and is published in the *Official Journal of the European Union*.

([52]) Article 27 of Regulation (EC) No 1/2003, mentioned above.
([53]) Article 1 of terms of reference of the hearing officer.

3.1.1. *Statement of Objections*

81. Before adopting a decision adversely affecting the interests of an addressee, in particular, a decision finding an infringement of Article 101 and 102 TFEU and ordering its termination (Article 7 of Regulation (EC) No 1/2003) and/or imposing fines (Article 23 of Regulation (EC) No 1/2003), the Commission will give the parties subject to the proceedings the opportunity to be heard on the matters to which the Commission has objected ([54]). The Commission will do this by adopting a Statement of Objections, which is notified to each of the parties subject to the proceedings.

3.1.1.1. Purpose and content of the Statement of Objections

82. The Statement of Objections sets out the preliminary position of the Commission on the alleged infringement of Articles 101 and/or 102 TFEU, after an in-depth investigation. Its purpose is to inform the parties concerned of the objections raised against them with a view to enabling them to exercise their rights of defence in writing and orally (at the hearing). It thus constitutes an essential procedural safeguard which ensures that the right to be heard is observed. The parties concerned will be provided with all the information they need to defend themselves effectively and to comment on the allegations made against them.

3.1.1.2. Possible imposition of remedies and arguments of the parties

83. If the Commission intends to impose remedies on the parties, in accordance with Article 7(1) of Regulation (EC) No 1/2003, the Statement of Objections will indicate the remedies envisaged that may be necessary to bring the suspected infringement to an end. The information given should be sufficiently detailed to allow the parties to defend themselves as to the necessity and proportionality of the remedies envisaged. If structural remedies are envisaged, in accordance with Article 7(1) of Regulation (EC) No 1/2003, the Statement of Objections will spell out why there is no equally effective behavioural remedy or why the Commission considers any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

3.1.1.3. Possible imposition of fines and arguments of the parties

84. The Statement of Objections will clearly indicate whether the Commission intends to impose fines on the undertakings, should the objections be upheld (Article 23 of Regulation (EC) No 1/2003). In such cases, the Statement of Objections will refer to the relevant principles laid down in the Guidelines on setting fines ([55]). In the Statement of Objections the Commission will indicate the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and that the infringement was committed intentionally or by negligence. The Statement of Objections will also mention in a sufficiently precise manner that certain facts may give rise to aggravating circumstances and, to the extent possible, to attenuating circumstances.

85. Although under no legal obligation in this respect, in order to increase transparency, the Commission will endeavour to include in the Statement of Objections (using information available) further matters relevant to any subsequent calculation of fines, including the relevant sales figures to be taken into account and the year(s) that will be considered for the value of such sales. Such information may also be provided to the parties after the Statement of Objections. In both cases, the parties will be provided with an opportunity to comment.

86. Should the Commission intend to depart in its final decision from the elements of fact or of law set out in the Statement of Objections to the disadvantage of one or more parties or should the Commission intend to take account of additional inculpatory evidence, the party or parties concerned will always be given the opportunity to make their views known thereon in an appropriate manner.

([54]) Article 27 of Regulation (EC) No 1/2003.
([55]) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ C 210, 1.9.2006, p. 2).

87. In the Statement of Objections the Commission will also inform parties that in exceptional cases, it may, upon request, take account of the undertaking's inability to pay and reduce or cancel the fine that might otherwise be imposed if that fine would irretrievably jeopardise the economic viability of the undertaking, according to point 35 of the Guidelines on setting fines ([56]).

88. The undertakings making such a request should be prepared to provide, detailed and up-to-date financial information to support their request. Usually, the Directorate-General for Competition will be in contact with the parties in order to collect additional information and/or clarify the information obtained, which will allow the parties to bring further relevant information to the attention of the Commission. When assessing an undertaking's claim that it is unable to pay, the Commission looks in particular at the financial statements for recent years and forecasts for the current and coming years; at ratios measuring the financial strength, profitability, solvency and liquidity; and the undertaking's relations with outside financial partners and with shareholders. The Commission also examines the specific social and economic context of each undertaking and assesses whether the fine would likely cause its assets to lose significantly their value ([57]).

89. The assessment of the financial situation is carried out for all undertakings that have made an inability to pay request close to the adoption of the decision and on the basis of up-to-date information, irrespective of when the request was submitted.

90. The parties may also present their arguments as to the matters that may be of importance for the possible imposition of fines at the oral hearing ([58]).

3.1.1.4. Transparency

91. In order to enhance the transparency of the proceedings, the Commission will, as a general rule, publish a press release setting out the key issues in the Statement of Objections shortly after it is received by its addressees. This press release will explicitly state that the Statement of Objections does not predetermine the final outcome of the proceedings, once the parties have been heard.

3.1.2. *Access to file*

92. The addressees of the Statement of Objections are granted access to the Commission's file, in accordance with Article 27(2) of Regulation (EC) No 1/2003 and Articles 15 and 16 of the Implementing Regulation, so as to allow them to effectively express their views on the preliminary conclusions reached by the Commission in its Statement of Objections.

93. The practicalities of access to the file, as well as detailed indications on the type of documents that will be accessible and confidentiality issues, are covered by a separate notice on access to file ([59]). Granting access to the Commission file is primarily the responsibility of the Directorate-General for Competition. The hearing officers will decide disputes between the parties, the information providers and the Directorate-General for Competition over access to information contained in the Commission's file in accordance with the notice on access to file, the applicable regulations and the principles laid down in the relevant case law. Lastly, special rules govern access to corporate statements in cartel cases and settlement procedures ([60]).

94. Efficient access to file depends to a large extent on the cooperation of the parties and other undertakings having provided information included in the file. As noted in paragraph (41) above, information providers must, in accordance with Article 16(3) of the Implementing Regulation, substantiate their confidentiality claims and provide a non-confidential version of the information. Such a non-confidential version must be provided in the same format as the confidential information, replacing deleted passages with summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission. In the case of a failure to provide a non-confidential version, it may be assumed that the documents do not contain confidential information ([61]).

([56]) See footnote 55.
([57]) See Note SEC(2010) 737/2 of 12 June 2010.
([58]) See paragraph 107 below.
([59]) Notice on the rules for access to the Commission file, mentioned above.
([60]) Commission Notice on Immunity from fines and reduction of fines in cartel cases (mentioned above), paragraphs 31 to 35 and Commission Notice on the conduct of settlement procedures (mentioned above), paragraphs 35 to 40.
([61]) See Article 16(4) of the Implementing Regulation.

3.1.3. *Procedures for facilitating the exchange of confidential information between parties to the proceedings*

95. Further to the possibilities contemplated in the notice on access to the file, two additional procedures may be used for the purpose of alleviating the burden of drawing up non-confidential versions of submissions: the negotiated disclosure to a restricted circle of persons and the data room procedure.

96. First, the Directorate-General for Competition may accept in certain cases, especially those with a very voluminous file that the parties agree voluntarily to use a negotiated disclosure procedure. Under this procedure, the party entitled to access to file agrees bilaterally with the information providers claiming confidentiality to receive all or some of the information which the latter have provided to the Commission, including confidential information. The party being granted access to file limits access to the information to a restricted circle of persons (to be decided by the parties on a case-by-case basis, if requested, under the supervision of the Directorate-General for Competition). To the extent that such negotiated access to the file would amount to restricting a party's right to have access to the investigation file, that party must waive its right to access to the file vis-à-vis the Commission. Normally, the party would receive the information subject to the negotiated disclosure procedure directly from the information provider. However, if the information that is subject to such an agreement would, exceptionally, be provided to the restricted circle of persons by the Commission, the information providers must waive their rights to confidentiality vis-à-vis the Commission.

97. Second, the Directorate-General for Competition may organise the so-called data room procedure. This procedure is typically used for the disclosure of quantitative data relevant for econometric analysis. Under this procedure, part of the file, including confidential information, is gathered in a room, at the Commission's premises (the data room). Access to the data room is granted to a restricted group of persons, i.e. the external legal counsel and/or the economic advisers of the party (collectively known as the 'advisers'), under the supervision of a Commission official. The advisers may make use of the information contained in the data room for the purpose of defending their client but may not disclose any confidential information to their client. The data room is equipped with several PC workstations and the necessary software (and if relevant the necessary data sets and a log of the regressions used to support the Commission's case). There is no network connection and no external communication is allowed. The advisers are permitted to remain in the data room during normal working hours and, if justified, access may be provided for several days. The advisers are strictly prohibited from taking copies, notes or summaries of the documents and may only remove a final report from the data room, which is to be verified by the case team in order to ensure that it does not contain any confidential information. Each adviser will sign a confidentiality agreement and will be presented with the conditions of special access to the data room before entering. To the extent that the use of such a data room procedure would restrict a party's right to have full access to the investigation file, the procedural guarantees provided for in Article 8 of the terms of reference of the hearing officer apply.

98. The hearing officer may decide pursuant to Article 8(4) of the terms of reference of the hearing officer that the data room procedure shall be used in those limited cases where access to certain confidential information is indispensible for a party's rights of defence and where the hearing officer considers that, on balance, the conflict between respect for confidentiality and the rights of defence is best solved in this way. The hearing officer will not take such decisions if he or she considers that the data room is not appropriate and that access to the information should be given in a different form (e.g. a non-confidential version).

3.1.4. *Written reply to the Statement of Objections*

99. Pursuant to Article 27(1) of Regulation (EC) No 1/2003, the Commission shall give the addressees of a Statement of Objections the opportunity of being heard on matters to which the Commission has taken objection. The written reply gives the parties subject to the proceedings the opportunity to set out their views on the objections raised by the Commission.

100. The time limit for the reply to the Statement of Objections will take into account both the time required for the preparation of the submission and the urgency of the case ([62]). The addressees of the Statement of Objections have the right to a minimum period of four weeks to

([62]) See Case T-44/00 *Mannesmannröhren-Werke AG* v *Commission* [2004] ECR II-2223, para. 65.

reply in writing ([63]). A longer period (normally, a period of two months, although this may be longer or shorter depending on the circumstances of the case) will be granted by the Directorate-General for Competition taking into account, inter alia, the following elements:

— the size and complexity of the file (e.g. the number of infringements, the alleged duration of the infringement(s), the size and number of documents and/or the size and complexity of expert studies); and/or

— whether the addressee of the statement of objection making the request has had prior access to information (e.g. key submissions, leniency applications); and/or

— any other objective obstacles which may be faced by the addressee of the Statement of Objections making the request in providing its observations.

101. An addressee of a Statement of Objections may, within the original time limit, seek an extension of the time limit to reply by means of a reasoned request to the Directorate-General for Competition at least 10 working days before the expiry of the original time limit. If such a request is not granted or the addressee of the Statement of Objections disagrees with the length of the extension granted, it may refer the matter to the hearing officer for review before the expiry of the original time limit.

102. The time limit will start to run from the date when access to the main documents of the file has been granted ([64]). In particular, time limits will normally not start running before the addressee of the Statement of Objections has been offered access to documents which are only accessible on Commission premises, e.g. corporate statements. The fact that access to the entire file has not been granted does not have the automatic consequence that a time limit has not started running ([65]).

103. Where required by the rights of defence ([66]), or where it may in the Commission's view help to further clarify factual and legal issues relevant for the case, the Commission may give parties a copy of the non-confidential version (or specific parts thereof) of other parties' written replies to the Statement of Objections. This would normally be done prior to the oral hearing, so as to allow parties to comment on them at the oral hearing. The Commission may also decide to do so in appropriate cases with respect to complainants and admitted third parties. If access to other parties' replies is granted because it is required for the rights of the defence parties are also entitled to have sufficient additional time to comment on these replies.

3.1.5. *Rights of complainants and interested third persons*

104. Complainants are closely associated with the proceedings. Pursuant to Article 6(1) of the Implementing Regulation, they are entitled to receive a non-confidential version of the Statement of Objections, and the Commission shall set a time limit in which the complainant may make its views known in writing. A request for an extension of this time limit may be made by way of a reasoned request to the Commission in due time before the expiry of the original time limit. If such a request is not granted or the Directorate-General for Competition and the complainant disagree about a requested extension, the complainant may refer the matter to the hearing officer, by means of a reasoned request ([67]).

([63]) See Article 17(2) of the Implementing Regulation. For the rule applicable to settlement procedures, see Article 10(a) of the Implementing Regulation.

([64]) In most cases, parties will be given access to the complete file by means of a CD-Rom containing all documents in the file.

([65]) See Case T-44/00, *Mannesmannröhren-Werke AG* v *Commission*, [2004] ECR II-2223, para 65. See also recital 15 of the terms of reference of the hearing officer which states 'In exceptional circumstances, the hearing officer may suspend the running of the time period in which an addressee of a statement of objections should reply to that statement until a dispute about access to file has been resolved, if the addressee would not be in a position to reply within the deadline granted and an extension would not be an adequate solution at that point in time.'

([66]) See Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275; Case T-54/03 *Lafarge* v *Commission* [2008] ECR II-120, paras 69-73; Case T-52/03 *Knauf* v *Commission* [2008] ECR II-115, paras 41-47, 67-79; Case C-407/08P *Knauf* v *Commission*, judgment of 1 July 2010 (not yet reported), paras 23-28.

([67]) Article 9(2) of the terms of reference of the hearing officer.

105. Upon application, the Commission shall also hear other natural or legal persons which can demonstrate a sufficient interest in the outcome of the procedure in accordance with Article 13 of the Implementing Regulation. The hearing officer takes the decision on whether such third persons are admitted to the proceedings. Persons who have been admitted shall be informed in writing of the nature and subject matter of the procedure and a time limit shall be set by the Commission in which they may make their views known in writing. A request for an extension of this time limit may be made by way of a reasoned request to the Directorate-General for Competition in due time before the expiry of the original time limit. If such a request is not granted or the Directorate-General for Competition and the third person admitted to the proceedings disagree about a requested extension the third person may refer the matter to the hearing officer, by means of a reasoned request ([68]).

3.1.6. *Oral hearing*

106. Every party to which a Statement of Objections has been addressed has the right to an oral hearing. An oral hearing may be requested within the time limit set for their written reply to the Statement of Objections.

107. The oral hearing allows the parties to develop orally the arguments that they submitted in writing and to supplement, where appropriate, the written evidence, or to inform the Commission of other matters that may be relevant. The oral hearing also allows the parties to present their arguments as to the matters that may be of importance for the possible imposition of fines. The fact that the hearing is not public guarantees that all attendees can express themselves freely. Any information disclosed during the hearing shall only be used for the purposes of judicial and/or administrative proceedings for the application of Articles 101 and 102 TFEU and shall not be disclosed or used for any other purpose by any participant in a hearing. This restriction also applies to the recording of the oral hearing, as well as any visual presentations. Should information disclosed during the oral hearing be used for a purpose other than judicial and/or administrative proceedings for the application of Articles 101 and 102 TFEU at any point in time with the involvement of outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

108. In view of the importance of the oral hearing, it is the practice of the Directorate-General for Competition to ensure the continuous presence of senior management of the Directorate-General for Competition (Director or Deputy Director-General), together with the case team of Commission officials responsible for the investigation. The competition authorities of the Member States, the Chief Economist's team, and associated Commission services ([69]), including the Legal Service, are also invited to attend by the hearing officer.

3.1.7. *Supplementary Statement of Objections and letter of facts*

109. If, after the Statement of Objections has been issued, new evidence is identified which the Commission intends to rely upon or if the Commission intends to change its legal assessment to the disadvantage of the undertakings concerned, the undertakings in question shall be given an opportunity to present their observations on these new aspects.

110. If additional objections are issued or the intrinsic nature of the infringement with which an undertaking is charged is modified ([70]), the Commission shall notify this to the parties in a Supplementary Statement of Objections. Before doing so, a State of Play meeting will normally be offered to the parties. The rules on setting the time limit for the reply to a Statement of Objections apply (see above), although a shorter time limit will typically be set in this context.

111. If, however, the objections already raised against the undertakings in the Statement of Objections are only corroborated by new evidence that the Commission intends to rely on, it will bring this to the attention of the parties concerned by a simple letter (letter of facts) ([71]). The letter of facts gives undertakings the opportunity to provide written comments on the new evidence within a fixed

([68]) See footnote 67.
([69]) See further the document 'Key actors and checks and balances', available on the Directorate-General for Competition's website.
([70]) For example a supplementary Statement of Objections would be issued if the new evidence allows the Commission to extend the duration of the infringement, the geographic scope or the nature or scope of the infringement.
([71]) When the Commission merely communicates to a party a non-confidential version (or specific excerpts thereof) of the other parties' written replies to the Statement of Objections and gives it the opportunity to submit its comments (see paragraph 103 above), this does not constitute a letter of facts.

time limit. A request for an extension of this time limit may be made by way of a reasoned request to the Commission. If the Directorate-General for Competition and the addressee disagree about a requested extension, the addressee may refer the matter to the hearing officer, by means of a reasoned request.

112. The procedural rights which are triggered by the sending of the Statement of Objections apply *mutatis mutandis* where a Supplementary Statement of Objections is issued, including the right of the parties to request an oral hearing. Access to all evidence gathered between the initial Statement of Objections and the Supplementary Statement of Objections will also be provided. If a letter of facts is issued, access will in general be granted to evidence gathered after the Statement of Objections up to the date of the said letter of facts. However, in cases where the Commission only intends to rely upon specific evidence that concerns one or a limited number of parties and/or isolated issues (in particular those regarding the determination of the amount of the fine or issues of parental liability), access will be provided only to the parties directly concerned and to the evidence relating to the issue(s) in question.

3.2. **Possible outcomes of this phase**

113. If, having regard to the parties' replies given in writing and/or at the oral hearing and on the basis of a thorough assessment of all information obtained up to this stage the objections are substantiated, the Commission will proceed towards adopting a decision finding an infringement of the relevant competition rules. The Commission can also decide to withdraw certain objections and to continue towards a decision finding an infringement for the remaining part.

114. If, however, the objections at this stage are not substantiated, the Commission will close the case. In this case, the information measures described above in paragraph (76) would also apply.

4. **COMMITMENT PROCEDURES**

115. Article 9 of Regulation (EC) No 1/2003 provides the possibility for undertakings to offer commitments that are intended to address the competition concerns identified by the Commission. If the Commission accepts these commitments, it may adopt a decision which makes them binding on the parties subject to the proceedings. It is at the discretion of the Commission whether or not to accept commitments. In light of the principle of proportionality, the Commission must verify that the commitments address the identified competition concerns and that the commitments offered do not manifestly go beyond what is necessary to address these concerns. When carrying out that assessment, the Commission will take into consideration the interests of third parties. However, it is not obliged to compare such voluntary commitments with measures it could impose under Article 7 of Regulation (EC) No 1/2003 and to regard as disproportionate any commitments which go beyond such measures ([72]).

116. Commitment decisions are not appropriate in cases where the Commission considers that the nature of the infringement calls for the imposition of a fine ([73]). Consequently, the Commission does not apply the Article 9 procedure to secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases.

117. The main difference between a prohibition decision pursuant to Article 7 and a commitment decision pursuant to Article 9 of Regulation (EC) No 1/2003 is that the former contains a finding of an infringement while the latter makes the commitments binding without concluding whether there was or still is an infringement. A commitment decision concludes that there are no longer grounds for action by the Commission. Moreover, commitments are offered by undertakings on a voluntary basis. Conversely, by an Article 7 decision, the Commission can impose remedies which are necessary to bring the infringement to an end (and/or fines) on undertakings.

([72]) Case C-441/07 P *Commission* v *Alrosa*, judgment of 29 June 2010, paragraph 120.
([73]) See recital 13 of Regulation (EC) No 1/2003.

4.1. **Initiation of commitment discussions**

118. Undertakings may contact the Directorate-General for Competition at any time to explore the Commission's readiness to pursue the case with the aim of reaching a commitment decision. The Commission encourages undertakings to signal at the earliest possible stage their interest in discussing commitments.

119. A State of Play meeting will be offered to the parties at that point. The Directorate-General for Competition will indicate to the undertaking the timeframe within which the discussions on potential commitments should be concluded and will present to them the preliminary competition concerns arising from the investigation.

120. In order to avoid delays due to translation, that meeting and the following steps of the procedure may be conducted in an agreed language on the basis of a duly provided 'language waiver' by which the parties accept to receive and submit documents in a language other than the language of the Member State in which they are located (see above Section 2.4).

4.2. **Preliminary Assessment**

121. Once the Commission is convinced of the undertakings' genuine willingness to propose commitments which will effectively address the competition concerns, a Preliminary Assessment will be issued. Pursuant to Article 9 of Regulation (EC) No 1/2003 the Preliminary Assessment summarises the main facts of the case and identifies the competition concerns that would warrant a decision requiring that the infringement is brought to an end. Prior to issuing the Preliminary Assessment, the parties will also be offered a State of Play meeting.

122. The Preliminary Assessment will serve as a basis for the parties to formulate appropriate commitments addressing the competition concerns expressed by the Commission, or to better define previously discussed commitments.

123. If a Statement of Objections has already been sent to the parties, commitments may nevertheless still be accepted, in appropriate cases. In these circumstances, a Statement of Objections fulfils the requirements of a Preliminary Assessment, as it contains a summary of the main facts as well as an assessment of the competition concerns identified.

124. Parties to the proceedings which offer commitments to meet the concerns expressed to them by the Commission in its Preliminary Assessment may call upon the hearing officer at any time during which the procedure under Article 9 is followed in relation to the effective exercise of their procedural rights ([74]).

125. The Commission or the undertaking(s) concerned may decide at any moment during the commitment procedure to discontinue their discussions. The Commission can then normally continue formal proceedings pursuant to Article 7 of Regulation (EC) No 1/2003 ([75]).

4.3. **Submission of the commitments**

126. After receiving the Preliminary Assessment, the parties will normally have one month to formally submit their commitments. If the parties have received a Statement of Objections and subsequently decide to submit commitments, the time limit to reply to the Statement of Objections will generally not be extended. The submission of commitments does not necessarily imply that the parties agree with the Commission's Preliminary Assessment.

127. The parties can offer commitments of a behavioural or structural nature that address adequately the competition concerns identified. Commitments which do not adequately remedy these concerns will not be accepted by the Commission.

([74]) Article 15(1) of the terms of reference of the hearing officer.
([75]) See Section 3 of this notice.

128. Commitments must be unambiguous and self-executing ([76]). If need be, a trustee can be appointed to assist the Commission in their implementation (monitoring and/or divestiture trustee). Furthermore, when commitments cannot be implemented without the agreement of third parties (e.g. where a third party that would not be a suitable buyer under the commitments holds a pre-emption right), the undertaking should submit evidence of the third party's agreement.

4.4. **The 'market test' and subsequent discussions with the parties**

129. In accordance with Article 27(4) of Regulation (EC) No 1/2003 the Commission must conduct a market test of the commitments before making them binding by decision. The Commission will only conduct a market test if it considers that the commitments offered prima facie address the competition concerns identified. The Commission must publish in the *Official Journal of the European Union* a notice (market test notice) containing a concise summary of the case and the main content of the commitments, whilst respecting the obligations of professional secrecy ([77]). It will also publish on the Directorate-General for Competition's website the full text of the commitments ([78]) in the authentic language ([79]). In order to enhance the transparency of the process, the Commission will also publish a press release setting out the key issues of the case and the proposed commitments. If the case is based on a complaint, the Commission will at this stage also inform the complainant about the market test and invite the complainant to submit comments. Similarly, third parties admitted to the procedure will be informed and invited to submit comments. At the Commission's discretion, triangular meetings with the parties and the complainant and/or admitted third parties may be held.

130. Interested third parties are invited to submit their observations within a fixed time limit of not less than one month in accordance with Article 27(4) of Regulation (EC) No 1/2003.

131. The Commission may send the market test document to other parties that may be potentially concerned by the outcome of the case (e.g. consumer associations).

132. After receipt of the replies to the market test, a State of Play meeting will be organised with the parties. The Commission will inform the parties orally or in writing of the substance of the replies.

133. Where the Commission is of the view, on the basis of the results of the market test (and any other information available) that the competition concerns identified have not been addressed or that changes in the text of the commitments are necessary to make them effective, this will be brought to the attention of the undertakings offering the commitments. If the latter are willing to address the problems identified by the Commission, they should submit an amended version of the commitments. If the amended version of the commitments alters the very nature or scope of the commitments, a new market test will be conducted. If the undertakings are unwilling to submit an amended version of the commitments, where this is required by the Commission's assessment of the result of the market test, the Commission can revert to the Article 7 procedure.

5. **PROCEDURE FOR REJECTION OF COMPLAINTS**

134. Formal complaints are an important tool in the implementation of the competition rules and are therefore carefully examined by the Commission. However, after appropriate assessment of the factual and legal circumstances of the individual case, the Commission may reject a complaint pursuant to the grounds and procedure set out below ([80]).

([76]) That is, their implementation must not be dependant on the will of a third party which is not bound by the commitments.
([77]) Article 28 of Regulation (EC) No 1/2003.
([78]) Non-confidential version.
([79]) Without translation.
([80]) See also Commission notice on the handling of complaints (mentioned above).

5.1. **Grounds for rejection**

135. The rejection of complaints can be based on 'insufficient grounds for acting' (also known as 'lack of European Union interest'), lack of competence or lack of evidence to establish the existence of an infringement.

136. Rejections based on 'insufficient grounds for acting' ([81]) concern in particular complaints where, given the limited likelihood of establishing the proof of the alleged infringements and the substantial investigatory resources which the Commission would have to invest in order to verify their existence, allocating the resources necessary to further investigate the case would be disproportionate, in light of its expected limited impact on the functioning of the internal market and/or the possibility of the complainant to have recourse to other means ([82]).

137. The Commission may also reject complaints for lack of substantiation (when the complainant fails to submit even a minimum of prima facie evidence necessary to substantiate an infringement of Articles 101 and/or 102 TFEU) or on substantive grounds (absence of an infringement).

138. If a national competition authority is dealing or has already dealt with the same case ([83]), the Commission shall inform the complainant accordingly. In such a situation, the complainant may withdraw the complaint. If the complainant maintains the complaint, the Commission may reject it by decision pursuant to Article 13 of Regulation (EC) No 1/2003 and in accordance with Article 9 of the Implementing Regulation ([84]). If a national court is dealing or has already dealt with the same case, the Commission may reject the complaint based on 'insufficient grounds for acting' ([85]).

5.2. **Procedure**

139. If the Commission, after careful examination of the case, comes to the preliminary conclusion that it should not pursue the case for any of the reasons mentioned above, it will first inform the complainant in a meeting or by phone that it has come to the preliminary view that the case may be rejected. Once informed, the complainant may decide to withdraw the complaint. Otherwise, the Commission will inform the complainant by a formal letter pursuant to Article 7(1) of the Implementing Regulation of its preliminary conclusion that there are insufficient grounds for acting and set a time limit for its written observations ([86]). In this context, the complainant has the right to request access to the documents on which the Commission bases its provisional assessment ([87]). If in the course of its examination of the complaint, the Commission has opened proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 a State of Play meeting will be offered to the complainant prior to sending such a formal letter. The time limit set in the formal letter shall be at least four weeks ([88]). The time limit will start to run from the date when access to the main documents on which the assessment was made has been granted. Where appropriate and upon reasoned request to the Directorate-General for Competition made before the expiry of the original time limit, the time limit may be extended ([89]). If such a request is not granted or the Directorate-General for Competition and the complainant disagree about the extension requested, the addressee may refer the matter to the hearing officer, by means of a reasoned request ([90]).

([81]) Cf. in particular Case T-24/90, *Automec II*, [1992] ECR II-2223 and Case C-119/97 P, *Ufex*, [1999] ECR I-1341.
([82]) The Commission notice on the handling of complaints lists in paragraph 44 certain criteria that can be used in isolation or combination for rejections on the grounds of lack of 'European Union interest'. Moreover, the Commission identified in its Report on Competition Policy 2005 some criteria that it could use to decide whether or not there is 'European Union interest'. See also Case T-427/08, *Confédération européenne des associations d'horlogeurs-réparateurs (CEAHR)* v *Commission*, not yet reported.
([83]) The notion of same case essentially implies: infringement of the same nature, same product market, same geographic market, at least one of the same undertakings, same period of time.
([84]) Paragraph 25 of the Commission's notice on the handling of complaints.
([85]) See Annual Report on Competition Policy 2005, adopted in June 2006, p. 25 ff.
([86]) Article 7(1) of the Implementing Regulation; paragraph 68 of the Commission's notice on the handling of complaints.
([87]) Article 8 of Regulation of the Implementing Regulation; paragraph 69 of the Commission's notice on the handling of complaints.
([88]) Article 17(2) of the Implementing Regulation.
([89]) Article 17(4) of the Implementing Regulation.
([90]) See footnote 67.

140. If the complainant does not react to the above mentioned letter of the Commission within the time limit, the complaint shall be deemed to have been withdrawn pursuant to Article 7(3) of the Implementing Regulation. The complainant will be informed accordingly about the administrative closure of the case.

141. If the submissions of the complainant in response to the above mentioned letter of the Commission, does not lead the Commission to a different assessment of the complaint, it will reject the complaint by formal decision pursuant to Article 7(2) of the Implementing Regulation. If the submissions of the complainant lead to a different assessment of the complaint, the Commission will continue its investigation.

6. **LIMITS ON THE USE OF INFORMATION**

142. Information exchanged in the course of these procedures, in particular in the context of access to file and review of key submissions, shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU ([91]).

143. At all stages of the proceedings, the Commission will respect genuine and justified requests from complainants or from information providers regarding the confidential nature of their submissions or contacts with the Commission, including, where appropriate, their identity, in order to protect their legitimate interests (in particular in case of possible retaliation) and to avoid discouraging them from coming forward to the Commission ([92]).

144. Commission officials and the members of the Advisory Committee are bound by the obligation of professional secrecy set out in Article 28 of Regulation (EC) No 1/2003. They are therefore prohibited from disclosing any information of the kind covered by this obligation which they have acquired or exchanged in the context of the investigation and the preparation of, and the deliberations in, the Advisory Committee. As regards the Advisory Committee, its members also must not reveal the opinion of the Advisory Committee prior to its publication, if any, or any information concerning the deliberations which led to the formulation of the opinion.

7. **ADOPTION, NOTIFICATION AND PUBLICATION OF DECISIONS**

145. All decisions pursuant to Articles 7, 9, 23 and 24 of Regulation (EC) No 1/2003 are adopted by the Commission, on a proposal of the Commissioner responsible for competition policy.

146. Immediately after the decision has been adopted, the addressees will be informed of the decision. The Directorate-General for Competition endeavours to send a courtesy copy to the parties. A certified copy of the full text of the decision as well as a copy of the final report of the hearing officer will then be notified to the addressees by express courier service.

147. A press release will be published after the adoption of the decision by the Commission. The press release describes the scope of the case and the nature of the infringement. It also indicates (where appropriate) the amount of fines for each undertaking concerned and/or the remedies imposed or, in decisions pursuant to Article 9 of Regulation (EC) No 1/2003, the commitments rendered binding.

148. The summary of the decision, the hearing officer's final report as well as the Opinion of the Advisory Committee will be published shortly after the adoption of the decision in the *Official Journal of the European Union* in all official languages ([93]).

([91]) Cf. Article 15(4) of the Implementing Regulation.
([92]) See Article 16(1) of Regulation (EC) No 1/2003.
([93]) With the exception of Irish (see Article 2 of Council Regulation (EC) No 920/2005 of 13 June 2005).

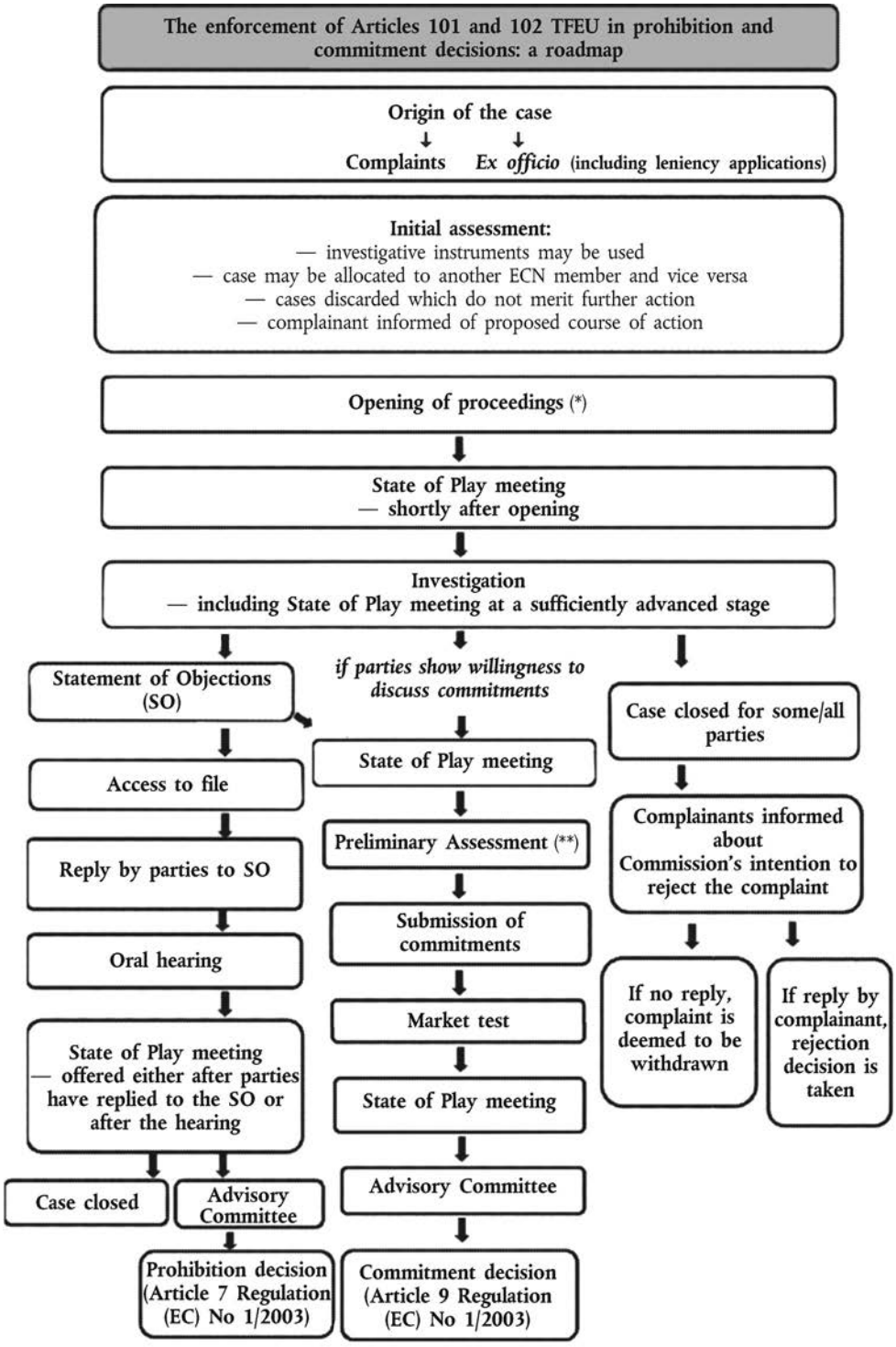
149. In addition to the requirements set out in Article 30(1) of Regulation (EC) No 1/2003, the Directorate-General for Competition will endeavour to publish as soon as possible on its website a non-confidential version of the decision in the authentic languages as well as in additional languages, if such versions are available. A non-confidential version of the decision will also be sent to the complainant. The addressees of the decision will normally be asked to provide the Commission within two weeks with a non-confidential version of the decision and to approve the summary. Should disputes arise regarding the deletion of business secrets, a provisional version of the decision excluding all information for which confidentiality has been requested will be made available on the website of the Directorate-General for Competition in any of the official languages in anticipation of a final version after resolution of the disputed parts.

150. In the interest of transparency, the Commission intends to make public on its website its decisions rejecting complaints (pursuant to Article 7 of the Implementing Regulation) or a summary thereof. If required for the protection of legitimate interests of the complainant, the published version of the decision will not identify the complainant. Decisions adopted pursuant to Article 7 of Regulation (EC) No 1/2003 or modifying commitments that have been made binding under Article 9 of that Regulation will also be made public on the website. Other types of decisions may also be published in appropriate cases.

8. **FUTURE REVISION**

151. This notice may be revised to reflect changes in the applicable legislation, significant developments in the case law of the Court of Justice of the European Union, or further experience gained in applying the competition rules. The Commission intends to engage in regular dialogue with the business and legal community and other interested parties on the experience gained through the application of this notice, of Regulation (EC) No 1/2003, the Implementing Regulation and its various notices and guidelines.

ANNEX 1



(*) With the exception of cartel proceedings, where the opening of proceedings normally takes place simultaneously with the adoption of the Statement of Objections.

(**) If an SO has already been issued, a Preliminary Assessment is not required.

Commission Notice on cooperation within the Network of Competition Authorities

(2004/C 101/03)

(Text with EEA relevance)

1. INTRODUCTION

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 [1] (hereafter the 'Council Regulation') creates a system of parallel competences in which the Commission and the Member States' competition authorities (hereafter the 'NCAs') [2] can apply Article 81 and Article 82 of the EC Treaty (hereafter the 'Treaty'). Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe. The network is called 'European Competition Network' (ECN).

2. The structure of the NCAs varies between Member States. In some Member States, one body investigates cases and takes all types of decisions. In other Member States, the functions are divided between two bodies, one which is in charge of the investigation of the case and another, often a college, which is responsible for deciding the case. Finally, in certain Member States, prohibition decisions and/or decisions imposing a fine can only be taken by a court: another competition authority acts as a prosecutor bringing the case before that court. Subject to the general principle of effectiveness, Article 35 of the Council Regulation allows Member States to choose the body or bodies which will be designated as national competition authorities and to allocate functions between them. Under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law [3]. The enforcement systems of the Member States differ but they have recognised the standards of each other's systems as a basis for cooperation [4].

3. The network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules. The Council Regulation together with the joint statement of the Council and the Commission on the functioning of the European Competition Network sets out the main principles of the functioning of the network. This notice presents the details of the system.

4. Consultations and exchanges within the network are matters between public enforcers and do not alter any rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring due process in the cases it deals with.

2. DIVISION OF WORK

2.1. Principles of allocation

5. The Council Regulation is based on a system of parallel competences in which all competition authorities have the power to apply Articles 81 or 82 of the Treaty and are responsible for an efficient division of work with respect to those cases where an investigation is deemed to be necessary. At the same time each network member retains full discretion in deciding whether or not to investigate a case. Under this system of parallel competences, cases will be dealt with by:

— a single NCA, possibly with the assistance of NCAs of other Member States; or

— several NCAs acting in parallel; or

— the Commission.

6. In most instances the authority that receives a complaint or starts an ex-officio procedure [5] will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure (see paragraph 18 below) where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act (see paragraphs 8 to 15 below).

7. Where re-allocation is found to be necessary for an effective protection of competition and of the Community interest, network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible [6]. In any event, re-allocation should be a quick and efficient process and not hold up ongoing investigations.

8. An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:

   1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;

   2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;

   3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

9. The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is better placed to act (see below paragraphs 14 and 15).

10. It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory.

> Example 1: *Undertakings situated in Member State A are involved in a price fixing cartel on products that are mainly sold in Member State A.*
>
> *The NCA in A is well placed to deal with the case.*

11. Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end.

> Example 2: *Two undertakings have set up a joint venture in Member State A. The joint venture provides services in Member States A and B and gives rise to a competition problem. A cease-and-desist order is considered to be sufficient to deal with the case effectively because it can bring an end to the entire infringement. Evidence is located mainly at the offices of the joint venture in Member State A.*
>
> *The NCAs in A and B are both well placed to deal with the case but single action by the NCA in A would be sufficient and more efficient than single action by NCA in B or parallel action by both NCAs.*

12. Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.

> Example 3: *Two undertakings agree on a market sharing agreement, restricting the activity of the company located in Member State A to Member State A and the activity of the company located in Member State B to Member State B.*
>
> *The NCAs in A and B are well placed to deal with the case in parallel, each one for its respective territory.*

13. The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

14. The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).

> Example 4: *Two undertakings agree to share markets or fix prices for the whole territory of the Community. The Commission is well placed to deal with the case.*
>
> Example 5: *An undertaking, dominant in four different national markets, abuses its position by imposing fidelity rebates on its distributors in all these markets. The Commission is well placed to deal with the case. It could also deal with one national market so as to create a 'leading' case and other national markets could be dealt with by NCAs, particularly if each national market requires a separate assessment.*

15. Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.

2.2. **Mechanisms of cooperation for the purpose of case allocation and assistance**

2.2.1. *Information at the beginning of the procedure (Article 11 of the Council Regulation)*

16. In order to detect multiple procedures and to ensure that cases are dealt with by a well placed competition authority, the members of the network have to be informed at an early stage of the cases pending before the various competition authorities ([7]). If a case is to be re-allocated, it is indeed in the best interest both of the network and of the undertakings concerned that the re-allocation takes place quickly.

17. The Council Regulation creates a mechanism for the competition authorities to inform each other in order to ensure an efficient and quick re-allocation of cases. Article 11(3) of the Council Regulation lays down an obligation for NCAs to inform the Commission when acting under Article 81 or 82 of the Treaty before or without delay after commencing the first formal investigative measure. It also states that the information may be made available to other NCAs ([8]). The rationale of Article 11(3) of the Council Regulation is to allow the network to detect multiple procedures and address possible case re-allocation issues as soon as an authority starts investigating a case. Information should therefore be provided to NCAs and the Commission before or just after any step similar to the measures of investigation that can be undertaken by the Commission under Articles 18 to 21 of the Council Regulation. The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. Network members will inform each other of pending cases by means of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case. They will also provide each other with updates when a relevant change occurs.

18. Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months, starting from the date of the first information sent to the network pursuant to Article 11 of the Council Regulation. During this period, competition authorities will endeavour to reach an agreement on a possible re-allocation and, where relevant, on the modalities for parallel action.

19. In general, the competition authority or authorities that is/are dealing with a case at the end of the re-allocation period should continue to deal with the case until the completion of the proceedings. Re-allocation of a case after the initial allocation period of two months should only occur where the facts known about the case change materially during the course of the proceedings.

2.2.2. *Suspension or termination of proceedings (Article 13 of the Council Regulation)*

20. If the same agreement or practice is brought before several competition authorities, be it because they have received a complaint or have opened a procedure on their own initiative, Article 13 of the Council Regulation provides a legal basis for suspending proceedings or rejecting a complaint on the grounds that another authority is dealing with the case or has dealt with the case. In Article 13 of the Council Regulation, 'dealing with the case' does not merely mean that a complaint has been lodged with another authority. It means that the other authority is investigating or has investigated the case on its own behalf.

21. Article 13 of the Council Regulation applies when another authority has dealt or is dealing with the competition issue raised by the complainant, even if the authority in question has acted or acts on the basis of a complaint lodged by a different complainant or as a result of an *ex-officio* procedure. This implies that Article 13 of the Council Regulation can be invoked when the agreement or practice involves the same infringement(s) on the same relevant geographic and product markets.

22. An NCA may suspend or close its proceedings but it has no obligation to do so. Article 13 of the Council Regulation leaves scope for appreciation of the peculiarities of each individual case. This flexibility is important: if a complaint was rejected by an authority following an investigation of the substance of the case, another authority may not want to re-examine the case. On the other hand, if a complaint was rejected for other reasons (e.g. the authority was unable to collect the evidence necessary

to prove the infringement), another authority may wish to carry out its own investigation and deal with the case. This flexibility is also reflected, for pending cases, in the choice open to each NCA as to whether it closes or suspends its proceedings. An authority may be unwilling to close a case before the outcome of another authority's proceedings is clear. The ability to suspend its proceedings allows the authority to retain its ability to decide at a later point whether or not to terminate its proceedings. Such flexibility also facilitates consistent application of the rules.

23. Where an authority closes or suspends proceedings because another authority is dealing with the case, it may transfer — in accordance with Article 12 of the Council Regulation — the information provided by the complainant to the authority which is to deal with the case.

24. Article 13 of the Council Regulation can also be applied to part of a complaint or to part of the proceedings in a case. It may be that only part of a complaint or of an ex-officio procedure overlaps with a case already dealt or being dealt with by another competition authority. In that case, the competition authority to which the complaint is brought is entitled to reject part of the complaint on the basis of Article 13 of the Council Regulation and to deal with the rest of the complaint in an appropriate manner. The same principle applies to the termination of proceedings.

25. Article 13 of the Council Regulation is not the only legal basis for suspending or closing ex-officio proceedings or rejecting complaints. NCAs may also be able to do so according to their national procedural law. The Commission may also reject a complaint for lack of Community interest or other reasons pertaining to the nature of the complaint ([9]).

2.2.3. *Exchange and use of confidential information (Article 12 of the Council Regulation)*

26. A key element of the functioning of the network is the power of all the competition authorities to exchange and use information (including documents, statements and digital information) which has been collected by them for the purpose of applying Article 81 or Article 82 of the Treaty. This power is a precondition for efficient and effective allocation and handling of cases.

27. Article 12 of the Council Regulation states that for the purpose of applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. This means that exchanges of information may not only take place between an NCA and the Commission but also between and amongst NCAs. Article 12 of the Council Regulation takes precedence over any contrary law of a Member State. The question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. When transmitting information the transmitting authority may inform the receiving authority whether the gathering of the information was contested or could still be contested.

28. The exchange and use of information contains in particular the following safeguards for undertakings and individuals.

(a) First, Article 28 of the Council Regulation states that 'the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities (. . .) shall not disclose information acquired or exchanged by them pursuant to the' Council Regulation which is 'of the kind covered by the obligation of professional secrecy'. However, the legitimate interest of undertakings in the protection of their business secrets may not prejudice the disclosure of information necessary to prove an infringement of Articles 81 and 82 of the Treaty. The term 'professional secrecy' used in Article 28 of the Council Regulation is a Community law concept and includes in particular business secrets and other confidential information. This will create a common minimum level of protection throughout the Community.

(b) The second safeguard given to undertakings relates to the use of information which has been exchanged within the network. Under Article 12(2) of the Council Regulation, information so exchanged can only be used in evidence for the application of Articles 81 and 82 of the Treaty and for the subject matter for which it was collected ([10]). According to Article 12(2) of the Council Regulation, the information exchanged may also be used for the purpose of applying national competition law in parallel in the same case. This is, however, only possible if the application of national law does not lead to an outcome as regards the finding of an infringement different from that under Articles 81 and 82 of the Treaty.

(c) The third safeguard given by the Council Regulation relates to sanctions on individuals on the basis of information exchanged pursuant to Article 12(1). The Council Regulation only provides for sanctions on undertakings for violations of Articles 81 and 82 of

the Treaty. Some national laws also provide for sanctions on individuals in connection with violations of Articles 81 and 82 of the Treaty. Individuals normally enjoy more extensive rights of defence (e.g. a right to remain silent compared to undertakings which may only refuse to answer questions which would lead them to admit that they have committed an infringement ([11])). Article 12(3) of the Council Regulation ensures that information collected from undertakings cannot be used in a way which would circumvent the higher protection of individuals. This provision precludes sanctions being imposed on individuals on the basis of information exchanged pursuant to the Council Regulation if the laws of the transmitting and the receiving authorities do not provide for sanctions of a similar kind in respect of individuals, unless the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the receiving authority. The qualification of the sanctions by national law ('administrative' or 'criminal') is not relevant for the purpose of applying Article 12(3) of the Council Regulation. The Council Regulation intends to create a distinction between sanctions which result in custody and other types of sanctions such as fines on individuals and other personal sanctions. If both the legal system of the transmitting and that of the receiving authority provide for sanctions of a similar kind (e.g. in both Member States, fines can be imposed on a member of the staff of an undertaking who has been involved in the violation of Article 81 or 82 of the Treaty), information exchanged pursuant to Article 12 of the Council Regulation can be used by the receiving authority. In that case, procedural safeguards in both systems are considered to be equivalent. If on the other hand, both legal systems do not provide for sanctions of a similar kind, the information can only be used if the same level of protection of the rights of the individual has been respected in the case at hand (see Article 12(3) of the Council Regulation). In that latter case however, custodial sanctions can only be imposed where both the transmitting and the receiving authority have the power to impose such a sanction.

2.2.4. *Investigations (Article 22 of the Council Regulation)*

29. The Council Regulation provides that an NCA may ask another NCA for assistance in order to collect information on its behalf. An NCA can ask another NCA to carry out fact-finding measures on its behalf. Article 12 of the Council Regulation empowers the assisting NCA to transmit the information it has collected to the requesting NCA. Any exchange between or amongst NCAs and use in evidence by the requesting NCA of such information shall be carried out in accordance with Article 12 of the Council Regulation. Where an NCA acts on behalf of another NCA, it acts pursuant to its own rules of procedure, and under its own powers of investigation.

30. Under Article 22(2) of the Council Regulation, the Commission can ask an NCA to carry out an inspection on its behalf. The Commission can either adopt a decision pursuant to Article 20(4) of the Council Regulation or simply issue a request to the NCA. The NCA officials will exercise their powers in accordance with their national law. The agents of the Commission may assist the NCA during the inspection.

2.3. **Position of undertakings**

2.3.1. *General*

31. All network members will endeavour to make the allocation of cases a quick and efficient process. Given the fact that the Council Regulation has created a system of parallel competences, the allocation of cases between members of the network constitutes a mere division of labour where some authorities abstain from acting. The allocation of cases therefore does not create individual rights for the companies involved in or affected by an infringement to have the case dealt with by a particular authority.

32. If a case is re-allocated to a given competition authority, it is because the application of the allocation criteria set out above led to the conclusion that this authority is well placed to deal with the case by single or parallel action. The competition authority to which the case is re-allocated would have been in a position, in any event, to commence an *ex-officio* procedure against the infringement.

33. Furthermore, all competition authorities apply Community competition law and the Council Regulation sets out mechanisms to ensure that the rules are applied in a consistent way.

34. If a case is re-allocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved.

2.3.2. *Position of complainants*

35. If a complaint is lodged with the Commission pursuant to Article 7 of the Council Regulation and if the Commission does not investigate the complaint or prohibit the agreement or practice complained of, the complainant has a right to obtain a decision rejecting his complaint. This is without prejudice to Article 7(3) of the Commission implementing regulation ([12]). The rights of complainants who lodge a complaint with an NCA are governed by the applicable national law.

36. In addition, Article 13 of the Council Regulation gives all NCAs the possibility of suspending or rejecting a complaint on the ground that another competition authority is dealing or has dealt with the same case. That provision also allows the Commission to reject a complaint on the ground that a competition authority of a Member State is dealing or has dealt with the case. Article 12 of the Council Regulation allows the transfer of information between competition authorities within the network subject to the safeguards provided in that Article (see paragraph 28 above).

2.3.3. *Position of applicants claiming the benefit of a leniency programme*

37. The Commission considers ([13]) that it is in the Community interest to grant favourable treatment to undertakings which co-operate with it in the investigation of cartel infringements. A number of Member States have also adopted leniency programmes ([14]) relating to cartel investigations. The aim of these leniency programmes is to facilitate the detection by competition authorities of cartel activity and also thereby to act as a deterrent to participation in unlawful cartels.

38. In the absence of a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article 81 of the Treaty in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question ([15]). In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to file leniency applications with the relevant authorities simultaneously. It is for the applicant to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.

39. As for all cases where Articles 81 and 82 of the Treaty are applied, where an NCA deals with a case which has been initiated as a result of a leniency application, it must inform the Commission and may make the information available to other members of the network pursuant to Article 11(3) of the Council Regulation (cf. paragraphs 16 *et subseq.*). The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. In such cases, however, information submitted to the network pursuant to Article 11 will not be used by other members of the network as the basis for starting an investigation on their own behalf whether under the competition rules of the Treaty or, in the case of NCAs, under their national competition law or other laws ([16]). This is without prejudice to any power of the authority to open an investigation on the basis of information received from other sources or, subject to paragraphs 40 and 41 below, to request, be provided with and use information pursuant to Article 12 from any member of the network, including the network member to whom the leniency application was submitted.

40. Save as provided under paragraph 41, information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to another authority pursuant to Article 12 of the Council Regulation if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. The network members will encourage leniency applicants to give such consent, in particular as regards disclosure to authorities in respect of which it would be open to the applicant to obtain lenient treatment. Once the leniency applicant has given consent to the transmission of information to another authority, that consent may not be withdrawn. This paragraph is without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.

41. Notwithstanding the above, the consent of the applicant for the transmission of information to another authority pursuant to Article 12 of the Council Regulation is not required in any of the following circumstances:

1. No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority.

2. No consent is required where the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions:

(a) on the leniency applicant;

(b) on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme;

(c) on any employee or former employee of any of the persons covered by (a) or (b).

A copy of the receiving authority's written commitment will be provided to the applicant.

3. In the case of information collected by a network member under Article 22(1) of the Council Regulation on behalf of and for the account of the network member to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the network member to whom the application was made.

42. Information relating to cases initiated as a result of a leniency application and which has been submitted to the Commission under Article 11(3) of the Council Regulation ([17]) will only be made available to those NCAs that have committed themselves to respecting the principles set out above (see paragraph 72). The same principle applies where a case has been initiated by the Commission as a result of a leniency application made to the Commission. This does not affect the power of any authority to be provided with information under Article 12 of the Council Regulation, provided however that the provisions of paragraphs 40 and 41 are respected.

3. CONSISTENT APPLICATION OF EC COMPETITION RULES ([18])

3.1. Mechanism of cooperation (Article 11(4) and 11(5) of the Council Regulation)

43. The Council Regulation pursues the objective that Articles 81 and 82 of the Treaty are applied in a consistent manner throughout the Community. In this respect NCAs will respect the convergence rule contained in Article 3(2) of the Council Regulation. In line with Article 16(2) they cannot — when ruling on agreements, decisions and practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision — take decisions, which would run counter to the decisions adopted by the Commission. Within the network of competition authorities the Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law.

44. According to Article 11(4) of the Council Regulation, no later than 30 days before the adoption of a decision applying Articles 81 or 82 of the Treaty and requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block-exemption regulation, NCAs shall inform the Commission. They have to send to the Commission, at the latest 30 days before the adoption of the decision, a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action.

45. As under Article 11(3) of the Council Regulation, the obligation is to inform the Commission, but the information may be shared by the NCA informing the Commission with the other members of the network.

46. Where an NCA has informed the Commission pursuant to Article 11(4) of the Council Regulation and the 30 days deadline has expired, the decision can be adopted as long as the Commission has not initiated proceedings. The Commission may make written observations on the case before the adoption of the decision by the NCA. The NCA and the Commission will make the appropriate efforts to ensure the consistent application of Community law (cf. paragraph 3 above).

47. If special circumstances require that a national decision is taken in less than 30 days following the transmission of information pursuant to Article 11(4) of the Council Regulation, the NCA concerned may ask the Commission for a swifter reaction. The Commission will endeavour to react as quickly as possible.

48. Other types of decisions, i.e. decisions rejecting complaints, decisions closing an *ex-officio* procedure or decisions ordering interim measures, can also be important from a competition policy point of view, and the network members may have an interest in informing each other about them and possibly discussing them. NCAs can therefore on the basis of Article 11(5) of the Council Regulation inform the Commission and thereby inform the network of any other case in which EC competition law is applied.

49. All members of the network should inform each other about the closure of their procedures which have been notified to the network pursuant to Article 11(2) and (3) of the Council Regulation ([19]).

3.2. **The initiation of proceedings by the Commission under Article 11(6) of the Council Regulation**

50. According to the case law of the Court of Justice, the Commission, entrusted by Article 85(1) of the Treaty with the task of ensuring the application of the principles laid down in Articles 81 and 82 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy ([20]). It can adopt individual decisions under Articles 81 and 82 of the Treaty at any time.

51. Article 11(6) of the Council Regulation states that the initiation by the Commission of proceedings for the adoption of a decision under the Council Regulation shall relieve all NCAs of their competence to apply Articles 81 and 82 of the Treaty. This means that once the Commission has opened proceedings, NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

52. The initiation of proceedings by the Commission is a formal act ([21]) by which the Commission indicates its intention to adopt a decision under Chapter III of the Council Regulation. It can occur at any stage of the investigation of the case by the Commission. The mere fact that the Commission has received a complaint is not in itself sufficient to relieve NCAs of their competence.

53. Two situations can arise. First, where the Commission is the first competition authority to initiate proceedings in a case for the adoption of a decision under the Council Regulation, national competition authorities may no longer deal with the case. Article 11(6) of the Council Regulation provides that once the Commission has initiated proceedings, the NCAs can no longer start their own procedure with a view to applying Articles 81 and 82 of the Treaty to the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

54. The second situation is where one or more NCAs have informed the network pursuant to Article 11(3) of the Council Regulation that they are acting on a given case. During the initial allocation period (indicative time period of two months, see paragraph 18 above), the Commission can initiate proceedings with the effects of Article 11(6) of the Council Regulation after having consulted the authorities concerned. After the allocation phase, the Commission will in principle only apply Article 11(6) of the Council Regulation if one of the following situations arises:

(a) Network members envisage conflicting decisions in the same case.

(b) Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission;

(c) Network member(s) is (are) unduly drawing out proceedings in the case;

(d) There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement;

(e) The NCA(s) concerned do not object.

55. If an NCA is already acting on a case, the Commission will explain the reasons for the application of Article 11(6) of the Council Regulation in writing to the NCA concerned and to the other members of the Network ([22]).

56. The Commission will announce to the network its intention of applying Article 11(6) of the Council Regulation in due time, so that Network members will have the possibility of asking for a meeting of the Advisory Committee on the matter before the Commission initiates proceedings.

57. The Commission will normally not — and to the extent that Community interest is not at stake — adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of the Council Regulation has taken place and the Commission has not made use of Article 11(6) of the Council Regulation.

4. THE ROLE AND THE FUNCTIONING OF THE ADVISORY COMMITTEE IN THE NEW SYSTEM

58. The Advisory Committee is the forum where experts from the various competition authorities discuss individual cases and general issues of Community competition law ([23]).

4.1. Scope of the consultation

4.1.1. *Decisions of the Commission*

59. The Advisory Committee is consulted prior to the Commission taking any decision pursuant to Articles 7, 8, 9, 10, 23, 24(2) or 29(1) of the Council Regulation. The Commission must take the utmost account of the opinion of the Advisory Committee and inform the Committee of the manner in which its opinion has been taken into account.

60. For decisions adopting interim measures, the Advisory Committee is consulted following a swifter and lighter procedure, on the basis of a short explanatory note and the operative part of the decision.

4.1.2. *Decisions of NCAs*

61. It is in the interest of the network that important cases dealt with by NCAs under Articles 81 and 82 of the Treaty can be discussed in the Advisory Committee. The Council Regulation enables the Commission to put a given case being dealt with by an NCA on the agenda of the Advisory Committee. Discussion can be requested by the Commission or by any Member State. In either case, the Commission will put the case on the agenda after having informed the NCA(s) concerned. This discussion in the Advisory Committee will not lead to a formal opinion.

62. In important cases, the Advisory Committee could also serve as a forum for the discussion of case allocation. In particular, where the Commission intends to apply Article 11(6) of the Council Regulation after the initial allocation period, the case can be discussed in the Advisory Committee before the Commission initiates proceedings. The Advisory Committee may issue an informal statement on the matter.

4.1.3. *Implementing measures, block-exemption regulations, guidelines and other notices (Article 33 of the Council Regulation)*

63. The Advisory Committee will be consulted on draft Commission regulations as provided for in the relevant Council Regulations.

64. Beside regulations, the Commission may also adopt notices and guidelines. These more flexible tools are very useful for explaining and announcing the Commission's policy, and for explaining its interpretation of the competition rules. The Advisory Committee will also be consulted on these notices and guidelines.

4.2. Procedure

4.2.1. *Normal procedure*

65. For consultation on Commission draft decisions, the meeting of the Advisory Committee takes place at the earliest 14 days after the invitation to the meeting is sent by the Commission. The Commission attaches to the invitation a summary of the case, a list of the most important documents, i.e. the documents needed to assess the case, and a draft decision. The Advisory Committee gives an opinion on the Commission draft decision. At the request of one or several members, the opinion shall be reasoned.

66. The Council Regulation allows for the possibility of the Member States agreeing upon a shorter period of time between the sending of the invitation and the meeting.

4.2.2. *Written procedure*

67. The Council Regulation provides for the possibility of a written consultation procedure. If no Member State objects, the Commission can consult the Member States by sending the documents to them and setting a deadline within which they can comment on the draft. This deadline would not normally be shorter than 14 days, except for decisions on interim measures pursuant to Article 8 of the Council Regulation. Where a Member State requests that a meeting takes place, the Commission will arrange for such a meeting.

4.3. Publication of the opinion of the Advisory Committee

68. The Advisory Committee can recommend the publication of its opinion. In that event, the Commission will carry out such publication simultaneously with the decision, taking into account the legitimate interest of undertakings in the protection of their business secrets.

5. FINAL REMARKS

69. This Notice is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Court of First Instance and the Court of Justice.

70. This Notice will be the subject of periodic review carried out jointly by the NCAs and the Commission. On the basis of the experience acquired, it will be reviewed no later than at the end of the third year after its adoption.

71. This notice replaces the Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 81 and 82 of the Treaty published in 1997 ([24]).

6. STATEMENT BY OTHER NETWORK MEMBERS

72. The principles set out in this notice will also be abided by those Member States' competition authorities which have signed a statement in the form of the Annex to this Notice. In this statement they acknowledge the principles of this notice, including the principles relating to the protection of applicants claiming the benefit of a leniency programme ([25]) and declare that they will abide by them. A list of these authorities is published on the website of the European Commission. It will be updated if appropriate.

([1]) OJ L 1, 4.1.2003, p. 1.

([2]) In this notice, the European Commission and the NCAs are collectively referred to as 'the competition authorities'.

([3]) Cf. ECJ case 68/88 — Commission v. Greece [1989] ECR 2965 (recitals 23 to 25)

([4]) See paragraph 8 of the Joint Statement of the Council and the Commission on the functioning of the network available from the Council register at http://register.consilium.eu.int (document No 15435/02 ADD 1).

([5]) In this Notice the term 'procedure' is used for investigations and/or formal proceedings for the adoption of a decision pursuant to the Council Regulation conducted by an NCA or the Commission, as the case may be.

([6]) See Recital 18 of the Council Regulation.

([7]) For cases initiated following a leniency application see paragraphs 37 *et subseq*.

([8]) The intention of making any information exchanged pursuant to Article 11 available and easily accessible to all network members is however expressed in the Joint Statement on the functioning of the network mentioned above in footnote 4.

([9]) See Commission notice on complaints.

([10]) See ECJ case 85/87 — Dow Benelux, [1989] ECR 3137 (recitals 17-20).

([11]) See ECJ case 374/87 — Orkem [1989] ECR 3283 and CFI, case T-112/98 — Mannesmannröhren-Werke AG, [2001] ECR II-729.

([12]) Commission Regulation (EC) No 773/2004, OJ L 123, 27.4.2004.

([13]) OJ C 45, 19.2.2002, p. 3 at paragraph 3.

([14]) In this Notice, the term 'leniency programme' is used to describe all programmes (including the Commission's programme) which offer either full immunity or a significant reduction in the penalties which would otherwise have been imposed on a participant in a cartel, in exchange for the freely volunteered disclosure of information on the cartel which satisfies specific criteria prior to or during the investigative stage of the case. The term does not cover reductions in the penalty granted for other reasons. The Commission will publish on its website a list of those authorities that operate a leniency programme.

([15]) See paragraphs 8 to 15 above.

([16]) Similarly, information transmitted with a view to obtaining assistance from the receiving authority under Articles 20 or 21 of the Council Regulation or of carrying out an investigation or other fact-finding measure under Article 22 of the Council Regulation may only be used for the purpose of the application of the said Articles.

([17]) See paragraph 17.

([18]) Article 15 of the Council Regulation empowers NCAs and the Commission to submit written and, with the permission of the Court, oral submissions in court proceedings for the application of Articles 81 and 82 of the Treaty. This is a very important tool for ensuring consistent application of Community rules. In exercising this power NCAs and the Commission will cooperate closely.

([19]) See paragraph 24 of the Joint Statement on the functioning of the network mentioned above in footnote 4.

([20]) See ECJ case C-344/98 — Masterfoods Ltd, [2000] ECR I-11369.

([21]) The ECJ has defined that concept in the case 48/72 — SA Brasserie de Haecht, [1973] ECR 77: 'the initiation of a procedure within the meaning of Article 9 of Regulation No 17 implies an authoritative act of the Commission, evidencing its intention of taking a decision.'

([22]) See paragraph 22 of the Joint Statement mentioned above in footnote 4.

([23]) In accordance with Article 14(2) of the Council Regulation, where horizontal issues such as block-exemption regulations and guidelines are being discussed, Member States can appoint an additional representative competent in competition matters and who does not necessarily belong to the competition authority.

([24]) OJ C 313, 15.10.1997, p. 3.

([25]) See paragraphs 37 *et subseq*.

ANNEX

STATEMENT REGARDING THE COMMISSION NOTICE ON COOPERATION WITHIN THE NETWORK OF COMPETITION AUTHORITIES

In order to cooperate closely with a view to protecting competition within the European Union in the interest of consumers, the undersigned competition authority:

1. Acknowledges the principles set out in the Commission Notice on Cooperation within the Network of Competition Authorities; and
2. Declares that it will abide by those principles, which include principles relating to the protection of applicants claiming the benefit of a leniency programme, in any case in which it is acting or may act and to which those principles apply.

....

(place) (date)

Commission 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

(2004/C 101/04)

(Text with EEA relevance)

I. THE SCOPE OF THE NOTICE

1. The present notice addresses the co-operation between the Commission and the courts of the EU Member States, when the latter apply Articles 81 and 82 EC. For the purpose of this notice, the 'courts of the EU Member States' (hereinafter 'national courts') are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC and that are authorised to ask a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC ([1]).

2. The national courts may be called upon to apply Articles 81 or 82 EC in lawsuits between private parties, such as actions relating to contracts or actions for damages. They may also act as public enforcer or as review court. A national court may indeed be designated as a competition authority of a Member State (hereinafter 'the national competition authority') pursuant to Article 35(1) of Regulation (EC) No 1/2003 (hereinafter 'the regulation') ([2]). In that case, the co-operation between the national courts and the Commission is not only covered by the present notice, but also by the notice on the co-operation within the network of competition authorities ([3]).

II. THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

A. THE COMPETENCE OF NATIONAL COURTS TO APPLY EC COMPETITION RULES

3. To the extent that national courts have jurisdiction to deal with a case ([4]), they have the power to apply Articles 81 and 82 EC ([5]). Moreover, it should be remembered that Articles 81 and 82 EC are a matter of public policy and are essential to the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market ([6]). According to the Court of Justice, where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules, such as the EC competition rules, are concerned. The position is the same if domestic law confers on national courts a discretion to apply of their own motion binding rules of law: national courts must apply the EC competition rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court. However, Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim ([7]).

4. Depending on the functions attributed to them under national law, national courts may be called upon to apply Articles 81 and 82 EC in administrative, civil or criminal proceedings ([8]). In particular, where a natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 81 and 82 EC, which is different from the enforcement in the public interest by the Commission or by national competition authorities ([9]). Indeed, national courts can give effect to Articles 81 and 82 EC by finding contracts to be void or by awards of damages.

5. National courts can apply Articles 81 and 82 EC, without it being necessary to apply national competition law in parallel. However, where a national court applies national competition law to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States within the meaning of Article 81(1) EC ([10]) or to any abuse prohibited by Article 82 EC, they also have to apply EC competition rules to those agreements, decisions or practices ([11]).

6. The regulation does not only empower the national courts to apply EC competition law. The parallel application of national competition law to agreements, decisions of associations of undertakings and concerted practices which affect trade between Member States may not lead to a different outcome from that of EC competition law. Article 3(2) of the regulation provides that agreements, decisions or concerted practices which do not infringe

Article 81(1) EC or which fulfil the conditions of Article 81(3) EC cannot be prohibited either under national competition law ([12]). On the other hand, the Court of Justice has ruled that agreements, decisions or concerted practices that violate Article 81(1) and do not fulfil the conditions of Article 81(3) EC cannot be upheld under national law ([13]). As to the parallel application of national competition law and Article 82 EC in the case of unilateral conduct, Article 3 of the regulation does not provide for a similar convergence obligation. However, in case of conflicting provisions, the general principle of primacy of Community law requires national courts to disapply any provision of national law which contravenes a Community rule, regardless of whether that national law provision was adopted before or after the Community rule ([14]).

7. Apart from the application of Articles 81 and 82 EC, national courts are also competent to apply acts adopted by EU institutions in accordance with the EC Treaty or in accordance with the measures adopted to give the Treaty effect, to the extent that these acts have direct effect. National courts may thus have to enforce Commission decisions ([15]) or regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices. When applying these EC competition rules, national courts act within the framework of Community law and are consequently bound to observe the general principles of Community law ([16]).

8. The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments ([17]). When applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices ([18]). Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission ([19]). Finally, and without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in Commission regulations and decisions which present elements of analogy with the case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC ([20]) and in the annual report on competition policy ([21]).

B. PROCEDURAL ASPECTS OF THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

9. The procedural conditions for the enforcement of EC competition rules by national courts and the sanctions they can impose in case of an infringement of those rules, are largely covered by national law. However, to some extent, Community law also determines the conditions in which EC competition rules are enforced. Those Community law provisions may provide for the faculty of national courts to avail themselves of certain instruments, e.g. to ask for the Commission's opinion on questions concerning the application of EC competition rules ([22]) or they may create rules that have an obligatory impact on proceedings before them, e.g. allowing the Commission and national competition authorities to submit written observations ([23]). These Community law provisions prevail over national rules. Therefore, national courts have to set aside national rules which, if applied, would conflict with these Community law provisions. Where such Community law provisions are directly applicable, they are a direct source of rights and duties for all those affected, and must be fully and uniformly applied in all the Member States from the date of their entry into force ([24]).

10. In the absence of Community law provisions on procedures and sanctions related to the enforcement of EC competition rules by national courts, the latter apply national procedural law and — to the extent that they are competent to do so — impose sanctions provided for under national law. However, the application of these national provisions must be compatible with the general principles of Community law. In this regard, it is useful to recall the case law of the Court of Justice, according to which:

(a) where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive ([25]);

(b) where the infringement of Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages ([26]);

(c) the rules on procedures and sanctions which national courts apply to enforce Community law

— must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness) ([27]) and they

— must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence) ([28]).

On the basis of the principle of primacy of Community law, a national court may not apply national rules that are incompatible with these principles.

C. PARALLEL OR CONSECUTIVE APPLICATION OF EC COMPETITION RULES BY THE COMMISSION AND BY NATIONAL COURTS

11. A national court may be applying EC competition law to an agreement, decision, concerted practice or unilateral behaviour affecting trade between Member States at the same time as the Commission or subsequent to the Commission ([29]). The following points outline some of the obligations national courts have to respect in those circumstances.

12. Where a national court comes to a decision before the Commission does, it must avoid adopting a decision that would conflict with a decision contemplated by the Commission ([30]). To that effect, the national court may ask the Commission whether it has initiated proceedings regarding the same agreements, decisions or practices ([31]) and if so, about the progress of proceedings and the likelihood of a decision in that case ([32]). The national court may, for reasons of legal certainty, also consider staying its proceedings until the Commission has reached a decision ([33]). The Commission, for its part, will endeavour to give priority to cases for which it has decided to initiate proceedings within the meaning of Article 2(1) of Commission Regulation (EC) No 773/2004 and that are the subject of national proceedings stayed in this way, in particular when the outcome of a civil dispute depends on them. However, where the national court cannot reasonably doubt the Commission's contemplated decision or where the Commission has already decided on a similar case, the national court may decide on the case pending before it in accordance with that contemplated or earlier decision without it being necessary to ask the Commission for the information mentioned above or to await the Commission's decision.

13. Where the Commission reaches a decision in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission. The binding effect of the Commission's decision is of course without prejudice to the interpretation of Community law by the Court of Justice. Therefore, if the national court doubts the legality of the Commission's decision, it cannot avoid the binding effects of that decision without a ruling to the contrary by the Court of Justice ([34]). Consequently, if a national court intends to take a decision that runs counter to that of the Commission, it must refer a question to the Court of Justice for a preliminary ruling (Article 234 EC). The latter will then decide on the compatibility of the Commission's decision with Community law. However, if the Commission's decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission's decision, the national court should stay its proceedings pending final judgment in the action for annulment by the Community courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted ([35]).

14. When a national court stays proceedings, e.g. awaiting the Commission's decision (situation described in point 12 of this notice) or pending final judgement by the Community courts in an action for annulment or in a preliminary ruling procedure (situation described in point 13), it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties ([36]).

III. THE CO-OPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

15. Other than the co-operation mechanism between the national courts and the Court of Justice under Article 234 EC, the EC Treaty does not explicitly provide for co-operation between the national courts and the Commission. However, in its interpretation of Article 10 EC, which obliges the Member States to facilitate the achievement of the Community's tasks, the Community courts found that this Treaty provision imposes on the European institutions and the Member States mutual duties of loyal co-operation with a view to attaining the objectives of the EC Treaty. Article 10 EC thus implies that the Commission must assist national courts when they apply Community law ([37]). Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks ([38]).

16. It is also appropriate to recall the co-operation between national courts and national authorities, in particular national competition authorities, for the application of Articles 81 and 82 EC. While the co-operation between these national authorities is primarily governed by national rules, Article 15(3) of the regulation provides for the possibility for national competition authorities to submit observations before the national courts of their Member State. Points 31 and 33 to 35 of this notice are *mutatis mutandis* applicable to those submissions.

A. THE COMMISSION AS *AMICUS CURIAE*

17. In order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case. Article 15 of the regulation refers to the most frequent types of such assistance: the transmission of information (points 21 to 26) and the Commission's opinions (points 27 to 30), both at the request of a national court and the possibility for the Commission to submit observations (points 31 to 35). Since the regulation provides for these types of assistance, it cannot be limited by any Member States' rule. However, in the absence of Community procedural rules to this effect and to the extent that they are necessary to facilitate these forms of assistance, Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities the regulation offers ([39]).

18. The national court may send its request for assistance in writing to

European Commission
Directorate General for Competition
B-1049 Brussels
Belgium

or send it electronically to comp-amicus@cec.eu.int

19. It should be recalled that whatever form the co-operation with national courts takes, the Commission will respect the independence of national courts. As a consequence, the assistance offered by the Commission does not bind the national court. The Commission has also to make sure that it respects its duty of professional secrecy and that it safeguards its own functioning and independence ([40]). In fulfilling its duty under Article 10 EC, of assisting national courts in the application of EC competition rules, the Commission is committed to remaining neutral and objective in its assistance. Indeed, the Commission's assistance to national courts is part of its duty to defend the public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court. In case the Commission has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether these contacts took place before or after the national court's request for co-operation.

20. The Commission will publish a summary concerning its co-operation with national courts pursuant to this notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

1. **The Commission's duty to transmit information to national courts**

21. The duty for the Commission to assist national courts in the application of EC competition law is mainly reflected in the obligation for the Commission to transmit information it holds to national courts. A national court may, e.g., ask the Commission for documents in its possession or for information of a procedural nature to enable it to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position. A national court may also ask the Commission when a decision is likely to be taken, so as to be able to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted ([41]).

22. In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested information within one month from the date it receives the request. Where the Commission has to ask the national court for further clarification of its request or where the Commission has to consult those who are directly affected by the transmission of the information, that period starts to run from the moment that it receives the required information.

23. In transmitting information to national courts, the Commission has to uphold the guarantees given to natural and legal persons by Article 287 EC ([42]). Article 287 EC prevents members, officials and other servants of the Commission from disclosing information covered by the obligation of professional secrecy. The information covered by professional secrecy may be both confidential information and business secrets. Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information might seriously harm the latter's interests ([43]).

24. The combined reading of Articles 10 and 287 EC does not lead to an absolute prohibition for the Commission to transmit information which is covered by the obligation of professional secrecy to national courts. The case law of the Community courts confirms that the duty of loyal co-operation requires the Commission to provide the national court with whatever information the latter asks for, even information covered by professional secrecy. However, in offering its co-operation to the national courts, the Commission may not in any circumstances undermine the guarantees laid down in Article 287 EC.

25. Consequently, before transmitting information covered by professional secrecy to a national court, the Commission will remind the court of its obligation under Community law to uphold the rights which Article 287 EC confers on natural and legal persons and it will ask the court whether it can and will guarantee protection of confidential information and business secrets. If the national court cannot offer such guarantee, the Commission shall not transmit the information covered by professional secrecy to the national court ([44]). Only when the national court has offered a guarantee that it will protect the confidential information and business secrets, will the Commission transmit the information requested, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be disclosed.

26. There are further exceptions to the disclosure of information by the Commission to national courts. Particularly, the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it ([45]). Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.

2. **Request for an opinion on questions concerning the application of EC competition rules**

27. When called upon to apply EC competition rules to a case pending before it, a national court may first seek guidance in the case law of the Community courts or in Commission regulations, decisions, notices and guidelines applying Articles 81 and 82 EC ([46]). Where these tools do not offer sufficient guidance, the national court may ask the Commission for its opinion on questions concerning the application of EC competition rules. The national court may ask the Commission for its opinion on economic, factual and legal matters ([47]). The latter is of course without prejudice to the possibility or the obligation for the national court to ask the Court of Justice for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 EC.

28. In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information ([48]). In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.

29. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.

30. In line with what has been said in point 19 of this notice, the Commission will not hear the parties before formulating its opinion to the national court. The latter will have to deal with the Commission's opinion in accordance with the relevant national procedural rules, which have to respect the general principles of Community law.

3. **The Commission's submission of observations to the national court**

31. According to Article 15(3) of the regulation, the national competition authorities and the Commission may submit observations on issues relating to the application of Articles 81 or 82 EC to a national court which is called upon to apply those provisions. The regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court ([49]).

32. The regulation specifies that the Commission will only submit observations when the coherent application of Articles 81 or 82 EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.

33. In order to enable the Commission to submit useful observations, national courts may be asked to transmit or ensure the transmission to the Commission of a copy of all documents that are necessary for the assessment of the case. In line with Article 15(3), second subparagraph, of the regulation, the Commission will only use those documents for the preparation of its observations ([50]).

34. Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.

35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles 81 or 82 EC

(a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;

(b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness) ([51]); and

(c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).

B. THE NATIONAL COURTS FACILITATING THE ROLE OF THE COMMISSION IN THE ENFORCEMENT OF EC COMPETITION RULES

36. Since the duty of loyal co-operation also implies that Member States' authorities assist the European institutions with a view to attaining the objectives of the EC Treaty ([52]), the regulation provides for three examples of such assistance: (1) the transmission of documents necessary for the assessment of a case in which the Commission would like to submit observations (see point 33), (2) the transmission of judgements applying Articles 81 or 82 EC); and (3) the role of national courts in the context of a Commission inspection.

1. **The transmission of judgements of national courts applying Articles 81 or 82 EC**

37. According to Article 15(2) of the regulation, Member States shall send to the Commission a copy of any written judgement of national courts applying Articles 81 or 82 EC without delay after the full written judgement is notified to the parties. The transmission of national judgements on the application of Articles 81 or 82 EC and the resulting information on proceedings before national courts primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgement.

2. **The role of national courts in the context of a Commission inspection**

38. Finally, national courts may play a role in the context of a Commission inspection of undertakings and associations of undertakings. The role of the national courts depends on whether the inspections are conducted in business premises or in non-business premises.

39. With regard to the inspection of business premises, national legislation may require authorisation from a national court to allow a national enforcement authority to assist the Commission in case of opposition of the undertaking concerned. Such authorisation may also be sought as a precautionary measure. When dealing with the request, the national court has the power to control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national court may ask the Commission, directly or through the national competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 EC, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned ([53]).

40. With regard to the inspection of non-business premises, the regulation requires the authorisation from a national court before a Commission decision ordering such an inspection can be executed. In that case, the national court may control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national court may ask the Commission, directly or through the national competition authority, for detailed explanations on those elements that are necessary to allow its control of the proportionality of the coercive measures envisaged ([54]).

41. In both cases referred to in points 39 and 40, the national court may not call into question the lawfulness of the Commission's decision or the necessity for the inspection nor can it demand that it be provided with information in the Commission's file ([55]). Furthermore, the duty of loyal co-operation requires the national court to take its decision within an appropriate timeframe that allows the Commission to effectively conduct its inspection ([56]).

IV. **FINAL PROVISIONS**

42. This notice is issued in order to assist national courts in the application of Articles 81 and 82 EC. It does not bind the national courts, nor does it affect the rights and obligations of the EU Member States and natural or legal persons under Community law.

43. This notice replaces the 1993 notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty ([57]).

([1]) For the criteria to determine which entities can be regarded as courts or tribunals within the meaning of Article 234 EC, see e.g. case C-516/99 Schmid [2002] ECR I-4573, 34: 'The Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'.

([2]) 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, p. 1).

([3]) Notice on the co-operation within the network of competition authorities (OJ C 101, 27.4.2004, p. 43). For the purpose of this notice, a 'national competition authority' is the authority designated by a Member State in accordance with Article 35(1) of the regulation.

([4]) The jurisdiction of a national court depends on national, European and international rules of jurisdiction. In this context, it may be recalled that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJ L 12, 16.1.2001, p. 1) is applicable to all competition cases of a civil or commercial nature.

([5]) See Article 6 of the regulation.

([6]) See Articles 2 and 3 EC, case C-126/97 Eco Swiss [1999] ECR I-3055, 36; case T-34/92 Fiatagri UK and New Holland Ford [1994] ECR II-905, 39 and case T-128/98 Aéroports de Paris [2000] ECR II-3929, 241.

([7]) Joined cases C-430/93 and C-431/93 van Schijndel [1995] ECR I-4705, 13 to 15 and 22.

([8]) According to the last sentence of recital 8 of Regulation (EC) No 1/2003, the regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

([9]) Case T-24/90 Automec [1992] ECR II-2223, 85.

([10]) For further clarification of the effect on trade concept, see the notice on this issue (OJ L 101, 27.4.2004, p. 81).

([11]) Article 3(1) of the regulation.

([12]) See also the notice on the application of Article 81(3) EC (OJ L 101, 27.4.2004, p. 2).

([13]) Case 14/68 Walt Wilhelm [1969] ECR 1 and joined cases 253/78 and 1 to 3/79 Giry and Guerlain [1980] ECR 2327, 15 to 17.

([14]) Case 106/77 Simmenthal [1978] ECR 629, 21 and case C-198/01, Consorzio Industrie Fiammiferi (CIF) [2003] 49.

([15]) E.g. a national court may be asked to enforce a Commission decision taken pursuant to Articles 7 to 10, 23 and 24 of the regulation.

([16]) See e.g. case 5/88 Wachauf [1989] ECR 2609, 19.

([17]) Joined cases C-215/96 and C-216/96 Bagnasco [1999] ECR I-135, 50.

([18]) Case 63/75 Fonderies Roubaix [1976] ECR 111, 9 to 11 and case C-234/89 Delimitis [1991] ECR I-935, 46.

([19]) On the parallel or consecutive application of EC competition rules by national courts and the Commission, see also points 11 to 14.

([20]) Case 66/86 Ahmed Saeed Flugreisen [1989] ECR 803, 27 and case C-234/89 Delimitis [1991] ECR I-935, 50. A list of Commission guidelines, notices and regulations in the field of competition policy, in particular the regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices, are annexed to this notice. For the decisions of the Commission applying Articles 81 and 82 EC (since 1964), see http://www.europa.eu.int/comm/competition/antitrust/cases/.

([21]) Joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 32.

([22]) On the possibility for national courts to ask the Commission for an opinion, see further in points 27 to 30.

([23]) On the submission of observations, see further in points 31 to 35.

([24]) Case 106/77 Simmenthal [1978] ECR 629, 14 and 15.

([25]) Case 68/88 Commission v Greece [1989] ECR 2965, 23 to 25.

([26]) On damages in case of an infringement by an undertaking, see case C-453/99 Courage and Crehan [2001] ECR 6297, 26 and 27. On damages in case of an infringement by a Member State or by an authority which is an emanation of the State and on the conditions of such state liability, see e.g. joined cases C-6/90 and C-9/90 Francovich [1991] ECR I-5357, 33 to 36; case C-271/91 Marshall v Southampton and South West Hampshire Area Health Authority [1993] ECR I-4367, 30 and 34 to 35; joined cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029; case C-392/93 British Telecommunications [1996] ECR I-1631, 39 to 46 and joined cases C-178/94, C-179/94 and C-188/94 to 190/94 Dillenkofer [1996] ECR I-4845, 22 to 26 and 72.

([27]) See e.g. case 33/76 Rewe [1976] ECR 1989, 5; case 45/76 Comet [1976] ECR 2043, 12 and case 79/83 Harz [1984] ECR 1921, 18 and 23.

([28]) See e.g. case 33/76 Rewe [1976] ECR 1989, 5; case 158/80 Rewe [1981] ECR 1805, 44; case 199/82 San Giorgio [1983] ECR 3595, 12 and case C-231/96 Edis [1998] ECR I-4951, 36 and 37.

([29]) Article 11(6), juncto Article 35(3) and (4) of the regulation prevents a parallel application of Articles 81 or 82 EC by the Commission and a national court only when the latter has been designated as a national competition authority.

([30]) Article 16(1) of the regulation.

([31]) The Commission makes the initiation of its proceedings with a view to adopting a decision pursuant to Article 7 to 10 of the regulation public (see Article 2(2) of Commission Regulation (EC) No 773/2004 of 7 April relating to proceedings pursuant to Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004). According to the Court of Justice, the initiation of proceedings implies an authoritative act of the Commission, evidencing its intention of taking a decision (case 48/72 Brasserie de Haecht [1973] ECR 77, 16).

([32]) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34. See further on this issue point 21 of this notice.

([33]) See Article 16(1) of the regulation and case C-234/89 Delimitis [1991] ECR I-935, 47 and case C-344/98 Masterfoods [2000] ECR I-11369, 51.

([34]) Case 314/85 Foto-Frost [1987] ECR 4199, 12 to 20.

([35]) See Article 16(1) of the regulation and case C-344/98 Masterfoods [2000] ECR I-11369, 52 to 59.

([36]) Case C-344/98 Masterfoods [2000] ECR, I-11369, 58.

([37]) Case C-2/88 Imm Zwartveld [1990] ECR I-3365, 16 to 22 and case C-234/89 Delimitis [1991] I-935, 53.

([38]) C-94/00 Roquette Frères [2002] ECR 9011, 31.

([39]) On the compatibility of such national procedural rules with the general principles of Community law, see points 9 and 10 of this notice.

([40]) On these duties, see e.g. points 23 to 26 of this notice.

([41]) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34.

([42]) Case C-234/89 Delimitis [1991] I-935, 53.

([43]) Case T-353/94 Postbank [1996] ECR II-921, 86 and 87 and case 145/83 Adams [1985] ECR 3539, 34.

([44]) Case C-2/88 Zwartveld [1990] ECR I-4405, 10 and 11 and case T-353/94 Postbank [1996] ECR II-921, 93.

([45]) Case C-2/88 Zwartveld [1990] ECR I-4405, 10 and 11; case C-275/00 First and Franex [2002] ECR I-10943, 49 and case T-353/94 Postbank [1996] ECR II-921, 93.

([46]) See point 8 of this notice.

([47]) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34.

([48]) Compare with case 96/81 Commission v the Netherlands [1982] ECR 1791, 7 and case 272/86 Commission v Greece [1988] ECR 4875, 30.

([49]) According to Article 15(4) of the regulation, this is without prejudice to wider powers to make observations before courts conferred on national competition authorities under national law.

([50]) See also Article 28(2) of the regulation, which prevents the Commission from disclosing the information it has acquired and which is covered by the obligation of professional secrecy.

([51]) Joined cases 46/87 and 227/88 Hoechst [1989] ECR, 2859, 33. See also Article 15(3) of the regulation.

([52]) Case C-69/90 Commission v Italy [1991] ECR 6011, 15.

([53]) Article 20(6) to (8) of the regulation and case C-94/00 Roquette Frères [2002] ECR 9011.

([54]) Article 21(3) of the regulation.

([55]) Case C-94/00 Roquette Frères [2002] ECR 9011, 39 and 62 to 66.

([56]) See also ibidem, 91 and 92.

([57]) OJ C 39, 13.2.93, p. 6.

ANNEX

COMMISSION BLOCK EXEMPTION REGULATIONS, NOTICES AND GUIDELINES

This list is also available and updated on the website of the Directorate General for Competition of the European Commission:

http://europa.eu.int/comm/competition/antitrust/legislation/

A. **Non-sector specific rules**

1. *Notices of a general nature*

— Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5)

— Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C 368, 22.12.2001, p. 13)

— Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81)

— Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 2)

2. *Vertical agreements*

— Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21)

— Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1)

3. *Horizontal co-operation agreements*

— Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3)

— Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000, p. 7)

— Guidelines on the applicability of Article 81 to horizontal co-operation agreements (OJ C 3, 6.1.2001, p. 2)

4. *Licensing agreements for the transfer of technology*

— Regulation (EC) No 773/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004)

— Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ C 101, 27.4.2004, p. 2)

B. **Sector specific rules**

1. *Insurance*

— Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 53, 28.2.2003, p. 8)

2. *Motor vehicles*

— Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30)

3. *Telecommunications and postal services*

— Guidelines on the application of EEC competition rules in the telecommunications sector (OJ C 233, 6.9.1991, p. 2)

— Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ C 39, 6.2.1998, p. 2)

— Notice on the application of the competition rules to access agreements in the telecommunications sector — Framework, relevant markets and principles (OJ C 265, 22.8.1998, p. 2)

— Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ C 165, 11.7.2002, p. 6)

4. *Transport*

— Regulation (EEC) No 1617/93 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and co-ordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports (OJ L 155, 26.6.1993, p. 18)

— Communication on clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects (OJ C 298, 30.9.1997, p. 5)

— Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24)

COMMISSION NOTICE

on the definition of relevant market for the purposes of Community competition law

(97/C 372/03)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement [1]. Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.

2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved [2] face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.

4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.

5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.

6. The Commission's interpretation of 'relevant market' is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II. DEFINITION OF RELEVANT MARKET

Definition of relevant product market and relevant geographic market

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows:

[1] The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of State aid cases.

[2] For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration; in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainants; for investigations within the meaning of Article 85, the parties to the Agreement.

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

8. 'Relevant geographic markets' are defined as follows:

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

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 an 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.

Concept of relevant market and objectives of Community competition policy

10. The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community's merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community's competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers ([3]). Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.

([3]) Definition given by the Court of Justice in its judgment of 13 February 1979 in Case 85/76, Hoffmann-La Roche [1979] ECR 461, and confirmed in subsequent judgments.

11. The same approach is followed by the Commission in its application of Article 86 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No 17, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market. Markets may also need to be defined in the application of Article 85 of the Treaty, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 85 (3) (b) for an exemption from the application of Article 85 (1) is met.

12. The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.

Basic principles for market definition

Competitive constraints

13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

14. The competitive constraints arising from supply side substitutability other then those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

Demand substitution

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentraiton of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 and 58.

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

19. Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.

Supply substitution

20. Supply-side substitutability may also be taken into account when defining markets in those situaitons in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term (4) without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

21. These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped

(4) That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).

into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

22. A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paer is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market galue and volume.

23. When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.

Potential competition

24. The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. it is often the case that the inclusion of product B would be enough to remove any competition concerns.

27. In such situations it is not necessary to consider whether the market includes additional products, or to reach a definitive conclusion on the precise product market. If under the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information.

Geographic dimension

28. The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

29. The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

31. The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

Market integration in the Community

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artifically isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures.

The process of gathering evidence

33. When a precise market definition is deemed necessary, the Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boudaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact the relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question. It might also request additional information to the undertakings involved.

34. Where appropriate, the Commission will address written requests for information to the market players mentioned above. These requests will usually include questions relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market. They will also ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market. The Commission might also discuss with marketing directors or other officers of those companies to gain a better understanding on how negotiations between suppliers and customers take place and better understand issues relating to the definition of the relevant market. Where appropriate, they might also carry out visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold.

35. The type of evidence relevant to reach a conclusion as to the product market can be categorized as follows:

Evidence to define markets — product dimension

36. An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes. However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determinded by other considerations as well. For example, there may be different competitive contraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.

37. The type of evidence the Commission considers relevant to assess whether two products are demand substitutes can be categorized as follows:

38. *Evidence of substitution in the recent past.* In certain cases, it is possible to analyse evidence relating to recent past events or shocks in the market that offer actual examples of substituion between two products. When available, this sort of information will normally be fundamental for market definition. If there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability. Launches of new products in the past can also offer useful information, when it is possible to precisely analyse which products have lost sales to the new product.

39. There are a number of *quantitative tests* that have specifically been designed for the purpose of delineating markets. These tests consist of various econometric and statistical approaches estimates of elasticities and cross-price elasticities (5) for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

40. *Views of customers and competitors.* The Commission often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it

(5) Own-price elasticity of demand for product X is a measure of the responsiveness of demand for X to percentage change in its own price. Cross-prise elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.

requires to reach a conclusion on the scope of the market. Reasoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5 % to 10 %) are taken into account when they are sufficiently backed by factual evidence.

41. *Consumer preferences.* In the case of consumer goods, it may be difficult for the Commission to gather the direct views of end consumers about substitute products. *Marketing studies* that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Commission's delineation of the relevant market. Consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question. The methodology followed in consumer surveys carried out *ad hoc* by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17 will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

42. *Barriers and costs associated with switching demand to potential substitutes.* There are a number of barriers and costs that might prevent the Commission from considering two *prima facie* demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

43. *Different categories of customers and price discrimination.* The extent of the product market might be narrowed in the presence of distinct groups of customers. A distinct group of customers for the relevant product may constitute a narrower, distinct market when such ha group could be subject to price discrimination. This will usually be the case when two conditions are met: (a) it is possible to identify clearly which group an individual customer belongs to at the moment of selling the relevant products to him, and (b) trade among customers or arbitrage by third parties should not be feasible.

Evidence for defining markets — geographic dimension

44. The type of evidence the Commission considers relevant to reach a conclusion as to the geographic market can be categorized as follows:

45. *Past evidence of diversion of orders to other areas.* In certain cases, evidence on changes in prices between different areas and consequent reactions by customers might be available. Generally, the same quantitative tests used for product market definition might as well be used in geographic market definition, bearing in mind that international comparisons of prices might be more complex due to a number of factors such as exchange rate movements, taxation and product differentiation.

46. *Basic demand characteristics.* The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

47. *Views of customers and competitors.* Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. *Current geographic pattern of purchases.* An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

49. *Trade flows/pattern of shipments.* When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

50. *Barriers and switching costs associated to divert orders to companies located in other areas.* The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

51. On the basis of the evidence gathered, the Commission will then define a geographic market that could range from a local dimension to a global one, and there are examples of both local and global markets in past decisions of the Commission.

52. The paragraphs above describe the different factors which might be relevant to define markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a susbset of these factors will be sufficient to reach a conclusion, as shown in the past decisional practice of the Commission.

IV. CALCULATION OF MARKET SHARE

53. The definition of the relevant market in both its product and geograhic dimensions allows the identification the suppliers and the customers/consumers active on that market. On that basis, a total market size and market shares for each supplier can be calculated on the basis of their sales of the relevant products in the relevant area. In practice, the total market size and market shares are often available from market sources, i.e. companies' estimates, studies commissioned from industry consultants and/or trade associations. When this is not the case, or when available estimates are not reliable, the Commission will usually ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares.

54. If sales are usually the reference to calculate market shares, there are nevertheless other indications that, depending on the specific products or industry in question, can offer useful information such as, in particular, capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in the case of sectors such as mining.

55. As a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier.

V. ADDITIONAL CONSIDERATIONS

56. There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed

by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

58. From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well.

Notice on agreements of minor importance which do not fall within the meaning of Article 85 (1) of the Treaty establishing the European Community

(97/C 372/04)

(Text with EEA relevance)

I.

1. The Commission considers it important to facilitate cooperation between undertakings where such cooperation is economically desirable without presenting difficulties from the point of view of competition policy. To this end, it published the notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises [1] listing a number of agreements that by their nature cannot be regarded as being in restraint of competition. Furthermore, in the notice concerning its assessment of certain subcontracting agreements [2] the Commission considered that that type of contract, which offers all undertakings opportunities for development, does not automatically fall within the scope of Article 85 (1). The notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EC Treaty [3] describes in detail the conditions under which the agreements in question do not fall under the prohibition of restrictive agreements. By issuing this notice which replaces the Commission notice of 3 September 1986 [4], the Commission is taking a further step towards defining the scope of Article 85 (1), in order to facilitate cooperation between undertakings.

2. Article 85 (1) prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable. Agreements which are not capable of significantly affecting trade between Member States are not caught by Article 85. They should therefore be examined on the basis, and within the framework, of national legislation alone. This is also the case for

[1] OJ C 75, 29. 7. 1968. p. 3, as corrected in OJ C 84, 28. 8. 1968, p. 14.

[2] OJ C 1, 3. 1. 1979, p. 2.

[3] OJ C 43, 16. 2. 1993, p. 2.

[4] OJ C 231, 12. 9. 1986, p. 2.

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [1]

(2001/C 368/07)

(Text with EEA relevance)

I

1. Article 81(1) prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable.

2. In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 of the EC Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1) [2].

3. Agreements may in addition not fall under Article 81(1) because they are not capable of appreciably affecting trade between Member States. This notice does not deal with this issue. It does not quantify what does not constitute an appreciable effect on trade. It is however acknowledged that agreements between small and medium-sized undertakings, as defined in the Annex to Commission Recommendation 96/280/EC [3], are rarely capable of appreciably affecting trade between Member States. Small and medium-sized undertakings are currently defined in that recommendation as undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million.

4. In cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

5. This notice also applies to decisions by associations of undertakings and to concerted practices.

6. This notice is without prejudice to any interpretation of Article 81 which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1):

   (a) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors) [4]; or

   (b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors).

   In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 % threshold is applicable.

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[1] This notice replaces the notice on agreements of minor importance published in OJ C 372, 9.12.1997.

[2] See, for instance, the judgment of the Court of Justice in Joined Cases C-215/96 and C-216/96 *Bagnasco (Carlos)* v *Banca Popolare di Novara and Casa di Risparmio di Genova e Imperia* (1999) ECR I-135, points 34-35. This notice is also without prejudice to the principles for assessment under Article 81(1) as expressed in the Commission notice 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements', OJ C 3, 6.1.2001, in particular points 17-31 inclusive, and in the Commission notice 'Guidelines on vertical restraints', OJ C 291, 13.10.2000, in particular points 5-20 inclusive.

[3] OJ L 107, 30.4.1996, p. 4. This recommendation will be revised. It is envisaged to increase the annual turnover threshold from EUR 40 million to EUR 50 million and the annual balance-sheet total threshold from EUR 27 million to EUR 43 million.

[4] On what are actual or potential competitors, see the Commission notice 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements', OJ C 3, 6.1.2001, paragraph 9. A firm is treated as an actual competitor if it is either active on the same relevant market or if, in the absence of the agreement, it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability). A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices.

8. Where in a relevant market competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds under point 7 are reduced to 5 %, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5 % are in general not considered to contribute significantly to a cumulative foreclosure effect ([1]). A cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects.

9. The Commission also holds the view that agreements are not restrictive of competition if the market shares do not exceed the thresholds of respectively 10 %, 15 % and 5 % set out in point 7 and 8 during two successive calendar years by more than 2 percentage points.

10. In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the notice on the definition of the relevant market for the purposes of Community competition law ([2]). The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

11. Points 7, 8 and 9 do not apply to agreements containing any of the following hardcore restrictions:

(1) as regards agreements between competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object ([3]):

(a) the fixing of prices when selling the products to third parties;

(b) the limitation of output or sales;

(c) the allocation of markets or customers;

(2) as regards agreements between non-competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except the following restrictions which are not hardcore:

— the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

— the restriction of sales to end users by a buyer operating at the wholesale level of trade,

— the restriction of sales to unauthorised distributors by the members of a selective distribution system, and

— the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;

([1]) See also the Commission notice 'Guidelines on vertical restraints', OJ C 291, 13.10.2000, in particular paragraphs 73, 142, 143 and 189. While in the guidelines on vertical restraints in relation to certain restrictions reference is made not only to the total but also to the tied market share of a particular supplier or buyer, in this notice all market share thresholds refer to total market shares.

([2]) OJ C 372, 9.12.1997, p. 5.

([3]) Without prejudice to situations of joint production with or without joint distribution as defined in Article 5, paragraph 2, of Commission Regulation (EC) No 2658/2000 and Article 5, paragraph 2, of Commission Regulation (EC) No 2659/2000, OJ L 304, 5.12.2000, pp. 3 and 7 respectively.

(e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods;

(3) as regards agreements between competitors as defined in point 7, where the competitors operate, for the purposes of the agreement, at a different level of the production or distribution chain, any of the hardcore restrictions listed in paragraph (1) and (2) above.

12. (1) For the purposes of this notice, the terms 'undertaking', 'party to the agreement', 'distributor', 'supplier' and 'buyer' shall include their respective connected undertakings.

(2) 'Connected undertakings' are:

(a) undertakings in which a party to the agreement, directly or indirectly:

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

— has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

— parties to the agreement or their respective connected undertakings referred to in (a) to (d), or

— one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

(3) For the purposes of paragraph 2(e), the market share held by these jointly held undertakings shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 2(a).

COMMISSION NOTICE

Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty

(2004/C 101/07)

(Text with EEA relevance)

1. INTRODUCTION

1. Articles 81 and 82 of the Treaty are applicable to horizontal and vertical agreements and practices on the part of undertakings which 'may affect trade between Member States'.

2. In their interpretation of Articles 81 and 82, the Community Courts have already substantially clarified the content and scope of the concept of effect on trade between Member States.

3. The present guidelines set out the principles developed by the Community Courts in relation to the interpretation of the effect on trade concept of Articles 81 and 82. They further spell out a rule indicating when agreements are in general unlikely to be capable of appreciably affecting trade between Member States (the non-appreciable affectation of trade rule or NAAT-rule). The guidelines are not intended to be exhaustive. The aim is to set out the methodology for the application of the effect on trade concept and to provide guidance on its application in frequently occurring situations. Although not binding on them, these guidelines also intend to give guidance to the courts and authorities of the Member States in their application of the effect on trade concept contained in Articles 81 and 82.

4. The present guidelines do not address the issue of what constitutes an appreciable restriction of competition under Article 81(1). This issue, which is distinct from the ability of agreements to appreciably affect trade between Member States, is dealt with in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty [1] (the *de minimis* rule). The guidelines are also not intended to provide guidance on the effect on trade concept contained in Article 87(1) of the Treaty on State aid.

5. These guidelines, including the NAAT-rule, are without prejudice to the interpretation of Articles 81 and 82 which may be given by the Court of Justice and the Court of First Instance.

2. THE EFFECT ON TRADE CRITERION

2.1. General principles

6. Article 81(1) provides that 'the following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions of associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'. For the sake of simplicity the terms 'agreements, decisions of associations of undertakings and concerted practices' are collectively referred to as 'agreements'.

7. Article 82 on its part stipulates that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.' In what follows the term 'practices' refers to the conduct of dominant undertakings.

8. The effect on trade criterion also determines the scope of application of Article 3 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2].

9. According to Article 3(1) of that Regulation the competition authorities and courts of the Member States must apply Article 81 to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, when they apply national competition law to such agreements, decisions or concerted practices. Similarly, when the competition authorities and courts of the Member States apply national competition law to any abuse prohibited by Article 82 of the Treaty, they must also apply Article 82 of the Treaty. Article 3(1) thus obliges the competition authorities and courts of the Member States to also apply Articles 81 and 82 when they apply national competition law to agreements and abusive practices which may affect trade between Member States. On the other hand, Article 3(1) does not oblige national competition authorities and courts to apply national competition law when they apply Articles 81 and 82 to agreements, decisions and concerted practices and to abuses which may affect trade between Member States. They may in such cases apply the Community competition rules on a stand alone basis.

10. It follows from Article 3(2) that the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States, however, are not under Regulation 1/2003 precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

11. Finally it should be mentioned that Article 3(3) stipulates that without prejudice to general principles and other provisions of Community law, Article 3(1) and (2) do not apply when the competition authorities and the courts of the Member States apply national merger control laws, nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

12. The effect on trade criterion is an autonomous Community law criterion, which must be assessed separately in each case. It is a jurisdictional criterion, which defines the scope of application of Community competition law ([3]). Community competition law is not applicable to agreements and practices that are not capable of appreciably affecting trade between Member States.

13. The effect on trade criterion confines the scope of application of Articles 81 and 82 to agreements and practices that are capable of having a minimum level of cross-border effects within the Community. In the words of the Court of Justice, the ability of the agreement or practice to affect trade between Member States must be 'appreciable' ([4]).

14. In the case of Article 81 of the Treaty, it is the agreement that must be capable of affecting trade between Member States. It is not required that each individual part of the agreement, including any restriction of competition which may flow from the agreement, is capable of doing so ([5]). If the agreement as a whole is capable of affecting trade between Member States, there is Community law jurisdiction in respect of the entire agreement, including any parts of the agreement that individually do not affect trade between Member States. In cases where the contractual relations between the same parties cover several activities, these activities must, in order to form part of the same agreement, be directly linked and form an integral part of the same overall business arrangement ([6]). If not, each activity constitutes a separate agreement.

15. It is also immaterial whether or not the participation of a particular undertaking in the agreement has an appreciable effect on trade between Member States ([7]). An undertaking cannot escape Community law jurisdiction merely because of the fact that its own contribution to an agreement, which itself is capable of affecting trade between Member States, is insignificant.

16. It is not necessary, for the purposes of establishing Community law jurisdiction, to establish a link between the alleged restriction of competition and the capacity of the agreement to affect trade between Member States. Non-restrictive agreements may also affect trade between Member States. For example, selective distribution agreements based on purely qualitative selection criteria justified by the nature of the products, which are not restrictive of competition within the meaning of Article 81(1), may nevertheless affect trade between Member States. However, the alleged restrictions arising from an agreement may provide a clear indication as to the capacity of the agreement to affect trade between Member States. For instance, a distribution agreement prohibiting exports is by its very nature capable of affecting trade between Member States, although not necessarily to an appreciable extent ([8]).

17. In the case of Article 82 it is the abuse that must affect trade between Member States. This does not imply, however, that each element of the behaviour must be assessed in isolation. Conduct that forms part of an overall strategy pursued by the dominant undertaking must be assessed in terms of its overall impact. Where a dominant undertaking adopts various practices in pursuit of the same aim, for instance practices that aim at eliminating or foreclosing competitors, in order for Article 82 to be applicable to all the practices forming part of this overall strategy, it is sufficient that at least one of these practices is capable of affecting trade between Member States ([9]).

18. It follows from the wording of Articles 81 and 82 and the case law of the Community Courts that in the application of the effect on trade criterion three elements in particular must be addressed:

    (a) The concept of 'trade between Member States',

    (b) The notion of 'may affect', and

    (c) The concept of 'appreciability'.

2.2. **The concept of 'trade between Member States'**

19. The concept of 'trade' is not limited to traditional exchanges of goods and services across borders ([10]). It is a wider concept, covering all cross-border economic activity including establishment ([11]). This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital.

20. According to settled case law the concept of 'trade' also encompasses cases where agreements or practices affect the competitive structure of the market. Agreements and practices that affect the competitive structure inside the Community by eliminating or threatening to eliminate a competitor operating within the Community may be subject to the Community competition rules ([12]). When an undertaking is or risks being eliminated the competitive structure within the Community is affected and so are the economic activities in which the undertaking is engaged.

21. The requirement that there must be an effect on trade 'between Member States' implies that there must be an impact on cross-border economic activity involving at least two Member States. It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State. Articles 81 and 82 may be applicable also in cases involving part of a Member State, provided that the effect on trade is appreciable ([13]).

22. The application of the effect on trade criterion is independent of the definition of relevant geographic markets. Trade between Member States may be affected also in cases where the relevant market is national or sub-national ([14]).

2.3. **The notion 'may affect'**

23. The function of the notion 'may affect' is to define the nature of the required impact on trade between Member States. According to the standard test developed by the Court of Justice, the notion 'may affect' implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States ([15]) ([16]). As mentioned in paragraph 20 above the Court of Justice has in addition developed a test based on whether or not the agreement or practice affects the competitive structure. In cases where the agreement or practice is liable to affect the competitive structure inside the Community, Community law jurisdiction is established.

24. The 'pattern of trade'-test developed by the Court of Justice contains the following main elements, which are dealt with in the following sections:

(a) 'A sufficient degree of probability on the basis of a set of objective factors of law or fact',

(b) An influence on the 'pattern of trade between Member States',

(c) 'A direct or indirect, actual or potential influence' on the pattern of trade.

2.3.1. *A sufficient degree of probability on the basis of a set of objective factors of law or fact*

25. The assessment of effect on trade is based on objective factors. Subjective intent on the part of the undertakings concerned is not required. If, however, there is evidence that undertakings have intended to affect trade between Member States, for example because they have sought to hinder exports to or imports from other Member States, this is a relevant factor to be taken into account.

26. The words 'may affect' and the reference by the Court of Justice to 'a sufficient degree of probability' imply that, in order for Community law jurisdiction to be established, it is not required that the agreement or practice will actually have or has had an effect on trade between Member States. It is sufficient that the agreement or practice is 'capable' of having such an effect ([17]).

27. There is no obligation or need to calculate the actual volume of trade between Member States affected by the agreement or practice. For example, in the case of agreements prohibiting exports to other Member States there is no need to estimate what would have been the level of parallel trade between the Member States concerned, in the absence of the agreement. This interpretation is consistent with the jurisdictional nature of the effect on trade criterion. Community law jurisdiction extends to categories of agreements and practices that are capable of having cross-border effects, irrespective of whether a particular agreement or practice actually has such effects.

28. The assessment under the effect on trade criterion depends on a number of factors that individually may not be decisive ([18]). The relevant factors include the nature of the agreement and practice, the nature of the products covered by the agreement or practice and the position and importance of the undertakings concerned ([19]).

29. The nature of the agreement and practice provides an indication from a qualitative point of view of the ability of the agreement or practice to affect trade between Member States. Some agreements and practices are by their very nature capable of affecting trade between Member States, whereas others require more detailed analysis in this respect. Cross-border cartels are an example of the former, whereas joint ventures confined to the territory of a single Member State are an example of the latter. This aspect is further examined in section 3 below, which deals with various categories of agreements and practices.

30. The nature of the products covered by the agreements or practices also provides an indication of whether trade between Member States is capable of being affected. When by their nature products are easily traded across borders or are important for undertakings that want to enter or expand their activities in other Member States, Community jurisdiction is more readily established than in cases where due to their nature there is limited demand for products offered by suppliers from other Member States or where the products are of limited interest from the point of view of cross-border establishment or the expansion of the economic activity carried out from such place of establishment ([20]). Establishment includes the setting-up by undertakings in one Member State of agencies, branches or subsidiaries in another Member State.

31. The market position of the undertakings concerned and their sales volumes are indicative from a quantitative point of view of the ability of the agreement or practice concerned to affect trade between Member States. This aspect, which forms an integral part of the assessment of appreciability, is addressed in section 2.4 below.

32. In addition to the factors already mentioned, it is necessary to take account of the legal and factual environment in which the agreement or practice operates. The relevant economic and legal context provides insight into the potential for an effect on trade between Member States. If there are absolute barriers to cross-border trade between Member States, which are external to the agreement or practice, trade is only capable of being affected if those barriers are likely to disappear in the foreseeable future. In cases where the barriers are not absolute but merely render cross-border activities more difficult, it is of the utmost importance to ensure that agreements and practices do not further hinder such activities. Agreements and practices that do so are capable of affecting trade between Member States.

2.3.2. *An influence on the 'pattern of trade between Member States'*

33. For Articles 81 and 82 to be applicable there must be an influence on the 'pattern of trade between Member States'.

34. The term 'pattern of trade' is neutral. It is not a condition that trade be restricted or reduced ([21]). Patterns of trade can also be affected when an agreement or practice causes an increase in trade. Indeed, Community law jurisdiction is established if trade between Member States is likely to develop differently with the agreement or practice compared to the way in which it would probably have developed in the absence of the agreement or practice ([22]).

35. This interpretation reflects the fact that the effect on trade criterion is a jurisdictional one, which serves to distinguish those agreements and practices which are capable of having cross-border effects, so as to warrant an examination under the Community competition rules, from those agreements and practices which do not.

2.3.3. *A 'direct or indirect, actual or potential influence' on the pattern of trade*

36. The influence of agreements and practices on patterns of trade between Member States can be 'direct or indirect, actual or potential'.

37. Direct effects on trade between Member States normally occur in relation to the products covered by an agreement or practice. When, for example, producers of a particular product in different Member States agree to share markets, direct effects are produced on trade between Member States on the market for the products in question. Another example of direct effects being produced is when a supplier limits distributor rebates to products sold within the Member State in which the distributors are established. Such practices increase the relative price of products destined for exports, rendering export sales less attractive and less competitive.

38. Indirect effects often occur in relation to products that are related to those covered by an agreement or practice. Indirect effects may, for example, occur where an agreement or practice has an impact on cross-border economic activities of undertakings that use or otherwise rely on the products covered by the agreement or practice ([23]). Such effects can, for instance, arise where the agreement or practice relates to an intermediate product, which is not traded, but

which is used in the supply of a final product, which is traded. The Court of Justice has held that trade between Member States was capable of being affected in the case of an agreement involving the fixing of prices of spirits used in the production of cognac ([24]). Whereas the raw material was not exported, the final product — cognac — was exported. In such cases Community competition law is thus applicable, if trade in the final product is capable of being appreciably affected.

39. Indirect effects on trade between Member States may also occur in relation to the products covered by the agreement or practice. For instance, agreements whereby a manufacturer limits warranties to products sold by distributors within their Member State of establishment create disincentives for consumers from other Member States to buy the products because they would not be able to invoke the warranty ([25]). Export by official distributors and parallel traders is made more difficult because in the eyes of consumers the products are less attractive without the manufacturer's warranty ([26]).

40. Actual effects on trade between Member States are those that are produced by the agreement or practice once it is implemented. An agreement between a supplier and a distributor within the same Member State, for instance one that prohibits exports to other Member States, is likely to produce actual effects on trade between Member States. Without the agreement the distributor would have been free to engage in export sales. It should be recalled, however, that it is not required that actual effects are demonstrated. It is sufficient that the agreement or practice be capable of having such effects.

41. Potential effects are those that may occur in the future with a sufficient degree of probability. In other words, foreseeable market developments must be taken into account ([27]). Even if trade is not capable of being affected at the time the agreement is concluded or the practice is implemented, Articles 81 and 82 remain applicable if the factors which led to that conclusion are likely to change in the foreseeable future. In this respect it is relevant to consider the impact of liberalisation measures adopted by the Community or by the Member State in question and other foreseeable measures aiming at eliminating legal barriers to trade.

42. Moreover, even if at a given point in time market conditions are unfavourable to cross-border trade, for example because prices are similar in the Member States in question, trade may still be capable of being affected if the situation may change as a result of changing market conditions ([28]). What matters is the ability of the agreement or practice to affect trade between Member States and not whether at any given point in time it actually does so.

43. The inclusion of indirect or potential effects in the analysis of effects on trade between Member States does not mean that the analysis can be based on remote or hypothetical effects. The likelihood of a particular agreement to produce indirect or potential effects must be explained by the authority or party claiming that trade between Member States is capable of being appreciably affected. Hypothetical or speculative effects are not sufficient for establishing Community law jurisdiction. For instance, an agreement that raises the price of a product which is not tradable reduces the disposable income of consumers. As consumers have less money to spend they may purchase fewer products imported from other Member States. However, the link between such income effects and trade between Member States is generally in itself too remote to establish Community law jurisdiction.

2.4. **The concept of appreciability**

2.4.1. *General principle*

44. The effect on trade criterion incorporates a quantitative element, limiting Community law jurisdiction to agreements and practices that are capable of having effects of a certain magnitude. Agreements and practices fall outside the scope of application of Articles 81 and 82 when they affect the market only insignificantly having regard to the weak position of the undertakings concerned on the market for the products in question ([29]). Appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market for the products concerned ([30]).

45. The assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned. When by its very nature the agreement or practice is capable of affecting trade between Member States, the appreciability threshold is lower than in the case of agreements and practices that are not by their very nature capable of affecting trade between Member States. The stronger the market position of the undertakings concerned, the more likely it is that an agreement or practice capable of affecting trade between Member States can be held to do so appreciably ([31]).

46. In a number of cases concerning imports and exports the Court of Justice has considered that the appreciability requirement was fulfilled when the sales of the undertakings concerned accounted for about 5 % of the market ([32]). Market share alone, however, has not always been considered the decisive factor. In particular, it is necessary also to take account of the turnover of the undertakings in the products concerned ([33]).

47. Appreciability can thus be measured both in absolute terms (turnover) and in relative terms, comparing the position of the undertaking(s) concerned to that of other players on the market (market share). This focus on the position and importance of the undertakings concerned is consistent with the concept 'may affect', which implies that the assessment is based on the ability of the agreement or practice to affect trade between Member States rather than on the impact on actual flows of goods and services across borders. The market position of the undertakings concerned and their turnover in the products concerned are indicative of the ability of an agreement or practice to affect trade between Member States. These two elements are reflected in the presumptions set out in paragraphs and 53 below.

48. The application of the appreciability test does not necessarily require that relevant markets be defined and market shares calculated ([34]). The sales of an undertaking in absolute terms may be sufficient to support a finding that the impact on trade is appreciable. This is particularly so in the case of agreements and practices that by their very nature are liable to affect trade between Member States, for example because they concern imports or exports or because they cover several Member States. The fact that in such circumstances turnover in the products covered by the agreement may be sufficient for a finding of an appreciable effect on trade between Member States is reflected in the positive presumption set out in paragraph below.

49. Agreements and practices must always be considered in the economic and legal context in which they occur. In the case of vertical agreements it may be necessary to have regard to any cumulative effects of parallel networks of similar agreements ([35]). Even if a single agreement or network of agreements is not capable of appreciably affecting trade between Member States, the effect of parallel networks of agreements, taken as a whole, may be capable of doing so. For that to be the case, however, it is necessary that the individual agreement or network of agreements makes a significant contribution to the overall effect on trade ([36]).

2.4.2. *Quantification of appreciability*

50. It is not possible to establish general quantitative rules covering all categories of agreements indicating when trade between Member States is capable of being appreciably affected. It is possible, however, to indicate when trade is normally not capable of being appreciably affected. Firstly, in its notice on agreements of minor importance which do not appreciably restrict competition in the meaning of Article 81(1) of the Treaty (the *de minimis* rule) ([37]) the Commission has stated that agreements between small and medium-sized undertakings (SMEs) as defined in the Annex to Commission Recommendation 96/280/EC ([38]) are normally not capable of affecting trade between Member States. The reason for this presumption is the fact that the activities of SMEs are normally local or at most regional in nature. However, SMEs may be subject to Community law jurisdiction in particular where they engage in cross-border economic activity. Secondly, the Commission considers it appropriate to set out general principles indicating when trade is normally not capable of being appreciably affected, i.e. a standard defining the absence of an appreciable effect on trade between Member States (the NAAT-rule). When applying Article 81, the Commission will consider this standard as a negative rebuttable presumption applying to all agreements within the meaning of Article 81(1) irrespective of the nature of the restrictions contained in the agreement, including restrictions that have been identified as hardcore restrictions in Commission block exemption regulations and guidelines. In cases where this presumption applies the Commission will normally not institute proceedings either upon application or on its own initiative. Where the undertakings assume in good faith that an agreement is covered by this negative presumption, the Commission will not impose fines.

51. Without prejudice to paragraph below, this negative definition of appreciability does not imply that agreements, which do not fall within the criteria set out below, are automatically capable of appreciably affecting trade between Member States. A case by case analysis is necessary.

52. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:

(a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %, and

(b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned ([39]) in the products covered by the agreement does not exceed 40 million euro. In the case of agreements concerning the joint buying of products the relevant turnover shall be the parties' combined purchases of the products covered by the agreement.

In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro. In the case of licence agreements the relevant turnover shall be the aggregate turnover of the licensees in the products incorporating the licensed technology and the licensor's own turnover in such products. In cases involving agreements concluded between a buyer and several suppliers the relevant turnover shall be the buyer's combined purchases of the products covered by the agreements.

The Commission will apply the same presumption where during two successive calendar years the above turnover threshold is not exceeded by more than 10 % and the above market threshold is not exceeded by more than 2 percentage points. In cases where the agreement concerns an emerging not yet existing market and where as a consequence the parties neither generate relevant turnover nor accumulate any relevant market share, the Commission will not apply this presumption. In such cases appreciability may have to be assessed on the basis of the position of the parties on related product markets or their strength in technologies relating to the agreement.

53. The Commission will also hold the view that where an agreement by its very nature is capable of affecting trade between Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement calculated as indicated in paragraphs 52 and 54 exceeds 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5 % threshold set out in the previous paragraph. However, this presumption does not apply where the agreement covers only part of a Member State (see paragraph 90 below).

54. With regard to the threshold of 40 million euro (cf. paragraph 52 above), the turnover is calculated on the basis of total Community sales excluding tax during the previous financial year by the undertakings concerned, of the products covered by the agreement (the contract products). Sales between entities that form part of the same undertaking are excluded ([40]).

55. In order to apply the market share threshold, it is necessary to determine the relevant market ([41]). This consists of the relevant product market and the relevant geographic market. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

56. In the case of networks of agreements entered into by the same supplier with different distributors, sales made through the entire network are taken into account.

57. Contracts that form part of the same overall business arrangement constitute a single agreement for the purposes of the NAAT-rule ([42]). Undertakings cannot bring themselves inside these thresholds by dividing up an agreement that forms a whole from an economic perspective.

3. THE APPLICATION OF THE ABOVE PRINCIPLES TO COMMON TYPES OF AGREEMENTS AND ABUSES

58. The Commission will apply the negative presumption set out in the preceding section to all agreements, including agreements that by their very nature are capable of affecting trade between Member States as well as agreements that involve trade with undertakings located in third countries (cf. section 3.3 below).

59. Outside the scope of negative presumption, the Commission will take account of qualitative elements relating to the nature of the agreement or practice and the nature of the products that they concern (see paragraphs and above). The relevance of the nature of the agreement is also reflected in the positive presumption set out in paragraph 53 above relating to appreciability in the case of agreements that by their very nature are capable of affecting trade between Member States. With a view to providing additional guidance on the application of the effect on trade concept it is therefore useful to consider various common types of agreements and practices.

60. In the following sections a primary distinction is drawn between agreements and practices that cover several Member States and agreements and practices that are confined to a single Member State or to part of a single Member State. These two main categories are broken down into further subcategories based on the nature of the agreement or practice involved. Agreements and practices involving third countries are also dealt with.

3.1. **Agreements and abuse covering or implemented in several Member States**

61. Agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States. When the relevant turnover exceeds the threshold set out in paragraph above it will therefore in most cases not be necessary to conduct a detailed analysis of whether trade between Member States is capable of being affected. However, in order to provide guidance also in these cases and to illustrate the principles developed in section 2 above, it is useful to explain what are the factors that are normally used to support a finding of Community law jurisdiction.

3.1.1. *Agreements concerning imports and exports*

62. Agreements between undertakings in two or more Member States that concern imports and exports are by their very nature capable of affecting trade between Member States. Such agreements, irrespective of whether they are restrictive of competition or not, have a direct impact on patterns of trade between Member States. In Kerpen & Kerpen, for example, which concerned an agreement between a French producer and a German distributor covering more than 10 % of exports of cement from France to Germany, amounting in total to 350 000 tonnes per year, the Court of Justice held that it was impossible to take the view that such an agreement was not capable of (appreciably) affecting trade between Member States ([43]).

63. This category includes agreements that impose restrictions on imports and exports, including restrictions on active and passive sales and resale by buyers to customers in other Member States ([44]). In these cases there is an inherent link between the alleged restriction of competition and the effect on trade, since the very purpose of the restriction is to prevent flows of goods and services between Member States, which would otherwise be possible. It is immaterial whether the parties to the agreement are located in the same Member State or in different Member States.

3.1.2. *Cartels covering several Member States*

64. Cartel agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between Member States. Cross-border cartels harmonise the conditions of competition and affect the interpenetration of trade by cementing traditional patterns of trade ([45]). When undertakings agree to allocate geographic territories, sales from other areas into the allocated territories are capable of being eliminated or reduced. When undertakings agree to fix prices, they eliminate competition and any resulting price differentials that would entice both competitors and customers to engage in cross-border trade. When undertakings agree on sales quotas traditional patterns of trade are preserved. The undertakings concerned abstain from expanding output and thereby from serving potential customers in other Member States.

65. The effect on trade produced by cross-border cartels is generally also by its very nature appreciable due to the market position of the parties to the cartel. Cartels are normally only formed when the participating undertakings together hold a large share of the market, as this allows them to raise price or reduce output.

3.1.3. *Horizontal cooperation agreements covering several Member States*

66. This section covers various types of horizontal cooperation agreements. Horizontal cooperation agreements may for instance take the form of agreements whereby two or more undertakings cooperate in the performance of a particular economic activity such as production and distribution ([46]). Often such agreements are referred to as joint ventures. However, joint ventures that perform on a lasting basis all the functions of an autonomous economic entity are covered by the Merger Regulation ([47]). At the level of the Community such full function joint ventures are not dealt with under Articles 81 and 82 except in cases where Article 2(4) of the Merger Regulation is applicable ([48]). This section therefore does not deal with full-function joint ventures. In the case of non-full function joint ventures the joint entity does not operate as an autonomous supplier (or buyer) on any market. It merely serves the parents, who themselves operate on the market ([49]).

67. Joint ventures which engage in activities in two or more Member States or which produce an output that is sold by the parents in two or more Member States affect the commercial activities of the parties in those areas of the Community. Such agreements are therefore normally by their very nature capable of affecting trade between Member States compared to the situation without the agreement ([50]). Patterns of trade are affected when undertakings switch their activities to the joint venture or use it for the purpose of establishing a new source of supply in the Community.

68. Trade may also be capable of being affected where a joint venture produces an input for the parent companies, which is subsequently further processed or incorporated into a product by the parent undertakings. This is likely to be the case where the input in question was previously sourced from suppliers in other Member States, where the parents previously produced the input in other Member States or where the final product is traded in more than one Member State.

69. In the assessment of appreciability it is important to take account of the parents' sales of products related to the agreement and not only those of the joint entity created by the agreement, given that the joint venture does not operate as an autonomous entity on any market.

3.1.4. *Vertical agreements implemented in several Member States*

70. Vertical agreements and networks of similar vertical agreements implemented in several Member States are normally capable of affecting trade between Member States if they cause trade to be channelled in a particular way. Networks of selective distribution agreements implemented in two or more Member States for example, channel trade in a particular way because they limit trade to members of the network, thereby affecting patterns of trade compared to the situation without the agreement ([51]).

71. Trade between Member States is also capable of being affected by vertical agreements that have foreclosure effects. This may for instance be the case of agreements whereby distributors in several Member States agree to buy only from a particular supplier or to sell only its products. Such agreements may limit trade between the Member States in which the agreements are implemented, or trade from Member States not covered by the agreements. Foreclosure may result from individual agreements or from networks of agreements. When an agreement or networks of agreements that cover several Member States have foreclosure effects, the ability of the agreement or agreements to affect trade between Member States is normally by its very nature appreciable.

72. Agreements between suppliers and distributors which provide for resale price maintenance (RPM) and which cover two or more Member States are normally also by their very nature capable of affecting trade between Member States ([52]). Such agreements alter the price levels that would have been likely to exist in the absence of the agreements and thereby affect patterns of trade.

3.1.5. *Abuses of dominant positions covering several Member States*

73. In the case of abuse of a dominant position it is useful to distinguish between abuses that raise barriers to entry or eliminate competitors (exclusionary abuses) and abuses whereby the dominant undertaking exploits its economic power for instance by charging excessive or discriminatory prices (exploitative abuses). Both kinds of abuse may be carried out either through agreements, which are equally subject to Article 81(1), or through unilateral conduct, which as far as Community competition law is concerned is subject only to Article 82.

74. In the case of exploitative abuses such as discriminatory rebates, the impact is on downstream trading partners, which either benefit or suffer, altering their competitive position and affecting patterns of trade between Member States.

75. When a dominant undertaking engages in exclusionary conduct in more than one Member State, such abuse is normally by its very nature capable of affecting trade between Member States. Such conduct has a negative impact on competition in an area extending beyond a single Member State, being likely to divert trade from the course it would have followed in the absence of the abuse. For example, patterns of trade are capable of being affected where the dominant undertaking grants loyalty rebates. Customers covered by the exclusionary rebate system are likely to purchase less from competitors of the dominant firm than they would otherwise have done. Exclusionary conduct that aims directly at eliminating a competitor such as predatory pricing is also capable of affecting trade between Member States because of its impact on the competitive market structure inside the Community ([53]). When a dominant firm engages in behaviour with a view to eliminating a competitor operating in more than one Member State, trade is capable of being affected in several ways. First, there is a risk that the affected competitor will cease to be a source of supply inside the Community. Even if the targeted undertaking is not eliminated, its future competitive conduct is likely to be affected, which may also have an impact on trade between Member States. Secondly, the abuse may have an impact on other competitors. Through its abusive behaviour the dominant undertaking can signal to its competitors that it will discipline attempts to engage in real competition. Thirdly, the very fact of eliminating a competitor may be sufficient for trade between Member States to be capable of being affected. This may be the case even where the undertaking that risks being eliminated mainly engages in exports to third countries ([54]). Once the effective competitive market structure inside the Community risks being further impaired, there is Community law jurisdiction.

76. Where a dominant undertaking engages in exploitative or exclusionary abuse in more than one Member State, the capacity of the abuse to affect trade between Member States will normally also by its very nature be appreciable. Given the market position of the dominant undertaking concerned, and the fact that the abuse is implemented in several Member States, the scale of the abuse and its likely impact on patterns of trade is normally such that trade between Member States is capable of being appreciably affected. In the case of an exploitative abuse such as price discrimination, the abuse alters the competitive position of trading partners in several Member States. In the case of exclusionary abuses, including abuses that aim at eliminating a competitor, the economic activity engaged in by competitors in several Member States is affected. The very existence of a dominant position in several Member States implies that competition in a substantial part of the common market is already weakened ([55]). When a dominant undertaking further weakens competition through recourse to abusive conduct, for example by eliminating a competitor, the ability of the abuse to affect trade between Member States is normally appreciable.

3.2. **Agreements and abuses covering a single, or only part of a, Member State**

77. When agreements or abusive practices cover the territory of a single Member State, it may be necessary to proceed with a more detailed inquiry into the ability of the agreements or abusive practices to affect trade between Member States. It should be recalled that for there to be an effect on trade between Member States it is not required that trade is reduced. It is sufficient that an appreciable change is capable of being caused in the pattern of trade between Member States. Nevertheless, in many cases involving a single Member State the nature of the alleged infringement, and in particular, its propensity to foreclose the national market, provides a good indication of the capacity of the agreement or practice to affect trade between Member States. The examples mentioned hereafter are not exhaustive. They merely provide examples of cases where agreements confined to the territory of a single Member State can be considered capable of affecting trade between Member States.

3.2.1. *Cartels covering a single Member State*

78. Horizontal cartels covering the whole of a Member State are normally capable of affecting trade between Member States. The Community Courts have held in a number of cases that agreements extending over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration which the Treaty is designed to bring about ([56]).

79. The capacity of such agreements to partition the internal market follows from the fact that undertakings participating in cartels in only one Member State, normally need to take action to exclude competitors from other Member States ([57]). If they do not, and the product covered by the agreement is tradable ([58]), the cartel risks being undermined by competition from undertakings from other Member States. Such agreements are normally also by their very nature capable of having an appreciable effect on trade between Member States, given the market coverage required for such cartels to be effective.

80. Given the fact that the effect on trade concept encompasses potential effects, it is not decisive whether such action against competitors from other Member States is in fact adopted at any given point in time. If the cartel price is similar to the price prevailing in other Member States, there may be no immediate need for the members of the cartel to take action against competitors from other Member States. What matters is whether or not they are likely to do so, if market conditions change. The likelihood of that depends on the existence or otherwise of natural barriers to trade in the market, including in particular whether or not the product in question is tradable. In a case involving certain retail banking services ([59]) the Court of Justice has, for example, held that trade was not capable of being appreciably affected because the potential for trade in the specific products concerned was very limited and because they were not an important factor in the choice made by undertakings from other Member States regarding whether or not to establish themselves in the Member State in question ([60]).

81. The extent to which the members of a cartel monitor prices and competitors from other Member States can provide an indication of the extent to which the products covered by the cartel are tradable. Monitoring suggests that competition and competitors from other Member States are perceived as a potential threat to the cartel. Moreover, if there is evidence that the members of the cartel have deliberately fixed the price level in the light of the price level prevailing in other Member States (limit pricing), it is an indication that the products in question are tradable and that trade between Member States is capable of being affected.

82. Trade is normally also capable of being affected when the members of a national cartel temper the competitive constraint imposed by competitors from other Member States by inducing them to join the restrictive agreement, or if their exclusion from the agreement places the competitors at a competitive disadvantage ([61]). In such cases the agreement either prevents these competitors from exploiting any competitive advantage that they have, or raises their costs, thereby having a negative impact on their competitiveness and their sales. In both

cases the agreement hampers the operations of competitors from other Member States on the national market in question. The same is true when a cartel agreement confined to a single Member State is concluded between undertakings that resell products imported from other Member States ([62]).

3.2.2. *Horizontal cooperation agreements covering a single Member State*

83. Horizontal cooperation agreements and in particular non-full function joint ventures (cf. paragraph 66 above), which are confined to a single Member State and which do not directly relate to imports and exports, do not belong to the category of agreements that by their very nature are capable of affecting trade between Member States. A careful examination of the capacity of the individual agreement to affect trade between Member States may therefore be required.

84. Horizontal cooperation agreements may, in particular, be capable of affecting trade between Member States where they have foreclosure effects. This may be the case with agreements that establish sector-wide standardisation and certification regimes, which either exclude undertakings from other Member States or which are more easily fulfilled by undertakings from the Member State in question due to the fact that they are based on national rules and traditions. In such circumstances the agreements make it more difficult for undertakings from other Member States to penetrate the national market.

85. Trade may also be affected where a joint venture results in undertakings from other Member States being cut off from an important channel of distribution or source of demand. If, for example, two or more distributors established within the same Member State, and which account for a substantial share of imports of the products in question, establish a purchasing joint venture combining their purchases of that product, the resulting reduction in the number of distribution channels limits the possibility for suppliers from other Member States of gaining access to the national market in question. Trade is therefore capable of being affected ([63]). Trade may also be affected where undertakings which previously imported a particular product form a joint venture which is entrusted with the production of that same product. In this case the agreement causes a change in the patterns of trade between Member States compared to the situation before the agreement.

3.2.3. *Vertical agreements covering a single Member State*

86. Vertical agreements covering the whole of a Member State may, in particular, be capable of affecting patterns of trade between Member States when they make it more difficult for undertakings from other Member States to penetrate the national market in question, either by means of exports or by means of establishment (foreclosure effect). When vertical agreements give rise to such foreclosure effects, they contribute to the partitioning of markets on a national basis, thereby hindering the economic interpenetration which the Treaty is designed to bring about ([64]).

87. Foreclosure may, for example, occur when suppliers impose exclusive purchasing obligations on buyers ([65]). In Delimitis ([66]), which concerned agreements between a brewer and owners of premises where beer was consumed whereby the latter undertook to buy beer exclusively from the brewer, the Court of Justice defined foreclosure as the absence, due to the agreements, of real and concrete possibilities of gaining access to the market. Agreements normally only create significant barriers to entry when they cover a significant proportion of the market. Market share and market coverage can be used as an indicator in this respect. In making the assessment account must be taken not only of the particular agreement or network of agreements in question, but also of other parallel networks of agreements having similar effects ([67]).

88. Vertical agreements which cover the whole of a Member State and which relate to tradable products may also be capable of affecting trade between Member States, even if they do not create direct obstacles to trade. Agreements whereby undertakings engage in resale price maintenance (RPM) may have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member State in question ([68]). Agreements involving RPM may also affect patterns of trade in much the same way as horizontal cartels. To the extent that the price resulting from RPM is higher than that prevailing in other Member States this price level is only sustainable if imports from other Member States can be controlled.

3.2.4. *Agreements covering only part of a Member State*

89. In qualitative terms the assessment of agreements covering only part of a Member State is approached in the same way as in the case of agreements covering the whole of a Member State. This means that the analysis in section 2 applies. In the assessment of appreciability, however, the two categories must be distinguished, as it must be taken into account that only part of a Member State is covered by the agreement. It must also be taken into account what proportion of the national territory is susceptible to trade. If, for example, transport costs or the operating radius of equipment render it economically unviable for undertakings from other Member States to serve the entire territory of another Member State, trade is capable of being affected if the agreement forecloses access to the part of the territory of a Member State that is susceptible to trade, provided that this part is not insignificant ([69]).

90. Where an agreement forecloses access to a regional market, then for trade to be appreciably affected, the volume of sales affected must be significant in proportion to the overall volume of sales of the products concerned inside the Member State in question. This assessment cannot be based merely on geographic coverage. The market share of the parties to the agreement must also be given fairly limited weight. Even if the parties have a high market share in a properly defined regional market, the size of that market in terms of volume may still be insignificant when compared to total sales of the products concerned within the Member State in question. In general, the best indicator of the capacity of the agreement to (appreciably) affect trade between Member States is therefore considered to be the share of the national market in terms of volume that is being foreclosed. Agreements covering areas with a high concentration of demand will thus weigh more heavily than those covering areas where demand is less concentrated. For Community jurisdiction to be established the share of the national market that is being foreclosed must be significant.

91. Agreements that are local in nature are in themselves not capable of appreciably affecting trade between Member States. This is the case even if the local market is located in a border region. Conversely, if the foreclosed share of the national market is significant, trade is capable of being affected even where the market in question is not located in a border region.

92. In cases in this category some guidance may be derived from the case law concerning the concept in Article 82 of a substantial part of the common market ([70]). Agreements that, for example, have the effect of hindering competitors from other Member States from gaining access to part of a Member State, which constitutes a substantial part of the common market, should be considered to have an appreciable effect on trade between Member States.

3.2.5. *Abuses of dominant positions covering a single Member State*

93. Where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected. Such abusive conduct will generally make it more difficult for competitors from other Member States to penetrate the market, in which case patterns of trade are capable of being affected ([71]). In Michelin ([72]), for example, the Court of Justice held that a system of loyalty rebates foreclosed competitors from other Member States and therefore affected trade within the meaning of Article 82. In Rennet ([73]) the Court similarly held that an abuse in the form of an exclusive purchasing obligation on customers foreclosed products from other Member States.

94. Exclusionary abuses that affect the competitive market structure inside a Member State, for instance by eliminating or threatening to eliminate a competitor, may also be capable of affecting trade between Member States. Where the undertaking that risks being eliminated only operates in a single Member State, the abuse will normally not affect trade between Member States. However, trade between Member States is capable of being affected where the targeted undertaking exports to or imports from other Member States ([74]) and where it also operates in other Member States ([75]). An effect on trade may arise from the dissuasive impact of the abuse on other competitors. If through repeated conduct the dominant undertaking has acquired a reputation for adopting exclusionary practices towards competitors that attempt to engage in direct competition, competitors from other Member States are likely to compete less aggressively, in which case trade may be affected, even if the victim in the case at hand is not from another Member State.

95. In the case of exploitative abuses such as price discrimination and excessive pricing, the situation may be more complex. Price discrimination between domestic customers will normally not affect trade between Member States. However, it may do so if the buyers are engaged in export activities and are disadvantaged by the discriminatory pricing or if this practice is used to prevent imports ([76]). Practices consisting of offering lower prices to customers that are the most likely to import products from other Member States may make it more difficult for competitors from other Member States to enter the market. In such cases trade between Member States is capable of being affected.

96. As long as an undertaking has a dominant position which covers the whole of a Member State it is normally immaterial whether the specific abuse engaged in by the dominant undertaking only covers part of its territory or affects certain buyers within the national territory. A dominant firm can significantly impede trade by engaging in abusive conduct in the areas or vis-à-vis the customers that are the most likely to be targeted by competitors from other Member States. For example, it may be the case that a particular channel of distribution constitutes a particularly important means of gaining access to broad categories of consumers. Hindering access to such channels can have a substantial impact on trade between Member States. In the assessment of appreciability it must also be taken into account that the very presence of the dominant undertaking covering the whole of a Member State is likely to make market penetration more difficult. Any abuse which makes it more difficult to enter the national market should therefore be considered to appreciably affect trade. The combination of the market position of the dominant undertaking and the anti-competitive nature of its conduct implies that such abuses have normally by their very nature an appreciable effect on trade. However, if the abuse is purely local in nature or

involves only an insignificant share of the sales of the dominant undertaking within the Member State in question, trade may not be capable of being appreciably affected.

3.2.6. *Abuse of a dominant position covering only part of a Member State*

97. Where a dominant position covers only part of a Member State some guidance may, as in the case of agreements, be derived from the condition in Article 82 that the dominant position must cover a substantial part of the common market. If the dominant position covers part of a Member State that constitutes a substantial part of the common market and the abuse makes it more difficult for competitors from other Member States to gain access to the market where the undertaking is dominant, trade between Member States must normally be considered capable of being appreciably affected.

98. In the application of this criterion regard must be had in particular to the size of the market in question in terms of volume. Regions and even a port or an airport situated in a Member State may, depending on their importance, constitute a substantial part of the common market ([77]). In the latter cases it must be taken into account whether the infrastructure in question is used to provide cross-border services and, if so, to what extent. When infrastructures such as airports and ports are important in providing cross-border services, trade between Member States is capable of being affected.

99. As in the case of dominant positions covering the whole of a Member State (cf. paragraph 95 above), trade may not be capable of being appreciably affected if the abuse is purely local in nature or involves only an insignificant share of the sales of the dominant undertaking.

3.3. **Agreements and abuses involving imports and exports with undertakings located in third countries, and agreements and practices involving undertakings located in third countries**

3.3.1. *General remarks*

100. Articles 81 and 82 apply to agreements and practices that are capable of affecting trade between Member States even if one or more of the parties are located outside the Community ([78]). Articles 81 and 82 apply irrespective of where the undertakings are located or where the agreement has been concluded, provided that the agreement or practice is either implemented inside the Community ([79]), or produce effects inside the Community ([80]). Articles 81 and 82 may also apply to agreements and practices that cover third countries, provided that they are capable of affecting trade between Member States. The general principle set out in section 2 above according to which the agreement or practice must be capable of having an appreciable influence, direct or indirect, actual or potential, on the pattern of trade between Member States, also applies in the case of agreements and abuses which involve undertakings located in third countries or which relate to imports or exports with third countries.

101. For the purposes of establishing Community law jurisdiction it is sufficient that an agreement or practice involving third countries or undertakings located in third countries is capable of affecting cross-border economic activity inside the Community. Import into one Member State may be sufficient to trigger effects of this nature. Imports can affect the conditions of competition in the importing Member State, which in turn can have an impact on exports and imports of competing products to and from other Member States. In other words, imports from third countries resulting from the agreement or practice may cause a diversion of trade between Member States, thus affecting patterns of trade.

102. In the application of the effect on trade criterion to the above mentioned agreements and practices it is relevant to examine, inter alia, what is the object of the agreement or practice as indicated by its content or the underlying intent of the undertakings involved ([81]).

103. Where the object of the agreement is to restrict competition inside the Community the requisite effect on trade between Member States is more readily established than where the object is predominantly to regulate competition outside the Community. Indeed in the former case the agreement or practice has a direct impact on competition inside the Community and trade between Member States. Such agreements and practices, which may concern both imports and exports, are normally by their very nature capable of affecting trade between Member States.

3.3.2. *Arrangements that have as their object the restriction of competition inside the Community*

104. In the case of imports, this category includes agreements that bring about an isolation of the internal market ([82]). This is, for instance, the case of agreements whereby competitors in the Community and in third countries share markets, e.g. by agreeing not to sell in each other's home markets or by concluding reciprocal (exclusive) distribution agreements ([83]).

105. In the case of exports, this category includes cases where undertakings that compete in two or more Member States agree to export certain (surplus) quantities to third countries with a view to co-ordinating their market conduct inside the Community. Such export agreements serve to reduce price competition by limiting output inside the Community, thereby affecting trade between Member States. Without the export agreement these quantities might have been sold inside the Community ([84]).

3.3.3. *Other arrangements*

106. In the case of agreements and practices whose object is not to restrict competition inside the Community, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the Community, and thus patterns of trade between Member States, are capable of being affected.

107. In this regard it is relevant to examine the effects of the agreement or practice on customers and other operators inside the Community that rely on the products of the undertakings that are parties to the agreement or practice ([85]). In Compagnie maritime belge ([86]), which concerned agreements between shipping companies operating between Community ports and West African ports, the agreements were held to be capable of indirectly affecting trade between Member States because they altered the catchment areas of the Community ports covered by the agreements and because they affected the activities of other undertakings inside those areas. More specifically, the agreements affected the activities of undertakings that relied on the parties for transportation services, either as a means of transporting goods purchased in third countries or sold there, or as an important input into the services that the ports themselves offered.

108. Trade may also be capable of being affected when the agreement prevents re-imports into the Community. This may, for example, be the case with vertical agreements between Community suppliers and third country distributors, imposing restrictions on resale outside an allocated territory, including the Community. If in the absence of the agreement resale to the Community would be possible and likely, such imports may be capable of affecting patterns of trade inside the Community ([87]).

109. However, for such effects to be likely, there must be an appreciable difference between the prices of the products charged in the Community and those charged outside the Community, and this price difference must not be eroded by customs duties and transport costs. In addition, the product volumes exported compared to the total market for those products in the territory of the common market must not be insignificant ([88]). If these product volumes are insignificant compared to those sold inside the Community, the impact of any re-importation on trade between Member States is considered not to be appreciable. In making this assessment, regard must be had not only to the individual agreement concluded between the parties, but also to any cumulative effect of similar agreements concluded by the same and competing suppliers. It may be, for example, that the product volumes covered by a single agreement are quite small, but that the product volumes covered by several such agreements are significant. In that case the agreements taken as a whole may be capable of appreciably affecting trade between Member States. It should be recalled, however (cf. paragraph 49 above), that the individual agreement or network of agreements must make a significant contribution to the overall effect on trade.

([1]) OJ C 368, 22.12.2001, p. 13.

([2]) OJ L 1, 4.1.2003, p. 1.

([3]) See e.g. Joined Cases 56/64 and 58/64, Consten and Grundig, [1966] ECR p. 429, and Joined Cases 6/73 and 7/73, Commercial Solvents, [1974] ECR p. 223.

([4]) See in this respect Case 22/71, Béguelin, [1971] ECR p. 949, paragraph 16.

([5]) See Case 193/83, Windsurfing, [1986] ECR p. 611, paragraph 96, and Case T-77/94, Vereniging van Groothandelaren in Bloemkwekerijprodukten, [1997] ECR II-759, paragraph 126.

([6]) See paragraphs 142 to 144 of the judgment in Vereniging van Groothandelaren in Bloemkwekerijprodukteten cited in the previous footnote.

([7]) See e.g. Case T-2/89, Petrofina, [1991] ECR II-1087, paragraph 226.

([8]) The concept of appreciability is dealt with in section 2.4 below.

([9]) See in this respect Case 85/76, Hoffmann-La Roche, [1979] ECR p. 461, paragraph 126.

([10]) Throughout these guidelines the term 'products' covers both goods and services.

([11]) See Case 172/80, Züchner, [1981] ECR p. 2021, paragraph 18. See also Case C-309/99, Wouters, [2002] ECR I-1577, paragraph 95, Case C-475/99, Ambulanz Glöckner, [2001] ECR I-8089, paragraph 49, Joined Cases C-215/96 and 216/96, Bagnasco, [1999] ECR I-135, paragraph 51, Case C-55/96, Job Centre, [1997] ECR I-7119, paragraph 37, and Case C-41/90, Höfner and Elser, [1991] ECR I-1979, paragraph 33.

([12]) See e.g. Joined Cases T-24/93 and others, Compagnie maritime belge, [1996] ECR II-1201, paragraph 203, and paragraph 23 of the judgment in Commercial Solvents cited in footnote.

([13]) See e.g. Joined Cases T-213/95 and T-18/96, SCK and FNK, [1997] ECR II-1739, and sections 3.2.4 and 3.2.6 below.

([14]) See section 3.2 below.

([15]) See e.g. the judgment in Züchner cited in footnote 11 and Case 319/82, Kerpen & Kerpen, [1983] ECR 4173, Joined Cases 240/82 and others, Stichting Sigarettenindustrie, [1985] ECR 3831, paragraph 48, and Joined Cases T-25/95 and others, Cimenteries CBR, [2000] ECR II-491, paragraph 3930.

(16) In some judgments mainly relating to vertical agreements the Court of Justice has added wording to the effect that the agreement was capable of hindering the attainment of the objectives of a single market between Member States, see e.g. Case T-62/98, Volkswagen, [2000] ECR II-2707, paragraph 179, and paragraph 47 of the Bagnasco judgment cited in footnote 11, and Case 56/65, Société Technique Minière, [1966] ECR 337. The impact of an agreement on the single market objective is thus a factor which can be taken into account.

(17) See e.g. Case T-228/97, Irish Sugar, [1999] ECR II-2969, paragraph 170, and Case 19/77, Miller, [1978] ECR 131, paragraph 15.

(18) See e.g. Case C-250/92, Gøttrup-Klim [1994] ECR II-5641, paragraph 54.

(19) See e.g. Case C-306/96, Javico, [1998] ECR I-1983, paragraph 17, and paragraph 18 of the judgment in Béguelin cited in footnote 4.

(20) Compare in this respect the judgments in Bagnasco and Wouters cited in footnote 11.

(21) See e.g. Case T-141/89, Tréfileurope, [1995] ECR II-791, Case T-29/92, Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO), [1995] ECR II-289, as far as exports were concerned, and Commission Decision in Volkswagen (II) (OJ L 264, 2.10.2001, p. 14).

(22) See in this respect Case 71/74, Frubo, [1975] ECR 563, paragraph 38, Joined Cases 209/78 and others, Van Landewyck, [1980] ECR 3125, paragraph 172, Case T-61/89, Dansk Pelsdyravler Forening, [1992] ECR II-1931, paragraph 143, and Case T-65/89, BPB Industries and British Gypsum, [1993] ECR II-389, paragraph 135.

(23) See in this respect Case T-86/95, Compagnie Générale Maritime and others, [2002] ECR II-1011, paragraph 148, and paragraph 202 of the judgment in Compagnie maritime belge cited in footnote 12.

(24) See Case 123/83, BNIC v Clair, [1985] ECR 391, paragraph 29.

(25) See Commission Decision in Zanussi, OJ L 322, 16.11.1978, p. 36, paragraph 11.

(26) See in this respect Case 31/85, ETA Fabrique d'Ébauches, [1985] ECR 3933, paragraphs 12 and 13.

(27) See Joined Cases C-241/91 P and C-242/91 P, RTE (Magill), [1995] ECR I-743, paragraph 70, and Case 107/82, AEG, [1983] ECR 3151, paragraph 60.

(28) See paragraph 60 of the AEG judgment cited in the previous footnote.

(29) See Case 5/69, Völk, [1969] ECR 295, paragraph 7.

(30) See e.g. paragraph 17 of the judgment in Javico cited in footnote 19, and paragraph 138 of the judgment in BPB Industries and British Gypsum cited in footnote 22.

(31) See paragraph 138 of the judgment in BPB Industries and British Gypsum cited in footnote 22.

(32) See e.g. paragraphs 9 and 10 of the Miller judgment cited in footnote 17, and paragraph 58 of the AEG judgment cited in footnote 27.

(33) See Joined Cases 100/80 and others, Musique Diffusion Française, [1983] ECR 1825, paragraph 86. In that case the products in question accounted for just above 3 % of sales on the national markets concerned. The Court held that the agreements, which hindered parallel trade, were capable of appreciably affecting trade between Member States due to the high turnover of the parties and the relative market position of the products, compared to those of products produced by competing suppliers.

(34) See in this respect paragraphs 179 and 231 of the Volkswagen judgment cited in footnote 16, and Case T-213/00, CMA CGM and others, [2003] ECR I-, paragraphs 219 and 220.

(35) See e.g. Case T-7/93, Langnese-Iglo, [1995] ECR II-1533, paragraph 120.

(36) See paragraphs 140 and 141 of the judgment in Vereniging van Groothandelaren in Bloemkwekerijprodukten cited in footnote 5.

(37) See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13, paragraph 3).

(38) OJ L 107, 30.4.1996, p. 4. With effect from 1.1.2005 this recommendation will be replaced by Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

(39) The term 'undertakings concerned' shall include connected undertakings as defined in paragraph 12.2 of the Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (OJ C 368, 22.12.2001, p. 13).

(40) See the previous footnote.

(41) When defining the relevant market, reference should be made to the notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

(42) See also paragraph 14 above.

(43) See paragraph 8 of the judgment in Kerpen & Kerpen cited in footnote 15. It should be noted that the Court does not refer to market share but to the share of French exports and to the product volumes involved.

(44) See e.g. the judgment in Volkswagen cited in footnote 16 and Case T-175/95, BASF Coatings, [1999] ECR II-1581. For a horizontal agreement to prevent parallel trade see Joined Cases 96/82 and others, IAZ International, [1983] ECR 3369, paragraph 27.

(45) See e.g. Case T-142/89, Usines Gustave Boël, [1995] ECR II-867, paragraph 102.

(46) Horizontal cooperation agreements are dealt with in the Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2). Those guidelines deal with the substantive competition assessment of various types of agreements but do not deal with the effect on trade issue.

(47) See Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

(48) The Commission Notice on the concept of full-function joint ventures under the Merger Regulation (OJ C 66, 2.3.1998, p. 1) gives guidance on the scope of this concept.

([49]) See e.g. the Commission Decision in Ford/Volkswagen (OJ L 20, 28.1.1993, p. 14).

([50]) See in this respect paragraph 146 of the Compagnie Générale Maritime judgment cited in footnote 23 above.

([51]) See in this respect Joined Cases 43/82 and 63/82, VBVB and VBBB, [1984] ECR 19, paragraph 9.

([52]) See in this respect Case T-66/89, Publishers Association, [1992] ECR II-1995.

([53]) See in this respect the judgment in Commercial Solvents cited in footnote 3, in the judgment in Hoffmann-La Roche, cited in footnote, paragraph 125, and in RTE and ITP cited in footnote, as well as Case 6/72, Continental Can, [1973] ECR 215, paragraph 16, and Case 27/76, United Brands, [1978] ECR 207, paragraphs 197 to 203.

([54]) See paragraphs 32 and 33 of the judgment in Commercial Solvents cited in footnote 3.

([55]) According to settled case law dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to act to an appreciable extent independently of its competitors, its customers and ultimately of the consumers, see e.g. paragraph 38 of the judgment in Hoffmann-La Roche cited in footnote 9.

([56]) See for a recent example paragraph 95 of the Wouters judgment cited in footnote 11.

([57]) See e.g. Case 246/86, Belasco, [1989] ECR 2117, paragraph 32-38.

([58]) See paragraph 34 of the Belasco judgment cited in the previous footnote and more recently Joined Cases T-202/98 a.o., British Sugar, [2001] ECR II-2035, paragraph 79. On the other hand this is not so when the market is not susceptible to imports, see paragraph 51 of the Bagnasco judgment cited in footnote 11.

([59]) Guarantees for current account credit facilities.

([60]) See paragraph 51 of the Bagnasco judgment cited in footnote 11.

([61]) See in this respect Case 45/85, Verband der Sachversicherer, [1987] ECR 405, paragraph 50, and Case C-7/95 P, John Deere, [1998] ECR I-3111. See also paragraph 172 of the judgment in Van Landewyck cited in footnote 22, where the Court stressed that the agreement in question reduced appreciably the incentive to sell imported products.

([62]) See e.g. the judgment in Stichting Sigarettenindustrie, cited in footnote 15, paragraphs 49 and 50.

([63]) See in this respect Case T-22/97, Kesko, [1999] ECR II-3775, paragraph 109.

([64]) See e.g. Case T-65/98, Van den Bergh Foods, [2003] ECR II-. . ., and the judgment in Langnese-Iglo, cited in footnote 35 paragraph 120.

([65]) See e.g. judgment of 7.12.2000, Case C-214/99, Neste, ECR I-11121.

([66]) See judgment of 28.2.1991, Case C-234/89, Delimitis, ECR I-935.

([67]) See paragraph 120 of the Langnese-Iglo judgment cited in footnote 35.

([68]) See e.g. Commission Decision in Volkswagen (II), cited in footnote 21, paragraphs 81 *et seq*.

([69]) See in this respect paragraphs 177 to 181 of the judgment in SCK and FNK cited in footnote 13.

([70]) See as to this notion the judgment in Ambulanz Glöckner, cited in footnote 11, paragraph 38, and Case C-179/90, Merci convenzionali porto di Genova, [1991] ECR I-5889, and Case C-242/95, GT-Link, [1997] ECR I-4449.

([71]) See e.g. paragraph 135 of the judgment in BPB Industries and British Gypsum cited in footnote.

([72]) See Case 322/81, Nederlandse Banden Industrie Michelin, [1983] ECR 3461

([73]) See Case 61/80, Coöperative Stremsel- en Kleurselfabriek, [1981] ECR 851, paragraph 15.

([74]) See in this respect judgment in Irish Sugar, cited in footnote 17 paragraph 169.

([75]) See paragraph 70 of the judgment in RTE (Magill) cited in footnote 27.

([76]) See the judgment in Irish Sugar cited in footnote 17.

([77]) See e.g. the case law cited in footnote 70.

([78]) See in this respect Case 28/77, Tepea, [1978] ECR 1391, paragraph 48, and paragraph 16 of the judgment in Continental Can cited in footnote 53.

([79]) See Joined Cases C-89/85 and others, Ahlström Osakeyhtiö (Woodpulp), [1988] ECR 651, paragraph 16.

([80]) See in this respect Case T-102/96, Gencor, [1999] ECR II-753, which applies the effects test in the field of mergers.

([81]) See to that effect paragraph 19 of the judgment in Javico cited in footnote 19.

([82]) See in this respect Case 51/75, EMI v CBS, [1976] ECR 811, paragraphs 28 and 29.

([83]) See Commission Decision in Siemens/Fanuc (OJ L 376, 31.12.1985, p. 29).

([84]) See in this respect Joined Cases 29/83 and 30/83, CRAM and Rheinzinc, [1984] ECR 1679, and Joined Cases 40/73 and others, Suiker Unie, [1975] ECR 1663, paragraphs 564 and 580.

([85]) See paragraph 22 of the judgment in Javico cited in footnote 19.

([86]) See paragraph 203 of the judgment in Compagnie maritime belge cited in footnote 12.

([87]) See in this respect the judgment in Javico cited in footnote 19.

([88]) See in this respect paragraphs 24 to 26 of the Javico judgment cited in footnote 19.

COMMUNICATION FROM THE COMMISSION

Notice

Guidelines on the application of Article 81(3) of the Treaty

(2004/C 101/08)

(Text with EEA relevance)

1. INTRODUCTION

1. Article 81(3) of the Treaty sets out an exception rule, which provides a defence to undertakings against a finding of an infringement of Article 81(1) of the Treaty. Agreements, decisions of associations of undertakings and concerted practices ([1]) caught by Article 81(1) which satisfy the conditions of Article 81(3) are valid and enforceable, no prior decision to that effect being required.

2. Article 81(3) can be applied in individual cases or to categories of agreements and concerted practices by way of block exemption regulation. Regulation 1/2003 on the implementation of the competition rules laid down in Articles 81 and 82 ([2]) does not affect the validity and legal nature of block exemption regulations. All existing block exemption regulations remain in force and agreements covered by block exemption regulations are legally valid and enforceable even if they are restrictive of competition within the meaning of Article 81(1) ([3]). Such agreements can only be prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority ([4]). Block exempted agreements cannot be held invalid by national courts in the context of private litigation.

3. The existing guidelines on vertical restraints, horizontal cooperation agreements and technology transfer agreements ([5]) deal with the application of Article 81 to various types of agreements and concerted practices. The purpose of those guidelines is to set out the Commission's view of the substantive assessment criteria applied to the various types of agreements and practices.

4. The present guidelines set out the Commission's interpretation of the conditions for exception contained in Article 81(3). It thereby provides guidance on how it will apply Article 81 in individual cases. Although not binding on them, these guidelines also intend to give guidance to the courts and authorities of the Member States in their application of Article 81(1) and (3) of the Treaty.

5. The guidelines establish an analytical framework for the application of Article 81(3). The purpose is to develop a methodology for the application of this Treaty provision. This methodology is based on the economic approach already introduced and developed in the guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements. The Commission will follow the present guidelines, which provide more detailed guidance on the application of the four conditions of Article 81(3) than the guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements, also with regard to agreements covered by those guidelines.

6. The standards set forth in the present guidelines must be applied in light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own facts and the guidelines must be applied reasonably and flexibly.

7. With regard to a number of issues, the present guidelines outline the current state of the case law of the Court of Justice. However, the Commission also intends to explain its policy with regard to issues that have not been dealt with in the case law, or that are subject to interpretation. The Commission's position, however, is without prejudice to the case law of the Court of Justice and the Court of First Instance concerning the interpretation of Article 81(1) and (3), and to the interpretation that the Community Courts may give to those provisions in the future.

2. THE GENERAL FRAMEWORK OF ARTICLE 81 EC

2.1. The Treaty provisions

8. Article 81(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States ([6]) and which have as their object or effect the prevention, restriction or distortion of competition ([7]).

9. As an exception to this rule Article 81(3) provides that the prohibition contained in Article 81(1) may be declared inapplicable in case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives, and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

10. According to Article 1(1) of Regulation 1/2003 agreements which are caught by Article 81(1) and which do not satisfy the conditions of Article 81(3) are prohibited, no prior decision to that effect being required ([8]). According to Article 1(2) of the same Regulation agreements which are caught by Article 81(1) but which satisfy the conditions of Article 81(3) are not prohibited, no prior decision to that effect being required. Such agreements are valid and enforceable from the moment that the conditions of Article 81(3) are satisfied and for as long as that remains the case.

11. The assessment under Article 81 thus consists of two parts. The first step is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential ([9]) anti-competitive effects. The second step, which only becomes relevant when an agreement is found to be restrictive of competition, is to determine the pro-competitive benefits produced by that agreement and to assess whether these pro-competitive effects outweigh the anti-competitive effects. The balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 81(3) ([10]).

12. The assessment of any countervailing benefits under Article 81(3) necessarily requires prior determination of the restrictive nature and impact of the agreement. To place Article 81(3) in its proper context it is appropriate to briefly outline the objective and principal content of the prohibition rule of Article 81(1). The Commission guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements ([11]) contain substantial guidance on the application of Article 81(1) to various types of agreements. The present guidelines are therefore limited to recalling the basic analytical framework for applying Article 81(1).

2.2. **The prohibition rule of Article 81(1)**

2.2.1. *General remarks*

13. The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

14. The prohibition rule of Article 81(1) applies to restrictive agreements and concerted practices between undertakings and decisions by associations of undertakings in so far as they are capable of affecting trade between Member States. A general principle underlying Article 81(1) which is expressed in the case law of the Community Courts is that each economic operator must determine independently the policy, which he intends to adopt on the market ([12]). In view of this the Community Courts have defined 'agreements', 'decisions' and 'concerted practices' as Community law concepts which allow a distinction to be made between the unilateral conduct of an undertaking and co-ordination of behaviour or collusion between undertakings ([13]). Unilateral conduct is subject only to Article 82 of the Treaty as far as Community competition law is concerned. Moreover, the convergence rule set out in Article 3(2) of Regulation 1/2003 does not apply to unilateral conduct. This provision applies only to agreements, decisions and concerted practices, which are capable of affecting trade between Member States. Article 3(2) provides that when such agreements, decisions and concerted practices are not prohibited by Article 81, they cannot be prohibited by national competition law. Article 3 is without prejudice to the fundamental principle of primacy of Community law, which entails in particular that agreements and abusive practices that are prohibited by Articles 81 and 82 cannot be upheld by national law ([14]).

15. The type of co-ordination of behaviour or collusion between undertakings falling within the scope of Article 81(1) is that where at least one undertaking vis-à-vis another undertaking undertakes to adopt a certain conduct on the market or that as a result of contacts between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced ([15]). It follows that co-ordination can take the form of obligations that regulate the market conduct of at least one of the parties as well as of arrangements that influence the market conduct of at least one of the parties by causing a change in its incentives. It is not required that co-ordination is in the interest of all the undertakings concerned ([16]). Co-ordination must also not necessarily be express. It can also be tacit. For an agreement to be capable of being regarded as having been concluded by tacit acceptance there must be an invitation from an undertaking to another undertaking, whether express or implied, to fulfil a goal jointly ([17]). In certain circumstances an agreement may be inferred from and imputed to an ongoing commercial relationship between the parties ([18]). However, the mere fact that a measure adopted by an undertaking falls within the context of on-going business relations is not sufficient ([19]).

16. Agreements between undertakings are caught by the prohibition rule of Article 81(1) when they are likely to have an appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties.

2.2.2. *The basic principles for assessing agreements under Article 81(1)*

17. The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions ([20]). In making this assessment it is necessary to take account of the likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand). Article 81(1) prohibits restrictions of both inter-brand competition and intra-brand competition ([21]).

18. For the purpose of assessing whether an agreement or its individual parts may restrict inter-brand competition and/or intra-brand competition it needs to be considered how and to what extent the agreement affects or is likely to affect competition on the market. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-brand competition while the second question relates to the impact of the agreement on intra-brand competition. As restraints may be capable of affecting both inter-brand competition and intra-brand competition at the same time, it may be necessary to analyse a restraint in light of both questions before it can be concluded whether or not competition is restricted within the meaning of Article 81(1):

(1) Does the agreement restrict actual or potential competition that would have existed without the agreement? If so, the agreement may be caught by Article 81(1). In making this assessment it is necessary to take into account competition between the parties and competition from third parties. For instance, where two undertakings established in different Member States undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a supplier imposes obligations on his distributors not to sell competing products and these obligations foreclose third party access to the market, actual or potential competition that would have existed in the absence of the agreement is restricted. In assessing whether the parties to an agreement are actual or potential competitors the economic and legal context must be taken into account. For instance, if due to the financial risks involved and the technical capabilities of the parties it is unlikely on the basis of objective factors that each party would be able to carry out on its own the activities covered by the agreement the parties are deemed to be non-competitors in respect of that activity ([22]). It is for the parties to bring forward evidence to that effect.

(2) Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). For instance, where a supplier restricts its distributors from competing with each other, (potential) competition that could have existed between the distributors absent the restraints is restricted. Such restrictions include resale price maintenance and territorial or customer sales restrictions between distributors. However, certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature ([23]). Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting. For instance, territorial restraints in an agreement between a supplier and a distributor may for a certain period of time fall outside Article 81(1), if the restraints are objectively necessary in order for the distributor to penetrate a new market ([24]). Similarly, a prohibition imposed on all distributors not to sell to certain categories of end users may not be restrictive of competition if such restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question. Claims that in the absence of a restraint the supplier would have resorted to vertical integration are not sufficient. Decisions on whether or not to vertically integrate depend on a broad range of complex economic factors, a number of which are internal to the undertaking concerned.

19. In the application of the analytical framework set out in the previous paragraph it must be taken into account that Article 81(1) distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 81(1) if its object or effect is to restrict inter-brand competition and/or intra-brand competition.

20. The distinction between restrictions by object and restrictions by effect is important. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects ([25]). In other words, for the purpose of applying Article 81(1) no actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object. Article 81(3), on the other hand, does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect. Article 81(3) applies to all agreements that fulfil the four conditions contained therein ([26]).

21. Restrictions of competition *by object* are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

22. The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market ([27]). In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition.

23. Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers ([28]). As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales ([29]).

24. If an agreement is not restrictive of competition by object it must be examined whether it has restrictive effects on competition. Account must be taken of both actual and potential effects ([30]). In other words the agreement must have likely anti-competitive effects. In the case of restrictions of competition by effect there is no presumption of anti-competitive effects. For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability ([31]). Such negative effects must be appreciable. The prohibition rule of Article 81(1) does not apply when the identified anti-competitive effects are insignificant ([32]). This test reflects the economic approach which the Commission is applying. The prohibition of Article 81(1) only applies where on the basis of proper market analysis it can be concluded that the agreement has likely anti-competitive effects on the market ([33]). It is insufficient for such a finding that the market shares of the parties exceed the thresholds set out in the Commission's *de minimis* notice ([34]). Agreements falling within safe harbours of block exemption regulations may be caught by Article 81(1) but this is not necessarily so. Moreover, the fact that due to the market shares of the parties, an agreement falls outside the safe harbour of a block exemption is in itself an insufficient basis for finding that the agreement is caught by Article 81(1) or that it does not fulfil the conditions of Article 81(3). Individual assessment of the likely effects produced by the agreement is required.

25. Negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market

power is the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time. In markets with high fixed costs undertakings must price significantly above their marginal costs of production in order to ensure a competitive return on their investment. The fact that undertakings price above their marginal costs is therefore not in itself a sign that competition in the market is not functioning well and that undertakings have market power that allows them to price above the competitive level. It is when competitive constraints are insufficient to maintain prices and output at competitive levels that undertakings have market power within the meaning of Article 81(1).

26. The creation, maintenance or strengthening of market power can result from a restriction of competition between the parties to the agreement. It can also result from a restriction of competition between any one of the parties and third parties, e.g. because the agreement leads to foreclosure of competitors or because it raises competitors' costs, limiting their capacity to compete effectively with the contracting parties. Market power is a question of degree. The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 82.

27. For the purposes of analysing the restrictive effects of an agreement it is normally necessary to define the relevant market ([35]). It is normally also necessary to examine and assess, *inter alia*, the nature of the products, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers. In some cases, however, it may be possible to show anti-competitive effects directly by analysing the conduct of the parties to the agreement on the market. It may for example be possible to ascertain that an agreement has led to price increases. The guidelines on horizontal cooperation agreements and on vertical restraints set out a detailed framework for analysing the competitive impact of various types of horizontal and vertical agreements under Article 81(1) ([36]).

2.2.3. *Ancillary restraints*

28. Paragraph 18 above sets out a framework for analysing the impact of an agreement and its individual restrictions on inter-brand competition and intra-brand competition. If on the basis of those principles it is concluded that the main transaction covered by the agreement is not restrictive of competition, it becomes relevant to examine whether individual restraints contained in the agreement are also compatible with Article 81(1) because they are ancillary to the main non-restrictive transaction.

29. In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it ([37]). If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction, also fall outside Article 81(1) ([38]). These related restrictions are called ancillary restraints. A restriction is directly related to the main transaction if it is subordinate to the implementation of that transaction and is inseparably linked to it. The test of necessity implies that the restriction must be objectively necessary for the implementation of the main transaction and be proportionate to it. It follows that the ancillary restraints test is similar to the test set out in paragraph 18(2) above. However, the ancillary restraints test applies in all cases where the main transaction is not restrictive of competition ([39]). It is not limited to determining the impact of the agreement on intra-brand competition.

30. The application of the ancillary restraint concept must be distinguished from the application of the defence under Article 81(3) which relates to certain economic benefits produced by restrictive agreements and which are balanced against the restrictive effects of the agreements. The application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects. Such balancing is reserved for Article 81(3) ([40]).

31. The assessment of ancillary restraints is limited to determining whether, in the specific context of the main non-restrictive transaction or activity, a particular restriction is necessary for the implementation of that transaction or activity and proportionate to it. If on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it ([41]). If, for example, the main object of a franchise agreement does not restrict competition, then restrictions, which are necessary for the proper functioning of the agreement, such as obligations aimed at protecting the uniformity and reputation of the franchise system, also fall outside Article 81(1) ([42]). Similarly, if a joint venture is not in itself restrictive of competition, then restrictions that are necessary for the functioning of the agreement are

deemed to be ancillary to the main transaction and are therefore not caught by Article 81(1). For instance in *TPS* ([43]) the Commission concluded that an obligation on the parties not to be involved in companies engaged in distribution and marketing of television programmes by satellite was ancillary to the creation of the joint venture during the initial phase. The restriction was therefore deemed to fall outside Article 81(1) for a period of three years. In arriving at this conclusion the Commission took account of the heavy investments and commercial risks involved in entering the market for pay-television.

2.3. **The exception rule of Article 81(3)**

32. The assessment of restrictions by object and effect under Article 81(1) is only one side of the analysis. The other side, which is reflected in Article 81(3), is the assessment of the positive economic effects of restrictive agreements.

33. The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains ([44]). Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals. This analytical framework is reflected in Article 81(1) and Article 81(3). The latter provision expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition ([45]).

34. The application of the exception rule of Article 81(3) is subject to four cumulative conditions, two positive and two negative:

(a) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress,

(b) Consumers must receive a fair share of the resulting benefits,

(c) The restrictions must be indispensable to the attainment of these objectives, and finally

(d) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

When these four conditions are fulfilled the agreement enhances competition within the relevant market, because it leads the undertakings concerned to offer cheaper or better products to consumers, compensating the latter for the adverse effects of the restrictions of competition.

35. Article 81(3) can be applied either to individual agreements or to categories of agreements by way of a block exemption regulation. When an agreement is covered by a block exemption the parties to the restrictive agreement are relieved of their burden under Article 2 of Regulation 1/2003 of showing that their individual agreement satisfies each of the conditions of Article 81(3). They only have to prove that the restrictive agreement benefits from a block exemption. The application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements that fall within their scope ([46]) fulfil each of the four conditions laid down in Article 81(3).

36. If in an individual case the agreement is caught by Article 81(1) and the conditions of Article 81(3) are not fulfilled the block exemption may be withdrawn. According to Article 29(1) of Regulation 1/2003 the Commission is empowered to withdraw the benefit of a block exemption when it finds that in a particular case an agreement covered by a block exemption regulation has certain effects which are incompatible with Article 81(3) of the Treaty. Pursuant to Article 29(2) of Regulation 1/2003 a competition authority of a Member State may also withdraw the benefit of a Commission block exemption regulation in respect of its territory (or part of its territory), if this territory has all the characteristics of a distinct geographic market. In the case of withdrawal it is for the competition authorities concerned to demonstrate that the agreement infringes Article 81(1) and that it does not fulfil the conditions of Article 81(3).

37. The courts of the Member States have no power to withdraw the benefit of block exemption regulations. Moreover, in their application of block exemption regulations Member State courts may not modify their scope by extending their sphere of application to agreements not covered by the block exemption regulation in question ([47]). Outside the scope of block exemption regulations Member State courts have the power to apply Article 81 in full (cf. Article 6 of Regulation 1/2003).

3. THE APPLICATION OF THE FOUR CONDITIONS OF ARTICLE 81(3)

38. The remainder of these guidelines will consider each of the four conditions of Article 81(3) ([48]). Given that these four conditions are cumulative ([49]) it is unnecessary to examine any remaining conditions once it is found that one of the conditions of Article 81(3) is not fulfilled. In individual cases it may therefore be appropriate to consider the four conditions in a different order.

39. For the purposes of these guidelines it is considered appropriate to invert the order of the second and the third condition and thus deal with the issue of indispensability before the issue of pass-on to consumers. The analysis of pass-on requires a balancing of the negative and positive effects of an agreement on consumers. This analysis should not include the effects of any restrictions, which already fail the indispensability test and which for that reason are prohibited by Article 81.

3.1. General principles

40. Article 81(3) of the Treaty only becomes relevant when an agreement between undertakings restricts competition within the meaning of Article 81(1). In the case of non-restrictive agreements there is no need to examine any benefits generated by the agreement.

41. Where in an individual case a restriction of competition within the meaning of Article 81(1) has been proven, Article 81(3) can be invoked as a defence. According to Article 2 of Regulation 1/2003 the burden of proof under Article 81(3) rests on the undertaking(s) invoking the benefit of the exception rule. Where the conditions of Article 81(3) are not satisfied the agreement is null and void, cf. Article 81(2). However, such automatic nullity only applies to those parts of the agreement that are incompatible with Article 81, provided that such parts are severable from the agreement as a whole ([50]). If only part of the agreement is null and void, it is for the applicable national law to determine the consequences thereof for the remaining part of the agreement ([51]).

42. According to settled case law the four conditions of Article 81(3) are cumulative ([52]), i.e. they must all be fulfilled for the exception rule to be applicable. If they are not, the application of the exception rule of Article 81(3) must be refused ([53]). The four conditions of Article 81(3) are also exhaustive. When they are met the exception is applicable and may not be made dependant on any other condition. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3) ([54]).

43. The assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers ([55]) must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market ([56]). Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same ([57]). Indeed, in some cases only consumers in a downstream market are affected by the agreement in which case the impact of the agreement on such consumers must be assessed. This is for instance so in the case of purchasing agreements ([58]).

44. The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur ([59]) and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case ([60]). When applying Article 81(3) in accordance with these principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 81 cannot be applied without taking due account of such *ex ante* investment. The risk facing the parties and the sunk investment that must be committed to implement

the agreement can thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.

45. In some cases the restrictive agreement is an irreversible event. Once the restrictive agreement has been implemented the *ex ante* situation cannot be re-established. In such cases the assessment must be made exclusively on the basis of the facts pertaining at the time of implementation. For instance, in the case of a research and development agreement whereby each party agrees to abandon its respective research project and pool its capabilities with those of another party, it may from an objective point of view be technically and economically impossible to revive a project once it has been abandoned. The assessment of the anti-competitive and pro-competitive effects of the agreement to abandon the individual research projects must therefore be made as of the time of the completion of its implementation. If at that point in time the agreement is compatible with Article 81, for instance because a sufficient number of third parties have competing research and development projects, the parties' agreement to abandon their individual projects remains compatible with Article 81, even if at a later point in time the third party projects fail. However, the prohibition of Article 81 may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. If for example in addition to joint research and development, the agreement provides for joint exploitation, Article 81 may apply to this part of the agreement if due to subsequent market developments the agreement becomes restrictive of competition and does not (any longer) satisfy the conditions of Article 81(3) taking due account of *ex ante* sunk investments, cf. the previous paragraph.

46. Article 81(3) does not exclude *a priori* certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule ([61]). However, severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3). Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article 81(3). They neither create objective economic benefits ([62]) nor do they benefit consumers ([63]). For example, a horizontal agreement to fix prices limits output leading to misallocation of resources. It also transfers value from consumers to producers, since it leads to higher prices without producing any countervailing value to consumers within the relevant market. Moreover, these types of agreements generally also fail the indispensability test under the third condition ([64]).

47. Any claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded ([65]). The purpose of Article 81 is to protect effective competition by ensuring that markets remain open and competitive. The protection of fair conditions of competition is a task for the legislator in compliance with Community law obligations ([66]) and not for undertakings to regulate themselves.

3.2. **First condition of Article 81(3): Efficiency gains**

3.2.1. *General remarks*

48. According to the first condition of Article 81(3) the restrictive agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. The provision refers expressly only to goods, but applies by analogy to services.

49. It follows from the case law of the Court of Justice that only objective benefits can be taken into account ([67]). This means that efficiencies are not assessed from the subjective point of view of the parties ([68]). Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. For instance, when companies agree to fix prices or share markets they reduce output and thereby production costs. Reduced competition may also lead to lower sales and marketing expenditures. Such cost reductions are a direct consequence of a reduction in output and value. The cost reductions in question do not produce any pro-competitive effects on the market. In particular, they do not lead to the creation of value through an integration of assets and activities. They merely allow the undertakings concerned to increase their profits and are therefore irrelevant from the point of view of Article 81(3).

50. The purpose of the first condition of Article 81(3) is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article 81(3). The aim of the analysis is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies. Given that for Article 81(3) to apply the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies.

51. All efficiency claims must therefore be substantiated so that the following can be verified:

(a) The *nature* of the claimed efficiencies;

(b) The *link* between the agreement and the efficiencies;

(c) The *likelihood* and *magnitude* of each claimed efficiency; and

(d) *How* and *when* each claimed efficiency would be achieved.

52. Letter (a) allows the decision-maker to verify whether the claimed efficiencies are objective in nature, cf. paragraph 49 above.

53. Letter (b) allows the decision-maker to verify whether there is a sufficient causal link between the restrictive agreement and the claimed efficiencies. This condition normally requires that the efficiencies result from the economic activity that forms the object of the agreement. Such activities may, for example, take the form of distribution, licensing of technology, joint production or joint research and development. To the extent, however, that an agreement has wider efficiency enhancing effects within the relevant market, for example because it leads to a reduction in industry wide costs, these additional benefits are also taken into account.

54. The causal link between the agreement and the claimed efficiencies must normally also be direct ([69]). Claims based on indirect effects are as a general rule too uncertain and too remote to be taken into account. A direct causal link exists for instance where a technology transfer agreement allows the licensees to produce new or improved products or a distribution agreement allows products to be distributed at lower cost or valuable services to be produced. An example of indirect effect would be a case where it is claimed that a restrictive agreement allows the undertakings concerned to increase their profits, enabling them to invest more in research and development to the ultimate benefit of consumers. While there may be a link between profitability and research and development, this link is generally not sufficiently direct to be taken into account in the context of Article 81(3).

55. Letters (c) and (d) allow the decision-maker to verify the value of the claimed efficiencies, which in the context of the third condition of Article 81(3) must be balanced against the anti-competitive effects of the agreement, see paragraph 101 below. Given that Article 81(1) only applies in cases where the agreement has likely negative effects on competition and consumers (in the case of hardcore restrictions such effects are presumed) efficiency claims must be substantiated so that they can be verified. Unsubstantiated claims are rejected.

56. In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.

57. In the case of claimed efficiencies in the form of new or improved products and other non-cost based efficiencies, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.

58. In cases where the agreement has yet to be fully implemented the parties must substantiate any projections as to the date from which the efficiencies will become operational so as to have a significant positive impact in the market.

3.2.2. *The different categories of efficiencies*

59. The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective economic efficiencies. There is considerable overlap between the various categories mentioned in Article 81(3) and the same agreement may give rise to several kinds of efficiencies. It is therefore not appropriate to draw clear and firm distinctions between the various categories. For the purpose of these guidelines, a distinction is made between cost efficiencies and efficiencies of a qualitative nature whereby value is created in the form of new or improved products, greater product variety etc.

60. In general, efficiencies stem from an integration of economic activities whereby undertakings combine their assets to achieve what they could not achieve as efficiently on their own or whereby they entrust another undertaking with tasks that can be performed more efficiently by that other undertaking.

61. The research and development, production and distribution process may be viewed as a value chain that can be divided into a number of stages. At each stage of this chain an undertaking must make a choice between performing the activity itself, performing it together with (an)other undertaking(s) or outsourcing the activity entirely to (an)other undertaking(s).

62. In each case where the choice made involves cooperation on the market with another undertaking, an agreement within the meaning of Article 81(1) normally needs to be concluded. These agreements can be vertical, as is the case where the parties operate at different levels of the value chain or horizontal, as is the case where the firms operate at the same level of the value chain. Both categories of agreements may create efficiencies by allowing the undertakings in question to perform a particular task at lower cost or with higher added value for consumers. Such agreements may also contain or lead to restrictions of competition in which case the prohibition rule of Article 81(1) and the exception rule of Article 81(3) may become relevant.

63. The types of efficiencies mentioned in the following are only examples and are not intended to be exhaustive.

3.2.2.1. Cost efficiencies

64. Cost efficiencies flowing from agreements between undertakings can originate from a number of different sources. One very important source of cost savings is the development of new production technologies and methods. In general, it is when technological leaps are made that the greatest potential for cost savings is achieved. For instance, the introduction of the assembly line led to a very substantial reduction in the cost of producing motor vehicles.

65. Another very important source of efficiency is synergies resulting from an integration of existing assets. When the parties to an agreement combine their respective assets they may be able to attain a cost/output configuration that would not otherwise be possible. The combination of two existing technologies that have complementary strengths may reduce production costs or lead to the production of a higher quality product. For instance, it may be that the production assets of firm A generate a high output per hour but require a relatively high input of raw materials per unit of output, whereas the production assets of firm B generate lower output per hour but require a relatively lower input of raw materials per unit of output. Synergies are created if by establishing a production joint venture combining the production assets of A and B the parties can attain a high(er) level of output per hour with a low(er) input of raw materials per unit of output. Similarly, if one undertaking has optimised one part of the value chain and another undertaking has optimised another part of the value chain, the combination of their operations may lead to lower costs. Firm A may for instance have a highly automated production facility resulting in low production costs per unit whereas B has developed an efficient order processing system. The system allows production to be tailored to customer demand, ensuring timely delivery and reducing warehousing and obsolescence costs. By combining their assets A and B may be able to obtain cost reductions.

66. Cost efficiencies may also result from economies of scale, i.e. declining cost per unit of output as output increases. To give an example: investment in equipment and other assets often has to be made in indivisible blocks. If an undertaking cannot fully utilise a block, its average costs will be higher than if it could do so. For instance, the cost of operating a truck is virtually the same regardless of whether it is almost empty, half-full or full. Agreements whereby undertakings combine their logistics operations may allow them to increase the load factors and reduce the number of vehicles employed. Larger scale may also allow for better division of labour leading to lower unit costs. Firms may achieve economies of scale in respect of all parts of the value chain, including research and development, production, distribution and marketing. Learning economies constitute a related type of efficiency. As experience is gained in using a particular production process or in performing particular tasks, productivity may increase because the process is made to run more efficiently or because the task is performed more quickly.

67. Economies of scope are another source of cost efficiency, which occur when firms achieve cost savings by producing different products on the basis of the same input. Such efficiencies may arise from the fact that it is possible to use the same components and the same facilities and personnel to produce a variety of products. Similarly, economies of scope may arise in distribution when several types of goods are distributed in the same vehicles. For instance, a producer of frozen pizzas and a producer of frozen vegetables may obtain economies of scope by jointly distributing their products. Both groups of products must be distributed in refrigerated vehicles and it is likely that there are significant overlaps in terms of customers. By combining their operations the two producers may obtain lower distribution costs per distributed unit.

68. Efficiencies in the form of cost reductions can also follow from agreements that allow for better planning of production, reducing the need to hold expensive inventory and allowing for better capacity utilisation. Efficiencies of this nature may for example stem from the use of 'just in time' purchasing, i.e. an obligation on a supplier of components to continuously supply the buyer according to its needs thereby avoiding the need for the buyer to maintain a significant stock of components which risks becoming obsolete. Cost savings may also result from agreements that allow the parties to rationalise production across their facilities.

3.2.2.2. Qualitative efficiencies

69. Agreements between undertakings may generate various efficiencies of a qualitative nature which are relevant to the application of Article 81(3). In a number of cases the main efficiency enhancing potential of the agreement is not cost reduction; it is quality improvements and other efficiencies of a qualitative nature. Depending on the individual case such efficiencies may therefore be of equal or greater importance than cost efficiencies.

70. Technical and technological advances form an essential and dynamic part of the economy, generating significant benefits in the form of new or improved goods and services. By cooperating undertakings may be able to create efficiencies that would not have been possible without the restrictive agreement or would have been possible only with substantial delay or at higher cost. Such efficiencies constitute an important source of economic benefits covered by the first condition of Article 81(3). Agreements capable of producing efficiencies of this nature include, in particular, research and development agreements. An example would be A and B creating a joint venture for the development and, if successful, joint production of a cell-based tyre. The puncture of one cell does not affect other cells, which means that there is no risk of collapse of the tyre in the event of a puncture. The tyre is thus safer than traditional tyres. It also means that there is no immediate need to change the tyre and thus to carry a spare. Both types of efficiencies constitute objective benefits within the meaning of the first condition of Article 81(3).

71. In the same way that the combination of complementary assets can give rise to cost savings, combinations of assets may also create synergies that create efficiencies of a qualitative nature. The combination of production assets may for instance lead to the production of higher quality products or products with novel features. This may for instance be the case for licence agreements, and agreements providing for joint production of new or improved goods or services. Licence agreements may, in particular, ensure more rapid dissemination of new technology in the Community and enable the licensee(s) to make available new products or to employ new production techniques that lead to quality improvements. Joint production agreements may, in particular, allow new or improved products or services to be introduced on the market more quickly or at lower cost ([70]). In the telecommunications sector, for example, cooperation agreements have been held to create efficiencies by making available more quickly new global services ([71]). In the banking sector cooperation agreements that made available improved facilities for making cross-border payments have also been held to create efficiencies falling within the scope of the first condition of Article 81(3) ([72]).

72. Distribution agreements may also give rise to qualitative efficiencies. Specialised distributors, for example, may be able to provide services that are better tailored to customer needs or to provide quicker delivery or better quality assurance throughout the distribution chain ([73]).

3.3. Third condition of Article 81(3): Indispensability of the restrictions

73. According to the third condition of Article 81(3) the restrictive agreement must not impose restrictions, which are not indispensable to the attainment of the efficiencies created by the agreement in question. This condition implies a two-fold test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.

74. In the context of the third condition of Article 81(3) the decisive factor is whether or not the restrictive agreement and individual restrictions make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned. The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction ([74]).

75. The first test contained in the third condition of Article 81(3) requires that the efficiencies be specific to the agreement in question in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies. In making this latter assessment the market conditions and business realities facing the parties to the agreement must be taken into account. Undertakings invoking the benefit of Article 81(3) are not required to consider hypothetical or theoretical alternatives. The Commission will not second guess the business judgment of the parties. It will only intervene where it is reasonably clear that there are realistic and attainable alternatives. The parties must only explain and demonstrate why such seemingly realistic and significantly less restrictive alternatives to the agreement would be significantly less efficient.

76. It is particularly relevant to examine whether, having due regard to the circumstances of the individual case, the parties could have achieved the efficiencies by means of another less restrictive type of agreement and, if so, when they would likely be able to obtain the efficiencies. It may also be necessary to examine whether the parties could have achieved the efficiencies on their own. For instance, where the claimed efficiencies take the form of cost reductions resulting from economies of scale or scope the undertakings concerned must explain and substantiate why the same efficiencies would not be likely to be attained through internal growth and price competition. In making this assessment it is relevant to consider, *inter alia*, what is the minimum efficient scale on the market concerned. The minimum efficient scale is the level of output required to minimise average cost and exhaust economies of scale ([75]). The larger the minimum efficient scale compared to the current size of either of the parties to the agreement, the more likely it is that the efficiencies will be deemed to be specific to the agreement. In the case of agreements that produce substantial synergies through the combination of complementary assets and capabilities the very nature of the efficiencies give rise to a presumption that the agreement is necessary to attain them.

77. These principles can be illustrated by the following hypothetical example:

A and B combine within a joint venture their respective production technologies to achieve higher output and lower raw material consumption. The joint venture is granted an exclusive licence to their respective production technologies. The parties transfer their existing production facilities to the joint venture. They also transfer key staff in order to ensure that existing learning economies can be exploited and further developed. It is estimated that these economies will reduce production costs by a further 5 %. The output of the joint venture is sold independently by A and B. In this case the indispensability condition necessitates an assessment of whether or not the benefits could be substantially achieved by means of a licence agreement, which would be likely to be less restrictive because A and B would continue to produce independently. In the circumstances described this is unlikely to be the case since under a licence agreement the parties would not be able to benefit in the same seamless and continued way from their respective experience in operating the two technologies, resulting in significant learning economies.

78. Once it is found that the agreement in question is necessary in order to produce the efficiencies, the indispensability of each restriction of competition flowing from the agreement must be assessed. In this context it must be assessed whether individual restrictions are reasonably necessary in order to produce the efficiencies. The parties to the agreement must substantiate their claim with regard to both the nature of the restriction and its intensity.

79. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise. The assessment of alternative solutions must take into account the actual and potential improvement in the field of competition by the elimination of a particular restriction or the application of a less restrictive alternative. The more restrictive the restraint the stricter the test under the third condition ([76]). Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices are unlikely to be considered indispensable.

80. The assessment of indispensability is made within the actual context in which the agreement operates and must in particular take account of the structure of the market, the economic risks related to the agreement, and the incentives facing the parties. The more uncertain the success of the product covered by the agreement, the more a restriction may be required to ensure that the efficiencies will materialise. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement. A restriction may for instance be necessary in order to avoid hold-up problems once a substantial sunk investment has been made by one of the parties. Once for instance a supplier has made a substantial relationship-specific

investment with a view to supplying a customer with an input, the supplier is locked into the customer. In order to avoid that *ex post* the customer exploits this dependence to obtain more favourable terms, it may be necessary to impose an obligation not to purchase the component from third parties or to purchase minimum quantities of the component from the supplier ([77]).

81. In some cases a restriction may be indispensable only for a certain period of time, in which case the exception of Article 81(3) only applies during that period. In making this assessment it is necessary to take due account of the period of time required for the parties to achieve the efficiencies justifying the application of the exception rule ([78]). In cases where the benefits cannot be achieved without considerable investment, account must, in particular, be taken of the period of time required to ensure an adequate return on such investment, see also paragraph 44 above.

82. These principles can be illustrated by the following hypothetical examples:

P produces and distributes frozen pizzas, holding 15 % of the market in Member State X. Deliveries are made directly to retailers. Since most retailers have limited storage capacity, relatively frequent deliveries are required, leading to low capacity utilisation and use of relatively small vehicles. T is a wholesaler of frozen pizzas and other frozen products, delivering to most of the same customers as P. The pizza products distributed by T hold 30 % of the market. T has a fleet of larger vehicles and has excess capacity. P concludes an exclusive distribution agreement with T for Member State X and undertakes to ensure that distributors in other Member States will not sell into T's territory either actively or passively. T undertakes to advertise the products, survey consumer tastes and satisfaction rates and ensure delivery to retailers of all products within 24 hours. The agreement leads to a reduction in total distribution costs of 30 % as capacity is better utilised and duplication of routes is eliminated. The agreement also leads to the provision of additional services to consumers. Restrictions on passive sales are hardcore restrictions under the block exemption regulation on vertical restraints ([79]) and can only be considered indispensable in exceptional circumstances. The established market position of T and the nature of the obligations imposed on it indicate this is not an exceptional case. The ban on active selling, on the other hand, is likely to be indispensable. T is likely to have less incentive to sell and advertise the P brand, if distributors in other Member States could sell actively in Member State X and thus get a free ride on the efforts of T. This is particularly so, as T also distributes competing brands and thus has the possibility of pushing more of the brands that are the least exposed to free riding.

S is a producer of carbonated soft drinks, holding 40 % of the market. The nearest competitor holds 20 %. S concludes supply agreements with customers accounting for 25 % of demand, whereby they undertake to purchase exclusively from S for 5 years. S concludes agreements with other customers accounting for 15 % of demand whereby they are granted quarterly target rebates, if their purchases exceed certain individually fixed targets. S claims that the agreements allow it to predict demand more accurately and thus to better plan production, reducing raw material storage and warehousing costs and avoiding supply shortages. Given the market position of S and the combined coverage of the restrictions, the restrictions are very unlikely to be considered indispensable. The exclusive purchasing obligation exceeds what is required to plan production and the same is true of the target rebate scheme. Predictability of demand can be achieved by less restrictive means. S could, for example, provide incentives for customers to order large quantities at a time by offering quantity rebates or by offering a rebate to customers that place firm orders in advance for delivery on specified dates.

3.4. **Second condition of Article 81(3): Fair share for consumers**

3.4.1. *General remarks*

83. According to the second condition of Article 81(3) consumers must receive a fair share of the efficiencies generated by the restrictive agreement.

84. The concept of '*consumers*' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.

85. The concept of '*fair share*' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement ([80]). If such consumers are worse off following the agreement, the second condition of Article 81(3) is not fulfilled. The positive effects of an agreement must be balanced against and compensate for its negative effects on consumers ([81]). When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.

86. It is not required that consumers receive a share of each and every efficiency gain identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement. In that case consumers obtain a fair share of the overall benefits ([82]). If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits. If not, the second condition of Article 81(3) is not fulfilled.

87. The decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers ([83]). In some cases a certain period of time may be required before the efficiencies materialise. Until such time the agreement may have only negative effects. The fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article 81(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on.

88. In making this assessment it must be taken into account that the value of a gain for consumers in the future is not the same as a present gain for consumers. The value of saving 100 euro today is greater than the value of saving the same amount a year later. A gain for consumers in the future therefore does not fully compensate for a present loss to consumers of equal nominal size. In order to allow for an appropriate comparison of a present loss to consumers with a future gain to consumers, the value of future gains must be discounted. The discount rate applied must reflect the rate of inflation, if any, and lost interest as an indication of the lower value of future gains.

89. In other cases the agreement may enable the parties to obtain the efficiencies earlier than would otherwise be possible. In such circumstances it is necessary to take account of the likely negative impact on consumers within the relevant market once this lead-time has lapsed. If through the restrictive agreement the parties obtain a strong position on the market, they may be able to charge a significantly higher price than would otherwise have been the case. For the second condition of Article 81(3) to be satisfied the benefit to consumers of having earlier access to the products must be equally significant. This may for instance be the case where an agreement allows two tyre manufacturers to bring to market three years earlier a new substantially safer tyre but at the same time, by increasing their market power, allows them to raise prices by 5 %. In such a case it is likely that having early access to a substantially improved product outweighs the price increase.

90. The second condition of Article 81(3) incorporates a sliding scale. The greater the restriction of competition found under Article 81(1) the greater must be the efficiencies and the pass-on to consumers. This sliding scale approach implies that if the restrictive effects of an agreement are relatively limited and the efficiencies are substantial it is likely that a fair share of the cost savings will be passed on to consumers. In such cases it is therefore normally not necessary to engage in a detailed analysis of the second condition of Article 81(3), provided that the three other conditions for the application of this provision are fulfilled.

91. If, on the other hand, the restrictive effects of the agreement are substantial and the cost savings are relatively insignificant, it is very unlikely that the second condition of Article 81(3) will be fulfilled. The impact of the restriction of competition depends on the intensity of the restriction and the degree of competition that remains following the agreement.

92. If the agreement has both substantial anti-competitive effects and substantial pro-competitive effects a careful analysis is required. In the application of the balancing test in such cases it must be taken into account that competition is an important long-term driver of efficiency and innovation. Undertakings that are not subject to effective competitive constraints – such as for instance dominant firms – have less incentive to maintain or build on the efficiencies. The more substantial the impact of the agreement on competition, the more likely it is that consumers will suffer in the long run.

93. The following two sections describe in more detail the analytical framework for assessing consumer pass-on of efficiency gains. The first section deals with cost efficiencies, whereas the section that follows covers other types of efficiencies such as new or improved products (qualitative efficiencies). The framework, which is developed in these two sections, is particularly important in cases where it is not immediately obvious that the competitive harms exceed the benefits to consumers or *vice versa* ([84]).

94. In the application of the principles set out below the Commission will have regard to the fact that in many cases it is difficult to accurately calculate the consumer pass-on rate and other types of consumer pass-on. Undertakings are only required to substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case.

3.4.2. *Pass-on and balancing of cost efficiencies*

95. When markets, as is normally the case, are not perfectly competitive, undertakings are able to influence the market price to a greater or lesser extent by altering their output ([85]). They may also be able to price discriminate amongst customers.

96. Cost efficiencies may in some circumstances lead to increased output and lower prices for the affected consumers. If due to cost efficiencies the undertakings in question can increase profits by expanding output, consumer pass-on may occur. In assessing the extent to which cost efficiencies are likely to be passed on to consumers and the outcome of the balancing test contained in Article 81(3) the following factors are in particular taken into account:

(a) The characteristics and structure of the market,

(b) The nature and magnitude of the efficiency gains,

(c) The elasticity of demand, and

(d) The magnitude of the restriction of competition.

All factors must normally be considered. Since Article 81(3) only applies in cases where competition on the market is being appreciably restricted, see paragraph 24 above, there can be no presumption that residual competition will ensure that consumers receive a fair share of the benefits. However, the degree of competition remaining on the market and the nature of this competition influences the likelihood of pass-on.

97. The greater the degree of residual competition the more likely it is that individual undertakings will try to increase their sales by passing on cost efficiencies. If undertakings compete mainly on price and are not subject to significant capacity constraints, pass-on may occur relatively quickly. If competition is mainly on capacity and capacity adaptations occur with a certain time lag, pass-on will be slower. Pass-on is also likely to be slower when the market structure is conducive to tacit collusion ([86]). If competitors are likely to retaliate against an increase in output by one or more parties to the agreement, the incentive to increase output may be tempered, unless the competitive advantage conferred by the efficiencies is such that the undertakings concerned have an incentive to break away from the common policy adopted on the market by the members of the oligopoly. In other words, the efficiencies generated by the agreement may turn the undertakings concerned into so-called 'mavericks' ([87]).

98. The nature of the efficiency gains also plays an important role. According to economic theory undertakings maximise their profits by selling units of output until marginal revenue equals marginal cost. Marginal revenue is the change in total revenue resulting from selling an additional unit of output and marginal cost is the change in total cost resulting from producing that additional unit of output. It follows from this principle that as a general rule output and pricing decisions of a profit maximising undertaking are not determined by its fixed costs (i.e. costs that do not vary with the rate of production) but by its variable costs (i.e. costs that vary with the rate of production). After fixed costs are incurred and capacity is set, pricing and output decisions are determined by variable cost and demand conditions. Take for instance a situation in which two companies each produce two products on two production lines operating only at half their capacities. A specialisation agreement may allow the two undertakings to specialise in producing one of the two products and scrap their second production line for the other product. At the same time the specialisation may allow the companies to reduce variable input and stocking costs. Only the latter savings will have a direct effect on the pricing and output decisions of the undertakings, as they will influence the marginal costs of production. The scrapping by each undertaking of one of their production lines will not reduce their variable costs and will not have an impact on their production costs. It follows that undertakings may have a direct incentive to pass on to consumers in the form of higher output and lower prices efficiencies that reduce marginal costs, whereas they have no such direct incentive with regard to efficiencies that reduce fixed costs. Consumers are therefore more likely to receive a fair share of the cost efficiencies in the case of reductions in variable costs than they are in the case of reductions in fixed costs.

99. The fact that undertakings may have an incentive to pass on certain types of cost efficiencies does not imply that the pass-on rate will necessarily be 100 %. The actual pass-on rate depends on the extent to which consumers respond to changes in price, i.e. the elasticity of demand. The greater the increase in demand caused by a decrease in price, the greater the pass-on rate. This follows from the fact that the greater the additional sales caused by a price reduction due to an increase in output the more likely it is that these sales will offset the loss of revenue caused by the lower price resulting from the increase in output. In the absence of price discrimination the lowering of prices affects all units sold by the undertaking, in which case marginal revenue is less than the price obtained for the marginal product. If the undertakings concerned are able to charge different prices to different customers, i.e. price discriminate, pass-on will normally only benefit price-sensitive consumers ([88]).

100. It must also be taken into account that efficiency gains often do not affect the whole cost structure of the undertakings concerned. In such event the impact on the price to consumers is reduced. If for example an agreement allows the parties to reduce production costs by 6 %, but production costs only make up one third of the costs on the basis of which prices are determined, the impact on the product price is 2 %, assuming that the full amount is passed-on.

101. Finally, and very importantly, it is necessary to balance the two opposing forces resulting from the restriction of competition and the cost efficiencies. On the one hand, any increase in market power caused by the restrictive agreement gives the undertakings concerned the ability and incentive to raise price. On the other hand, the types of cost efficiencies that are taken into account may give the undertakings concerned an incentive to reduce price, see paragraph 98 above. The effects of these two opposing forces must be balanced against each other. It is recalled in this regard that the consumer pass-on condition incorporates a sliding scale. When the agreement causes a substantial reduction in the competitive constraint facing the parties, extraordinarily large cost efficiencies are normally required for sufficient pass-on to occur.

3.4.3. *Pass-on and balancing of other types of efficiencies*

102. Consumer pass-on can also take the form of qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase.

103. Any such assessment necessarily requires value judgment. It is difficult to assign precise values to dynamic efficiencies of this nature. However, the fundamental objective of the assessment remains the same, namely to ascertain the overall impact of the agreement on the consumers within the relevant market. Undertakings claiming the benefit of Article 81(3) must substantiate that consumers obtain countervailing benefits (see in this respect paragraphs 57 and 86 above).

104. The availability of new and improved products constitutes an important source of consumer welfare. As long as the increase in value stemming from such improvements exceeds any harm from a maintenance or an increase in price caused by the restrictive agreement, consumers are better off than without the agreement and the consumer pass-on requirement of Article 81(3) is normally fulfilled. In cases where the likely effect of the agreement is to increase prices for consumers within the relevant market it must be carefully assessed whether the claimed efficiencies create real value for consumers in that market so as to compensate for the adverse effects of the restriction of competition.

3.5. **Fourth condition of Article 81(3): No elimination of competition**

105. According to the fourth condition of Article 81(3) the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming *inter alia* from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.

106. The concept in Article 81(3) of elimination of competition in respect of a substantial part of the products concerned is an autonomous Community law concept specific to Article 81(3) ([89]). However, in the application of this concept it is necessary to take account of the relationship between Article 81 and Article 82. According to settled case law the application of Article 81(3) cannot prevent the application of Article 82 of the Treaty ([90]). Moreover, since Articles 81 and 82 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 81(3) be interpreted as precluding any application of this provision to restrictive agreements that constitute an abuse of a dominant position ([91]) ([92]). However, not all restrictive agreements concluded by a dominant undertaking constitute an abuse of a dominant position. This is for instance the case where a dominant undertaking is party to a non-full function joint venture ([93]), which is found to be restrictive of competition but at the same time involves a substantial integration of assets.

107. Whether competition is being eliminated within the meaning of the last condition of Article 81(3) depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about. The more competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated within the meaning of Article 81(3). Moreover, the greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned risks being eliminated.

108. The application of the last condition of Article 81(3) requires a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint. Both actual and potential competition must be considered.

109. While market shares are relevant, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share. More extensive qualitative and quantitative analysis is normally called for. The capacity of actual competitors to compete and their incentive to do so must be examined. If, for example, competitors face capacity constraints or have relatively higher costs of production their competitive response will necessarily be limited.

110. In the assessment of the impact of the agreement on competition it is also relevant to examine its influence on the various parameters of competition. The last condition for exception under Article 81(3) is not fulfilled, if the agreement eliminates competition in one of its most important expressions. This is particularly the case when an agreement eliminates price competition ([94]) or competition in respect of innovation and development of new products.

111. The actual market conduct of the parties can provide insight into the impact of the agreement. If following the conclusion of the agreement the parties have implemented and maintained substantial price increases or engaged in other conduct indicative of the existence of a considerable degree of market power, it is an indication that the parties are not subject to any real competitive pressure and that competition has been eliminated with regard to a substantial part of the products concerned.

112. Past competitive interaction may also provide an indication of the impact of the agreement on future competitive interaction. An undertaking may be able to eliminate competition within the meaning of Article 81(3) by concluding an agreement with a competitor that in the past has been a 'maverick' ([95]). Such an agreement may change the competitive incentives and capabilities of the competitor and thereby remove an important source of competition in the market.

113. In cases involving differentiated products, i.e. products that differ in the eyes of consumers, the impact of the agreement may depend on the competitive relationship between the products sold by the parties to the agreement. When undertakings offer differentiated products the competitive constraint that individual products impose on each other differs according to the degree of substitutability between them. It must therefore be considered what is the degree of substitutability between the products offered by the parties, i.e. what is the competitive constraint that they impose on each other. The more the products of the parties to the agreement are close substitutes the greater the likely restrictive effect of the agreement. In other words, the more substitutable the products the greater the likely change brought about by the agreement in terms of restriction of competition on the market and the more likely it is that competition in respect of a substantial part of the products concerned risks being eliminated.

114. While sources of actual competition are usually the most important, as they are most easily verified, sources of potential competition must also be taken into account. The assessment of potential competition requires an analysis of barriers to entry facing undertakings that are not already competing within the relevant market. Any assertions by the parties that there are low barriers to market entry must be supported by information identifying the sources of potential competition and the parties must also substantiate why these sources constitute a real competitive pressure on the parties.

115. In the assessment of entry barriers and the real possibility for new entry on a significant scale, it is relevant to examine, *inter alia*, the following:

(i) The regulatory framework with a view to determining its impact on new entry.

(ii) The cost of entry including sunk costs. Sunk costs are those that cannot be recovered if the entrant subsequently exits the market. The higher the sunk costs the higher the commercial risk for potential entrants.

(iii) The minimum efficient scale within the industry, i.e. the rate of output where average costs are minimised. If the minimum efficient scale is large compared to the size of the market, efficient entry is likely to be more costly and risky.

(iv) The competitive strengths of potential entrants. Effective entry is particularly likely where potential entrants have access to at least as cost efficient technologies as the incumbents or other competitive advantages that allow them to compete effectively. When potential entrants are on the same or an inferior technological trajectory compared to the incumbents and possess no other significant competitive advantage entry is more risky and less effective.

(v) The position of buyers and their ability to bring onto the market new sources of competition. It is irrelevant that certain strong buyers may be able to extract more favourable conditions from the parties to the agreement than their weaker competitors ([96]). The presence of strong buyers can only serve to counter a prima facie finding of elimination of competition if it is likely that the buyers in question will pave the way for effective new entry.

(vi) The likely response of incumbents to attempted new entry. Incumbents may for example through past conduct have acquired a reputation of aggressive behaviour, having an impact on future entry.

(vii) The economic outlook for the industry may be an indicator of its longer-term attractiveness. Industries that are stagnating or in decline are less attractive candidates for entry than industries characterised by growth.

(viii) Past entry on a significant scale or the absence thereof.

116. The above principles can be illustrated by the following hypothetical examples, which are not intended to establish thresholds:

Firm A is brewer, holding 70 % of the relevant market, comprising the sale of beer through cafés and other on-trade premises. Over the past 5 years A has increased its market share from 60 %. There are four other competitors in the market, B, C, D and E with market shares of 10 %, 10 %, 5 % and 5 %. No new entry has occurred in the recent past and price changes implemented by A have generally been followed by competitors. A concludes agreements with 20 % of the on-trade premises representing 40 % of sales volumes whereby the contracting parties undertake to purchase beer only from A for a period of 5 years. The agreements raise the costs and reduce the revenues of rivals, which are foreclosed from the most attractive outlets. Given the market position of A, which has been strengthened in recent years, the absence of new entry and the already weak position of competitors it is likely that competition in the market is eliminated within the meaning of Article 81(3).

Shipping firms A, B, C, and D, holding collectively more than 70 % of the relevant market, conclude an agreement whereby they agree to coordinate their schedules and their tariffs. Following the implementation of the agreement prices rise between 30 % and 100 %. There are four other suppliers, the largest holding about 14 % of the relevant market. There has been no new entry in recent years and the parties to the agreement did not lose significant market share following the price increases. The existing competitors brought no significant new capacity to the market and no new entry occurred. In light of the market position of the parties and the absence of competitive response to their joint conduct it can reasonably be concluded that the parties to the agreement are not subject to real competitive pressures and that the agreement affords them the possibility of eliminating competition within the meaning of Article 81(3).

A is a producer of electric appliances for professional users with a market share of 65 % of a relevant national market. B is a competing manufacturer with 5 % market share which has developed a new type of motor that is more powerful while consuming less electricity. A and B conclude an agreement whereby they establish a production joint venture for the production of the new motor. B undertakes to grant an exclusive licence to the joint venture. The joint venture combines the new technology of B with the efficient manufacturing and quality control process of A. There is one other main competitor with 15 % of the market. Another competitor with 5 % market share has recently been acquired by C, a major international producer of competing electric appliances, which itself owns efficient technologies. C has thus far not been active on the market mainly due to the fact that local presence and servicing is desired by customers. Through the acquisition C gains access to the service organisation required to penetrate the market. The entry of C is likely to ensure that competition is not being eliminated.

(1) In the following the term 'agreement' includes concerted practices and decisions of associations of undertakings.

(2) OJ L 1, 4.1.2003, p. 1.

(3) All existing block exemption regulations and Commission notices are available on the DG Competition web-site: http://www.europa.eu.int/comm/dgs/competition

(4) See paragraph 36 below.

(5) See Commission Notice on Guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1), Commission Notice on Guidelines on the application of Article 81 of the Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2), and Commission Notice on Guidelines on the application of Article 81 of the Treaty to technology transfer agreements, not yet published.

(6) The concept of effect on trade between Member States is dealt with in separate guidelines.

(7) In the following the term 'restriction' includes the prevention and distortion of competition.

(8) According to Article 81(2) such agreements are automatically void.

(9) Article 81(1) prohibits both actual and potential anti-competitive effects, see e.g. Case C-7/95 P, John Deere, [1998] ECR I-3111, paragraph 77.

(10) See Case T-65/98, Van den Bergh Foods, [2003] ECR II . . ., paragraph 107 and Case T-112/99, Métropole télévision (M6) and others, [2001] ECR II-2459, paragraph 74, where the Court of First Instance held that it is only in the precise framework of Article 81(3) that the pro- and anti-competitive aspects of a restriction may be weighed.

(11) See note above.

(12) See e.g. Case C-49/92 P, Anic Partecipazioni, [1999] ECR I-4125, paragraph 116; and Joined Cases 40/73 to 48/73 and others, Suiker Unie, [1975] ECR page 1663, paragraph 173.

(13) See in this respect paragraph 108 of the judgment in Anic Partecipazioni cited in the previous note and Case C-277/87, Sandoz Prodotti, [1990] ECR I-45.

(14) See in this respect e.g. Case 14/68, Walt Wilhelm, [1969] ECR 1, and more recently Case T-203/01, Michelin (II), [2003] ECR II . . ., paragraph 112.

(15) See Joined Cases T-25/95 and others, Cimenteries CBR, [2000] ECR II-491, paragraphs 1849 and 1852; and Joined Cases T-202/98 and others, British Sugar, [2001] ECR II-2035, paragraphs 58 to 60.

(16) See to that effect Case C-453/99, Courage v Crehan, [2001] ECR I-6297, and paragraph 3444 of the judgment in Cimenteries CBR cited in the previous note.

(17) See in this respect Joined Cases C-2/01 P and C-3/01 P, Bundesverband der Arzneimittel-Importeure, [2004] ECR I . . ., paragraph 102.

(18) See e.g. Joined Cases 25/84 and 26/84, Ford, [1985] ECR 2725.

(19) See in this respect paragraph 141 of the judgment in Bundesverband der Arzneimittel-Importeure cited in note.

(20) See Case 56/65, Société Technique Minière, [1966] ECR 337, and paragraph 76 of the judgment in John Deere, cited in note 9.

(21) See in this respect e.g. Joined Cases 56/64 and 58/66, Consten and Grundig, [1966] ECR 429.

(22) See in this respect e.g. Commission Decision in Elopak/Metal Box – Odin (OJ 1990 L 209, p. 15) and in TPS (OJ 1999 L 90, p. 6).

(23) See in this respect the judgment in Société Technique Minière cited in note 20 and Case 258/78, Nungesser, [1982] ECR 2015.

(24) See rule 10 in paragraph 119 of the Guidelines on vertical restraints cited in note above, according to which inter alia passive sales restrictions — a hardcore restraint — are held to fall outside Article 81(1) for a period of 2 years when the restraint is linked to opening up new product or geographic markets.

(25) See e.g. paragraph 99 of the judgment in Anic Partecipazioni cited in note 12.

(26) See paragraph 46 below.

(27) See Joined Cases 29/83 and 30/83, CRAM and Rheinzink, [1984] ECR 1679, paragraph 26, and Joined Cases 96/82 and others, ANSEAU-NAVEWA, [1983] ECR 3369, paragraphs 23-25.

(28) See the Guidelines on horizontal cooperation agreements, cited in note, paragraph 25, and Article 5 of Commission Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3).

(29) See Article 4 Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21) and the Guidelines on Vertical Restraints, cited in note, paragraph 46 et seq. See also Case 279/87, Tipp-Ex, [1990] ECR I-261, and Case T-62/98, Volkswagen v Commission, [2000] ECR II-2707, paragraph 178.

(30) See paragraph 77 of the judgment in John Deere cited in note 9.

(31) It is not sufficient in itself that the agreement restricts the freedom of action of one or more of the parties, see paragraphs 76 and 77 of the judgment in Métropole television (M6) cited in note10. This is in line with the fact that the object of Article 81 is to protect competition on the market for the benefit of consumers.

(32) See e.g. Case 5/69, Völk, [1969] ECR 295, paragraph 7. Guidance on the issue of appreciability can be found in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13) The notice defines appreciability in a negative way. Agreements, which fall outside the scope of the de minimis notice, do not necessarily have appreciable restrictive effects. An individual assessment is required.

(33) See in this respect Joined Cases T-374/94 and others, European Night Services, [1998] ECR II-3141.

(34) See note 32.

(35) See in this respect Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 1).

(36) For the reference in the OJ see note 5.

(37) See paragraph 104 of the judgment in Métropole télévision (M6) and others, cited in note 10.

(38) See e.g. Case C-399/93, Luttikhuis, [1995] ECR I-4515, paragraphs 12 to 14.

(39) See in this respect paragraphs 118 et seq. of the Métropole television judgment cited in note 10.

(40) See paragraph 107 of the judgment in Métropole télévision judgement cited in note 10.

(41) See e.g. Commission Decision in Elopak/Metal Box – Odin cited in note 22.

(42) See Case 161/84, Pronuptia, [1986] ECR 353.

(43) See note 22. The decision was upheld by the Court of First Instance in the judgment in Métropole télévision (M6) cited in note 10.

(44) Cost savings and other gains to the parties that arise from the mere exercise of market power do not give rise to objective benefits and cannot be taken into account, cf. paragraph 49 below.

([45]) See the judgment in Consten and Grundig, cited in note 21.

([46]) The fact that an agreement is block exempted does not in itself indicate that the individual agreement is caught by Article 81(1).

([47]) See e.g. Case C-234/89, Delimitis, [1991] ECR I-935, paragraph 46.

([48]) Article 36(4) of Regulation 1/2003 has, inter alia, repealed Article 5 of Regulation 1017/68 applying rules of competition to transport by rail, road and inland waterway. However, the Commission's case practice adopted under Regulation 1017/68 remains relevant for the purposes of applying Article 81(3) in the inland transport sector.

([49]) See paragraph 42 below.

([50]) See the judgment in Société Technique Minière cited in note 20.

([51]) See in this respect Case 319/82, Kerpen & Kerpen, [1983] ECR 4 173, paragraphs 11 and 12.

([52]) See e.g. Case T-185/00 and others, Métropole télévision SA (M6), [2002] ECR II-3805, paragraph 86, Case T-17/93, Matra, ECR [1994] II-595, paragraph 85; and Joined Cases 43/82 and 63/82, VBVB and VBBB, [1984] ECR 19, paragraph 61.

([53]) See Case T-213/00, CMA CGM and others, [2003] ECR II . . ., paragraph 226.

([54]) See to that effect implicitly paragraph 139 of the Matra judgment cited in note 52 and Case 26/76, Metro (I), [1977] ECR 1875, paragraph 43.

([55]) As to the concept of consumers see paragraph 84 below where it is stated that consumers are the customers of the parties and subsequent buyers. The parties themselves are not 'consumers' for the purposes of Article 81(3).

([56]) The test is market specific, see to that effect Case T-131/99, Shaw, [2002] ECR II-2023, paragraph 163, where the Court of First Instance held that the assessment under Article 81(3) had to be made within the same analytical framework as that used for assessing the restrictive effects, and Case C-360/92 P, Publishers Association, [1995] ECR I-23, paragraph 29, where in a case where the relevant market was wider than national the Court of Justice held that in the application of Article 81(3) it was not correct only to consider the effects on the national territory.

([57]) In Case T-86/95, Compagnie Générale Maritime and others, [2002] ECR II-1011, paragraphs 343 to 345, the Court of First Instance held that Article 81(3) does not require that the benefits are linked to a specific market and that in appropriate cases regard must be had to benefits 'for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement'. Importantly, however, in this case the affected group of consumers was the same. The case concerned intermodal transport services encompassing a bundle of, inter alia, inland and maritime transportation provided to shipping companies across the Community. The restrictions related to inland transport services, which were held to constitute a separate market, whereas the benefits were claimed to occur in relation to maritime transport services. Both services were demanded by shippers requiring intermodal transport services between northern Europe and South-East and East Asia. The judgment in CMA CGM, cited in note 53 above, also concerned a situation where the agreement, while covering several distinct services, affected the same group of consumers, namely shippers of containerised cargo between northern Europe and the Far East. Under the agreement the parties fixed charges and surcharges relating to inland transport services, port services and maritime transport services. The Court of First Instance held (cf. paragraphs 226 to 228) that in the circumstances of the case there was no need to define relevant markets for the purpose of applying Article 81(3). The agreement was restrictive of competition by its very object and there were no benefits for consumers.

([58]) See paragraphs 126 and 132 of the Guidelines on horizontal co-operation agreements cited in note 5 above.

([59]) See the Ford judgment cited in note 18.

([60]) See in this respect for example Commission Decision in TPS (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition of Article 81(1) also only applies as long as the agreement has a restrictive object or restrictive effects.

([61]) See paragraph 85 of the Matra judgment cited in note 52.

([62]) As to this requirement see paragraph 49 below.

([63]) See e.g. Case T-29/92, Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO), [1995] ECR II-289.

([64]) See e.g. Case 258/78, Nungesser, [1982] ECR 2015, paragraph 77, concerning absolute territorial protection.

([65]) See in this respect e.g. the judgment in SPO cited in note 63.

([66]) National measures must, inter alia, comply with the Treaty rules on free movement of goods, services, persons and capital.

([67]) See e.g. the judgment in Consten and Grundig cited in note 21.

([68]) See in this respect Commission Decision in Van den Bergh Foods (OJ 1998 L 246, p. 1).

([69]) See in this respect Commission Decision in Glaxo Wellcome (OJ 2001 L 302, p. 1).

([70]) See e.g. Commission Decision in GEAE/P&W (OJ 2000 L 58, p. 16); in British Interactive Broadcasting/Open (OJ 1999 L 312, p. 1) and in Asahi/Saint Gobain (OJ 1994 L 354, page 87).

([71]) See e.g. Commission Decision in Atlas (OJ 1996 L 239, p. 23), and in Phoenix/Global One (OJ 1996 L 239, p. 57).

([72]) See e.g. Commission Decision in Uniform Eurocheques (OJ 1985 L 35, p. 43).

([73]) See e.g. Commission Decision in Cégétel + 4 (OJ 1999 L 88, p. 26).

(74) As to the former question, which may be relevant in the context of Article 81(1), see paragraph 18 above.

(75) Scale economies are normally exhausted at a certain point. Thereafter average costs will stabilise and eventually rise due to, for example, capacity constraints and bottlenecks.

(76) See in this respect paragraphs 392 to 395 of the judgment in Compagnie Générale Maritime cited in note 57.

(77) See for more detail paragraph 116 of the Guidelines on Vertical Restraints cited in note 5.

(78) See Joined Cases T-374/94 and others, European Night Services, [1998] ECR II-3141, paragraph 230.

(79) See Commission Regulation No 2790/1999 on the application of Article 81(3) of the Treaty on categories of vertical agreements and concerted practices (OJ 1999 L 336, page 21).

(80) See in this respect the judgment in Consten and Grundig cited in note 21, where the Court of Justice held that the improvements within the meaning of the first condition of Article 81(3) must show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.

(81) It is recalled that positive and negative effects on consumers are in principle balanced within each relevant market (cf. paragraph 43 above).

(82) See in this respect paragraph 48 of the Metro (I) judgment cited in note 54.

(83) See paragraph 163 of the judgment in Shaw cited in note 56.

(84) In the following sections, for convenience the competitive harm is referred to in terms of higher prices; competitive harm could also mean lower quality, less variety or lower innovation than would otherwise have occurred.

(85) In perfectly competitive markets individual undertakings are price-takers. They sell their products at the market price, which is determined by overall supply and demand. The output of the individual undertaking is so small that any individual undertaking's change in output does not affect the market price.

(86) Undertakings collude tacitly when in an oligopolistic market they are able to coordinate their action on the market without resorting to an explicit cartel agreement.

(87) This term refers to undertakings that constrain the pricing behaviour of other undertakings in the market who might otherwise have tacitly colluded.

(88) The restrictive agreement may even allow the undertakings in question to charge a higher price to customers with a low elasticity of demand.

(89) See Joined Cases T-191/98, T-212/98 and T-214/98, Atlantic Container Line (TACA), [2003] ECR II-. . ., paragraph 939, and Case T-395/94, Atlantic Container Line, [2002] ECR II-875, paragraph 330.

(90) See Joined Cases C-395/96 P and C-396/96 P, Compagnie maritime belge, [2000] ECR I-1365, paragraph 130. Similarly, the application of Article 81(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 81(1), see to that effect Case C-309/99, Wouters, [2002] ECR I-1577, paragraph 120.

(91) See in this respect Case T-51/89, Tetra Pak (I), [1990] ECR II-309, and Joined Cases T-191/98, T-212/98 and T-214/98, Atlantic Container Line (TACA), [2003] ECR II-. . ., paragraph 1456.

(92) This is how paragraph 135 of the Guidelines on vertical restraints and paragraphs 36, 71, 105, 134 and 155 of the Guidelines on horizontal cooperation agreements, cited in note 5, should be understood when they state that in principle restrictive agreements concluded by dominant undertakings cannot be exempted.

(93) Full function joint ventures, i.e. joint ventures that perform on a lasting basis all the functions of an autonomous economic entity, are covered by Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1990 L 257, p 13).

(94) See paragraph 21 of the judgment in Metro (I) cited in note 54.

(95) See paragraph 97 above.

(96) See in this respect Case T-228/97, Irish Sugar, [1999] ECR II-2969, paragraph 101.

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

(Text with EEA relevance)

(2009/C 45/02)

I. INTRODUCTION

1. Article 82 of the Treaty establishing the European Community ('Article 82') prohibits abuses of a dominant position. In accordance with the case-law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. Article 82 is the legal basis for a crucial component of competition policy and its effective enforcement helps markets to work better for the benefit of businesses and consumers. This is particularly important in the context of the wider objective of achieving an integrated internal market.

II. PURPOSE OF THIS DOCUMENT

2. This document sets out the enforcement priorities that will guide the Commission's action in applying Article 82 to exclusionary conduct by dominant undertakings. Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article 82.

3. This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance of the European Communities. In addition, the general framework set out in this document applies without prejudice to the possibility for the Commission to reject a complaint when it considers that a case lacks priority on grounds of lack of Community interest.

4. Article 82 applies to undertakings which hold a dominant position on one or more relevant markets. Such a position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance). This document only relates to abuses committed by an undertaking holding a single dominant position.

5. In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.

6. The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.

7. Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured. For the purpose of providing guidance on its enforcement priorities the Commission at this stage limits itself to exclusionary conduct and in, particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common.

8. In applying the general enforcement principles set out in this Communication, the Commission will take into account the specific facts and circumstances of each case. For example, in cases involving regulated markets, the Commission will take into account the specific regulatory environment in conducting its assessment ([1]). The Commission may therefore adapt the approach set out in this Communication to the extent that this would appear to be reasonable and appropriate in a given case.

III. GENERAL APPROACH TO EXCLUSIONARY CONDUCT

A. Market power

9. The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 82. According to the case-law, holding a dominant position confers a special responsibility on the undertaking concerned, the scope of which must be considered in the light of the specific circumstances of each case ([2]).

10. Dominance has been defined under Community law as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers ([3]). This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. The Commission may consider that effective competitive constraints are absent even if some actual or potential competition remains ([4]). In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative ([5]).

11. The Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant ([6]). In this Communication, the expression 'increase prices' includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers ([7]).

12. The assessment of dominance will take into account the competitive structure of the market, and in particular the following factors:

— constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors),

— constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry),

— constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).

(a) *Market position of the dominant undertaking and its competitors*

13. Market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market ([8]). However, the Commission will interpret market shares in the light of the relevant market conditions, and

([1]) See for instance paragraph 82.

([2]) Case 322/81 *Nederlandsche Banden Industrie Michelin (Michelin I)* v *Commission* [1983] ECR 3461, paragraph 57; Case T-83/91 *Tetra Pak* v *Commission (Tetra Pak II)* [1993] ECR II-755, paragraph 114; Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 139; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 112; and Case T-203/01 *Michelin* v *Commission (Michelin II)* [2003] ECR II-4071, paragraph 97.

([3]) See Case 27/76 *United Brands Company and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 65; Case 85/76 *Hoffmann-La Roche & Co.* v *Commission* [1979] ECR 461, paragraph 38.

([4]) See Case 27/76 *United Brands Company and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraphs 113 to 121; Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, paragraph 330.

([5]) Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraphs 65 and 66; Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, paragraph 47; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 90.

([6]) What is a significant period of time will depend on the product and on the circumstances of the market in question, but normally a period of two years will be sufficient.

([7]) Accounting profitability may be a poor proxy for the exercise of market power. See to that effect Case 27/76 *United Brands Company and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 126.

([8]) Case 85/76 *Hoffmann-La Roche & Co.* v *Commission* [1979] ECR 461, paragraph 39-41; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 90, 91 and 92; Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 100.

in particular of the dynamics of the market and of the extent to which products are differentiated. The trend or development of market shares over time may also be taken into account in volatile or bidding markets.

14. The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission.

15. Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position and, in certain circumstances, of possible serious effects of abusive conduct, justifying an intervention by the Commission under Article 82 ([1]). However, as a general rule, the Commission will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behaviour of the undertaking.

(b) *Expansion or entry*

16. Competition is a dynamic process and an assessment of the competitive constraints on an undertaking cannot be based solely on the existing market situation. The potential impact of expansion by actual competitors or entry by potential competitors, including the threat of such expansion or entry, is also relevant. An undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient. For the Commission to consider expansion or entry likely it must be sufficiently profitable for the competitor or entrant, taking into account factors such as the barriers to expansion or entry, the likely reactions of the allegedly dominant undertaking and other competitors, and the risks and costs of failure. For expansion or entry to be considered timely, it must be sufficiently swift to deter or defeat the exercise of substantial market power. For expansion or entry to be considered sufficient, it cannot be simply small-scale entry, for example into some market niche, but must be of such a magnitude as to be able to deter any attempt to increase prices by the putatively dominant undertaking in the relevant market.

17. Barriers to expansion or entry can take various forms. They may be legal barriers, such as tariffs or quotas, or they may take the form of advantages specifically enjoyed by the dominant undertaking, such as economies of scale and scope, privileged access to essential inputs or natural resources, important technologies ([2]) or an established distribution and sales network ([3]). They may also include costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier. The dominant undertaking's own conduct may also create barriers to entry, for example where it has made significant investments which entrants or competitors would have to match ([4]), or where it has concluded long-term contracts with its customers that have appreciable foreclosing effects. Persistently high market shares may be indicative of the existence of barriers to entry and expansion.

(c) *Countervailing buyer power*

18. Competitive constraints may be exerted not only by actual or potential competitors but also by customers. Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength ([5]). Such countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices. Buyer power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking.

B. **Foreclosure leading to consumer harm ('anti-competitive foreclosure')**

19. The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term

([1]) As to the relationship between the degree of dominance and the finding of abuse, see Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines* v *Commission* [2000] ECR I-1365, paragraph 119; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 186.

([2]) Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 19.

([3]) Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 48.

([4]) Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 91.

([5]) See Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraphs 97 to 104, in which the Court of First Instance considered whether the alleged lack of independence of the undertaking *vis-à-vis* its customers should be seen as an exceptional circumstance preventing the finding of a dominant position in spite of the fact that the undertaking was responsible for a very large part of the sales recorded on the industrial sugar market in Ireland.

'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices ([1]) to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such anti-competitive foreclosure either at the intermediate level or at the level of final consumers, or at both levels ([2]).

20. The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The Commission considers the following factors to be generally relevant to such an assessment:

— *the position of the dominant undertaking*: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure,

— *the conditions on the relevant market*: this includes the conditions of entry and expansion, such as the existence of economies of scale and/or scope and network effects. Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant undertaking forecloses a significant part of the relevant market. Similarly, the conduct may allow the dominant undertaking to 'tip' a market characterised by network effects in its favour or to further entrench its position on such a market. Likewise, if entry barriers in the upstream and/or downstream market are significant, this means that it may be costly for competitors to overcome possible foreclosure through vertical integration,

— *the position of the dominant undertaking's competitors*: this includes the importance of competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. It may, for example, be the closest competitor to the dominant undertaking, be a particularly innovative competitor, or have the reputation of systematically cutting prices. In its assessment, the Commission may also consider in appropriate cases, on the basis of information available, whether there are realistic, effective and timely counterstrategies that competitors would be likely to deploy,

— *the position of the customers or input suppliers*: this may include consideration of the possible selectivity of the conduct in question. The dominant undertaking may apply the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti-competitive foreclosure ([3]). In the case of customers, they may, for example, be the ones most likely to respond to offers from alternative suppliers, they may represent a particular means of distributing the product that would be suitable for a new entrant, they may be situated in a geographic area well suited to new entry or they may be likely to influence the behaviour of other customers. In the case of input suppliers, those with whom the dominant undertaking has concluded exclusive supply arrangements may be the ones most likely to respond to requests by customers who are competitors of the dominant undertaking in a downstream market, or may produce a grade of the product — or produce at a location — particularly suitable for a new entrant. Any strategies at the disposal of the customers or input suppliers which could help to counter the conduct of the dominant undertaking will also be considered,

— *the extent of the allegedly abusive conduct*: in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect,

— *possible evidence of actual foreclosure*: if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed,

— *direct evidence of any exclusionary strategy*: this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct.

([1]) For the meaning of the expression 'increase price' see paragraph 11.

([2]) The concept of 'consumers' encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers. Where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream.

([3]) Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 188.

21. When pursuing a case the Commission will develop the analysis of the general factors mentioned in paragraph 20, together with the more specific factors described in the sections dealing with certain types of exclusionary conduct, and any other factors which it may consider to be appropriate. This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking's conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices.

22. There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product.

C. **Price-based exclusionary conduct**

23. The considerations in paragraphs 23 to 27 apply to price-based exclusionary conduct. Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking ([1]).

24. However, the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.

25. In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing. This will require that sufficiently reliable data be available. Where available, the Commission will use information on the costs of the dominant undertaking itself. If reliable information on those costs is not available, the Commission may decide to use the cost data of competitors or other comparable reliable data.

26. The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC) ([2]). Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product specific fixed costs made before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market ([3]).

27. If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.

([1]) Case 62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, paragraph 72: in relation to pricing below average total cost (ATC) the Court of Justice stated: '*Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them*'. See also Judgment of 10 April 2008 in Case T-271/03 *Deutsche Telekom* v *Commission* not yet reported, paragraph 194.

([2]) Average avoidable cost is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct. In most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided. Long-run average incremental cost is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. If multi-product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs. In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors.

([3]) In order to apply these cost benchmarks it may also be necessary to look at revenues and costs of the dominant company and its competitors in a wider context. It may not be sufficient to only assess whether the price or revenue covers the costs for the product in question, but it may be necessary to look at incremental revenues in case the dominant company's conduct in question negatively affects its revenues in other markets or of other products. Similarly, in the case of two sided markets it may be necessary to look at revenues and costs of both sides at the same time.

D. **Objective necessity and efficiencies**

28. In the enforcement of Article 82, the Commission will also examine claims put forward by a dominant undertaking that its conduct is justified ([1]). A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

29. The question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking. Exclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question. However, proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards. It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product ([2]).

30. The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. In this context, the dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled ([3]):

— the efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution,

— the conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies,

— the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets,

— the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

31. It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm.

IV. **SPECIFIC FORMS OF ABUSE**

A. **Exclusive dealing**

32. A dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing ([4]). This section sets out the circumstances which are most likely to prompt an intervention by the Commission in respect of exclusive dealing arrangements entered into by dominant undertakings.

(a) *Exclusive purchasing*

33. An exclusive purchasing obligation requires a customer on a particular market to purchase exclusively or to a large

([1]) See Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 184; Case 311/84 *Centre Belge d'études de marché — Télémarketing (CBEM)* v *Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261, paragraph 27; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 102 to 119; Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, paragraphs 136 and 207; Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraphs 69 and 86.

([2]) See, for instance, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 118-119; Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, paragraphs 83 and 84 and 138.

([3]) See, in the different context of Article 81, the Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

([4]) The notion of exclusive dealing also includes exclusive supply obligations or incentives with the same effect, whereby the dominant undertaking tries to foreclose its competitors by hindering them from purchasing from suppliers. The Commission considers that such input foreclosure is in principle liable to result in anti-competitive foreclosure if the exclusive supply obligation or incentive ties most of the efficient input suppliers and customers competing with the dominant undertaking are unable to find alternative efficient sources of input supply.

extent only from the dominant undertaking. Certain other obligations, such as stocking requirements, which appear to fall short of requiring exclusive purchasing, may in practice lead to the same effect ([1]).

34. In order to convince customers to accept exclusive purchasing, the dominant undertaking may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into an exclusive purchasing obligation with the dominant undertaking. But it would be wrong to conclude automatically from this that all exclusive purchasing obligations, taken together, are beneficial for customers overall, including those currently not purchasing from the dominant undertaking, and the final consumers. The Commission will focus its attention on those cases where it is likely that consumers as a whole will not benefit. This will, in particular, be the case if there are many customers and the exclusive purchasing obligations of the dominant undertaking, taken together, have the effect of preventing the entry or expansion of competing undertakings.

35. In addition to the factors mentioned in paragraph 20, the following factors will generally be of particular relevance in determining whether the Commission will intervene in respect of exclusive purchasing arrangements.

36. The capacity for exclusive purchasing obligations to result in anti-competitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors who either are not yet present in the market at the time the obligations are concluded, or who are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier ([2]). If competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation. In general, the longer the duration of the obligation, the greater the likely foreclosure effect. However, if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anti-competitive foreclosure.

([1]) Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653. In this case the obligation to use coolers exclusively for the products of the dominant undertaking was considered to lead to outlet exclusivity.

([2]) Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraphs 104 and 156.

(b) *Conditional rebates*

37. Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates). Conditional rebates are not an uncommon practice. Undertakings may offer such rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates — when granted by a dominant undertaking — can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking ([3]).

38. In addition to the factors already mentioned in paragraph 20, the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates is liable to result in anti-competitive foreclosure and, consequently, will be part of the Commission's enforcement priorities.

39. As with exclusive purchasing obligations, the likelihood of anti-competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer. A conditional rebate granted by a dominant undertaking may enable it to use the 'non contestable' portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the 'contestable' portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes) ([4]).

40. In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates ([5]). The potential foreclosing effect of retroactive rebates is in principle strongest on the last purchased unit of the product before the threshold is exceeded. However, what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit, but the foreclosing effect of the rebate system

([3]) In this regard, the assessment of conditional rebates differs from that of predation, which always entails a sacrifice.

([4]) See Case T-203/01 *Michelin* v *Commission (Michelin II)* [2003] ECR II-4071, paragraphs 162 and 163. See also Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraphs 277 and 278.

([5]) Case 322/81 *Nederlandsche Banden Industrie Michelin* v *Commission (Michelin I)* [1983] ECR 3461, paragraphs 70 to 73.

on (actual or potential) competitors of the dominant supplier. The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.

41. When applying the methodology explained in paragraphs 23 to 27, the Commission intends to investigate, to the extent that the data are available and reliable, whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers. In this context the Commission will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand ('the relevant range') away from the dominant undertaking. The effective price that the competitor will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time. The Commission will take into account the margin of error that may be caused by the uncertainties inherent in this kind of analysis.

42. The relevant range over which to calculate the effective price in a particular case depends on the specific facts of each case and on whether the rebate is incremental or retroactive. For incremental rebates, the relevant range is normally the incremental purchases that are being considered. For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer's purchase requirements can realistically be switched to a competitor (the 'contestable share' or 'contestable portion'). If it is likely that customers would be willing and able to switch large amounts of demand to a (potential) competitor relatively quickly, the relevant range is likely to be relatively large. If, on the other hand, it is likely that customers would only be willing or able to switch small amounts incrementally, then the relevant range will be relatively small. For existing competitors their capacity to expand sales to customers and the fluctuations in those sales over time may also provide an indication of the relevant range. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible. It may be possible to take the historical growth pattern of new entrants in the same or in similar markets as an indication of a realistic market share of a new entrant ([1]).

43. The lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect. However, as long as the effective price remains consistently above the LRAIC of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing in an anti-competitive way.

44. Where the effective price is below AAC, as a general rule the rebate scheme is capable of foreclosing even equally efficient competitors. Where the effective price is between AAC and LRAIC, the Commission will investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be affected. In this context, the Commission will investigate whether and to what extent competitors have realistic and effective counterstrategies at their disposal, for instance their capacity to also use a 'non contestable' portion of their buyers' demand as leverage to decrease the price for the relevant range. Where competitors do not have such counterstrategies at their disposal, the Commission will consider that the rebate scheme is capable of foreclosing equally efficient competitors.

45. As indicated in paragraph 27, this analysis will be integrated in the general assessment, taking into account other relevant quantitative or qualitative evidence. It is normally important to consider whether the rebate system is applied with an individualised or a standardised threshold. An individualised threshold — one based on a percentage of the total requirements of the customer or an individualised volume target — allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect ([2]). By contrast, a standardised volume threshold — where the threshold is the same for all or a group of customers — may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. If, however, it can be established that a standardised volume threshold approximates the requirements of an appreciable proportion of customers, the Commission is likely to consider that such a standardised system of rebates may produce anti-competitive foreclosure effects.

(c) *Efficiencies*

46. Provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by dominant undertakings that rebate systems achieve cost or other advantages which are passed on to customers ([3]). Transaction-related cost advantages are often more likely to be

([1]) The relevant range will be estimated on the basis of data which may have varying degrees of precision. The Commission will take this into account in drawing any conclusions regarding the dominant undertaking's ability to foreclose equally efficient competitors. It may also be useful to calculate how big a share of customers' requirements on average the entrant should capture as a minimum so that the effective price is at least as high as the LRAIC of the dominant company. In a number of cases the size of this share, when compared with the actual market shares of competitors and their shares of the customers' requirements, may make it clear whether the rebate scheme is capable to have an anti-competitive foreclosure effect.

([2]) See Case 85/76 *Hoffmann-La Roche & Co.* v *Commission* [1979] ECR 461, paragraphs 89 and 90; Case T-288/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 213; Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraphs 7 to 11 and 270 to 273.

([3]) For instance, for rebates see Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 86.

achieved with standardised volume targets than with individualised volume targets. Similarly, incremental rebate schemes are in general more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes ([1]). Under the same conditions, the Commission will consider evidence demonstrating that exclusive dealing arrangements result in advantages to particular customers if those arrangements are necessary for the dominant undertaking to make certain relationship-specific investments in order to be able to supply those customers.

B. **Tying and bundling**

47. A dominant undertaking may try to foreclose its competitors by tying or bundling. This section sets out the circumstances which are most likely to prompt an intervention by the Commission when assessing tying and bundling by dominant undertakings.

48. 'Tying' usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis ([2]). 'Bundling' usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.

49. Tying and bundling are common practices intended to provide customers with better products or offerings in more cost effective ways. However, an undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market.

50. The Commission will normally take action under Article 82 where an undertaking is dominant in the tying market ([3]) and where, in addition, the following conditions are fulfilled: (i) the tying and tied products are distinct products, and (ii) the tying practice is likely to lead to anti-competitive foreclosure ([4]).

([1]) See, to that effect, Case T-203/01 *Michelin* v *Commission (Michelin II)* [2003] ECR II-4071, paragraphs 56 to 60, 74 and 75.

([2]) Technical tying occurs when the tying product is designed in such a way that it only works properly with the tied product (and not with the alternatives offered by competitors). Contractual tying occurs when the customer who purchases the tying product undertakes also to purchase the tied product (and not the alternatives offered by competitors).

([3]) The undertaking should be dominant in the tying market, though not necessarily in the tied market. In bundling cases, the undertaking needs to be dominant in one of the bundled markets. In the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied after-market.

([4]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, in particular paragraphs 842, 859 to 862, 867 and 869.

(a) *Distinct products*

51. Whether the products will be considered by the Commission to be distinct depends on customer demand. Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product ([5]). Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product ([6]) or of each of the products bundled by the dominant undertaking, or evidence indicating that undertakings with little market power, particularly in competitive markets, tend not to tie or not to bundle such products.

(b) *Anti-competitive foreclosure in the tied and/or tying market*

52. Tying or bundling may lead to anti-competitive effects in the tied market, the tying market, or both at the same time. However, even when the aim of the tying or bundling is to protect the dominant undertaking's position in the tying market, this is done indirectly through foreclosing the tied market. In addition to the factors already mentioned in paragraph 20, the Commission considers that the following factors are generally of particular importance for identifying cases of likely or actual anti-competitive foreclosure.

53. The risk of anti-competitive foreclosure is expected to be greater where the dominant undertaking makes its tying or bundling strategy a lasting one, for example through technical tying which is costly to reverse. Technical tying also reduces the opportunities for resale of individual components.

54. In the case of bundling, the undertaking may have a dominant position for more than one of the products in the bundle. The greater the number of such products in the bundle, the stronger the likely anti-competitive foreclosure. This is particularly true if the bundle is difficult for a competitor to replicate, either on its own or in combination with others.

55. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers who will buy the tied product alone to sustain competitors of the dominant undertaking in the tied market, the tying can lead to those customers facing higher prices.

([5]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 917, 921 and 922.

([6]) Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 67.

56. If the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the dominant undertaking may seek to avoid this substitution and as a result be able to raise its prices.

57. If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market.

58. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry to the tying market alone more difficult.

(c) *Multi-product rebates*

59. A multi-product rebate may be anti-competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.

60. In theory, it would be ideal if the effect of the rebate could be assessed by examining whether the incremental revenue covers the incremental costs for each product in the dominant undertaking's bundle. However, in practice assessing the incremental revenue is complex. Therefore, in its enforcement practice the Commission will in most situations use the incremental price as a good proxy. If the incremental price that customers pay for each of the dominant undertaking's products in the bundle remains above the LRAIC of the dominant undertaking from including that product in the bundle, the Commission will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may, however, be warranted if the incremental price is below the LRAIC, because in such a case even an equally efficient competitor may be prevented from expanding or entering ([1]).

61. If the evidence suggests that competitors of the dominant undertaking are selling identical bundles, or could do so in a timely way without being deterred by possible additional costs, the Commission will generally regard this as a bundle competing against a bundle, in which case the relevant question is not whether the incremental revenue covers the incremental costs for each product in the bundle, but rather whether the price of the bundle as a whole is predatory.

([1]) In principle, the LRAIC cost benchmark is relevant here as long as competitors are not able to also sell bundles (see paragraphs 23 to 27 and paragraph 61).

(d) *Efficiencies*

62. Provided that the conditions set out in Section III D are fulfilled, the Commission will look into claims by dominant undertakings that their tying and bundling practices may lead to savings in production or distribution that would benefit customers. The Commission may also consider whether such practices reduce transaction costs for customers, who would otherwise be forced to buy the components separately, and enable substantial savings on packaging and distribution costs for suppliers. It may also examine whether combining two independent products into a new, single product might enhance the ability to bring such a product to the market to the benefit of consumers. The Commission may also consider whether tying and bundling practices allow the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product.

C. **Predation**

63. In line with its enforcement priorities, the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm ([2]).

(a) *Sacrifice*

64. Conduct will be viewed by the Commission as entailing a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, or by expanding its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided. The Commission will take AAC as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided ([3]). Pricing below AAC will thus in most cases be

([2]) The Commission may also pursue predatory practices by dominant undertakings on secondary markets on which they are not yet dominant. In particular, the Commission will be more likely to find such an abuse in sectors where activities are protected by a legal monopoly. While the dominant undertaking does not need to engage in predatory conduct to protect its dominant position in the market protected by legal monopoly, it may use the profits gained in the monopoly market to cross-subsidize its activities in another market and thereby threaten to eliminate effective competition in that other market.

([3]) In most cases the average variable cost (AVC) and AAC will be the same, as often only variable costs can be avoided. However, in circumstances where AVC and AAC differ, the latter better reflects possible sacrifice: for example, if the dominant undertaking had to expand capacity in order to be able to predate, then the sunk costs of that extra capacity should be taken into account in looking at the dominant undertaking's losses. Those costs would be reflected in the AAC, but not the AVC.

viewed by the Commission as a clear indication of sacrifice ([1]).

65. However, the concept of sacrifice does not only include pricing below AAC ([2]). In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower than could have been expected from a reasonable alternative conduct, that is to say, whether the dominant undertaking incurred a loss that it could have avoided ([3]). The Commission will not compare the actual conduct with hypothetical or theoretical alternatives that might have been more profitable. Only economically rational and practicable alternatives will be considered which, taking into account the market conditions and business realities facing the dominant undertaking, can realistically be expected to be more profitable.

66. In some cases it will be possible to rely upon direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy ([4]), such as a detailed plan to sacrifice in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action ([5]).

(b) *Anti-competitive foreclosure*

67. If sufficient reliable data are available, the Commission will apply the equally efficient competitor analysis, described in paragraphs 25 to 27, to determine whether the conduct is capable of harming consumers. Normally only pricing below LRAIC is capable of foreclosing as efficient competitors from the market.

68. In addition to the factors already mentioned in paragraph 20, the Commission will generally investigate whether and how the suspected conduct reduces the likelihood that competitors will compete. For instance, if the dominant undertaking is better informed about cost or other market conditions, or can distort market signals about profitability, it may engage in predatory conduct so as to influence the expectations of potential entrants and thereby deter entry. If the conduct and its likely effects are felt on multiple markets and/or in successive periods of possible entry, the dominant undertaking may be shown to be seeking a reputation for predatory conduct. If the targeted competitor is dependent on external financing, substantial price decreases or other predatory conduct by the dominant undertaking could adversely affect the competitor's performance so that its access to further financing may be seriously undermined.

69. The Commission does not consider that it is necessary to show that competitors have exited the market in order to show that there has been anti-competitive foreclosure. The possibility cannot be excluded that the dominant undertaking may prefer to prevent the competitor from competing vigorously and have it follow the dominant undertaking's pricing, rather than eliminate it from the market altogether. Such disciplining avoids the risk inherent in eliminating competitors, in particular the risk that the assets of the competitor are sold at a low price and stay in the market, creating a new low cost entrant.

70. Generally speaking, consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice.

71. This does not mean that the Commission will only intervene if the dominant undertaking would be likely to be able to increase its prices above the level persisting in the market before the conduct. It is sufficient, for instance, that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred. Identifying consumer harm is not a mechanical calculation of profits and losses, and proof of overall profits is not required. Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with consideration of other factors, such as entry barriers ([6]). In this context, the Commission will also consider possibilities of re-entry.

72. It may be easier for the dominant undertaking to engage in predatory conduct if it selectively targets specific customers with low prices, as this will limit the losses incurred by the dominant undertaking.

([1]) In Case 62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, paragraph 71, the Court held, in relation to pricing below average variable cost (AVC), that: '*A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its price by taking advantage of its monopolistic position, since each sale generates a loss …*'.

([2]) If the estimate of cost is based on the direct cost of production (as registered in the undertaking's accounts), it may not adequately capture whether or not there has been a sacrifice.

([3]) However, undertakings should not be penalised for incurring *ex post* losses where the *ex ante* decision to engage in the conduct was taken in good faith, that is to say, if they can provide conclusive evidence that they could reasonably expect that the activity would be profitable.

([4]) See Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, paragraphs 151 and 171, and Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraphs 198 to 215.

([5]) In Case 62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, the Court accepted that there was clear evidence of AKZO threatening ECS in two meetings with below cost pricing if it did not withdraw from the organic peroxides market. In addition there was a detailed plan, with figures, describing the measures that AKZO would put into effect if ECS would not withdraw from the market (see paragraphs 76 to 82, 115, and 131 to 140).

([6]) This was confirmed in Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, upheld on appeal in Case C-333/94 P *Tetra Pak International* v *Commission* [1996] ECR I-5951, where the Court of First Instance stated that proof of actual recoupment was not required (paragraph 150 in fine). More in general, as predation may turn out to be more difficult than expected at the start of the conduct, the total costs to the dominant undertaking of predating could outweigh its later profits and thus make actual recoupment impossible while it may still be rational to decide to continue with the predatory strategy that it started some time ago. See also COMP/38.233 *Wanadoo Interactive*, Commission Decision of 16 July 2003, paragraphs 332 to 367.

73. It is less likely that the dominant undertaking engages in predatory conduct if the conduct concerns a low price applied generally for a long period of time.

(c) *Efficiencies*

74. In general it is considered unlikely that predatory conduct will create efficiencies. However, provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale or efficiencies related to expanding the market.

D. **Refusal to supply and margin squeeze**

75. When setting its enforcement priorities, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. The Commission therefore considers that intervention on competition law grounds requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply on the dominant undertaking ([1]). The existence of such an obligation — even for a fair remuneration — may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings — or undertakings who anticipate that they may become dominant — not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.

76. Typically competition problems arise when the dominant undertaking competes on the 'downstream' market with the buyer whom it refuses to supply. The term 'downstream market' is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service. This section deals only with this type of refusal.

77. Other types of possibly unlawful refusal to supply, in which the supply is made conditional upon the purchaser accepting limitations on its conduct, are not dealt with in this section. For instance, halting supplies in order to punish customers for dealing with competitors or refusing to supply customers that do not agree to tying arrangements, will be examined by the Commission in line with the principles set out in the sections on exclusive dealing and tying and bundling. Similarly, refusals to supply aimed at preventing the purchaser from engaging in parallel trade ([2]) or from lowering its resale price are also not dealt with in this section.

78. The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers ([3]), refusal to license intellectual property rights ([4]), including when the licence is necessary to provide interface information ([5]), or refusal to grant access to an essential facility or a network ([6]).

79. The Commission does not regard it as necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified ([7]). Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking; 'constructive refusal' is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply.

80. Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market ([8]), does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called 'margin squeeze'). In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking ([9]).

81. The Commission will consider these practices as an enforcement priority if all the following circumstances are present:

— the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,

([1]) Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP)* v *Commission (Magill)* [1995] ECR I-743, paragraph 50; Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 35; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 319, 330, 331, 332 and 336.

([2]) See Judgment of 16 September 2008 in Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* v *GlaxoSmithKline*, not yet reported.

([3]) Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223.

([4]) Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP)* v *Commission (Magill)* [1995] ECR 743; Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039. Those judgments show that in exceptional circumstances a refusal to license intellectual property rights is abusive.

([5]) See Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601.

([6]) See Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers* v *Stena Sealink — Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland* v *Aer Lingus* — (OJ L 96, 10.4.1992, p. 34).

([7]) Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 44.

([8]) Including a situation in which an integrated undertaking that sells a 'system' of complementary products refuses to sell one of the complementary products on an unbundled basis to a competitor that produces the other complementary product.

([9]) In some cases, however, the LRAIC of a non-integrated competitor downstream might be used as the benchmark, for example when it is not possible to clearly allocate the dominant undertaking's costs to downstream and upstream operations.

— the refusal is likely to lead to the elimination of effective competition on the downstream market, and

— the refusal is likely to lead to consumer harm.

82. In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether *ex ante* or *ex post*. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti-competitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present.

(a) *Objective necessity of the input*

83. In examining whether a refusal to supply deserves its priority attention, the Commission will consider whether the supply of the refused input is objectively necessary for operators to be able to compete effectively on the market. This does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market ([1]). Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter — at least in the long-term — the negative consequences of the refusal ([2]). In this regard, the Commission will normally make an assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future ([3]). The notion of duplication means the creation of an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market ([4]).

84. The criteria set out in paragraph 81 apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (*de novo* refusals to supply). However, the termination of an existing supply arrangement is more likely to be found to be abusive than a *de novo* refusal to supply. For example, if the dominant undertaking had previously been supplying the requesting undertaking, and the latter had made relationship-specific investments in order to use the subsequently refused input, the Commission may be more likely to regard the input in question as indispensable. Similarly, the fact that the owner of the essential input in the past has found it in its interest to supply is an indication that supplying the input does not imply any risk that the owner receives inadequate compensation for the original investment. It would therefore be up to the dominant company to demonstrate why circumstances have actually changed in such a way that the continuation of its existing supply relationship would put in danger its adequate compensation.

(b) *Elimination of effective competition*

85. If the requirements set out in paragraphs 83 and 84 are fulfilled, the Commission considers that a dominant undertaking's refusal to supply is generally liable to eliminate, immediately or over time, effective competition in the downstream market. The likelihood of effective competition being eliminated is generally greater the higher the market share of the dominant undertaking in the downstream market. The less capacity-constrained the dominant undertaking is relative to competitors in the downstream market, the closer the substitutability between the dominant undertaking's output and that of its competitors in the downstream market, the greater the proportion of competitors in the downstream market that are affected, and the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking.

(c) *Consumer harm*

86. In examining the likely impact of a refusal to supply on consumer welfare, the Commission will examine whether, for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply. If they do, the Commission will normally pursue the case.

87. The Commission considers that consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled ([5]). This may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already

([1]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 428 and 560 to 563.

([2]) Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications LTD (ITP)* v *Commission (Magill)* [1995] ECR 743, paragraphs 52 and 53; Case 7/97 *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I-7791, paragraphs 44 and 45; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 421.

([3]) In general, an input is likely to be impossible to replicate when it involves a natural monopoly due to scale or scope economies, where there are strong network effects or when it concerns so-called 'single source' information. However, in all cases account should be taken of the dynamic nature of the industry and, in particular whether or not market power can rapidly dissipate.

([4]) Case 7/97 *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I-7791, paragraph 46, Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 29.

([5]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 643, 647, 648, 649, 652, 653 and 656.

offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development ([1]).

88. The Commission also considers that a refusal to supply may lead to consumer harm where the price in the upstream input market is regulated, the price in the downstream market is not regulated and the dominant undertaking, by excluding competitors on the downstream market through a refusal to supply, is able to extract more profits in the unregulated downstream market than it would otherwise do.

(d) *Efficiencies*

89. The Commission will consider claims by the dominant undertaking that a refusal to supply is necessary to allow the dominant undertaking to realise an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account. The Commission will also consider claims by the dominant undertaking that its own innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about, including the development of follow-on innovation by competitors.

90. However, when considering such claims, the Commission will ensure that the conditions set out in Section III D are fulfilled. In particular, it falls on the dominant undertaking to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation ([2]). If a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal to supply is justified on efficiency grounds.

([1]) Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 49; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 658.

([2]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 659.

Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

(2006/C 210/02)

(Text with EEA relevance)

INTRODUCTION

1. Pursuant to Article 23(2)(a) of Regulation No 1/2003 [1], the Commission may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 or 82 of the Treaty.

2. In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion [2] within the limits set by Regulation No 1/2003. First, the Commission must have regard both to the gravity and to the duration of the infringement. Second, the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003.

3. In order to ensure the transparency and impartiality of its decisions, the Commission published on 14 January 1998 guidelines on the method of setting fines [3]. After more than eight years of implementation, the Commission has acquired sufficient experience to develop further and refine its policy on fines.

4. The Commission's power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article 81 or 82 of the Treaty is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles [4]. For this purpose, the Commission must ensure that its action has the necessary deterrent effect [5]. Accordingly, when the Commission discovers that Article 81 or 82 of the Treaty has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).

5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. It necessarily has an impact on the potential consequences of the infringement on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.

6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.

7. It is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices.

8. The sections below set out the principles which will guide the Commission when it sets fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

METHOD FOR THE SETTING OF FINES

9. Without prejudice to point 37 below, the Commission will use the following two-step methodology when setting the fine to be imposed on undertakings or associations of undertakings.

10. First, the Commission will determine a basic amount for each undertaking or association of undertakings (see Section 1 below).

11. Second, it may adjust that basic amount upwards or downwards (see Section 2 below).

1. Basic amount of the fine

12. The basic amount will be set by reference to the value of sales and applying the following methodology.

[1] Council Regulation (EC) No 1 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, p. 1).

[2] See, for example, Case C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425, paragraph 172.

[3] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).

[4] See, for example, *Dansk Rørindustri A/S and others v Commission*, cited above, paragraph 170.

[5] See Joined Cases 100/80 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 106.

A. *Calculation of the value of sales*

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly [1] relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter 'value of sales').

14. Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members.

15. In determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures.

16. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.

17. The value of sales will be determined before VAT and other taxes directly related to the sales.

18. Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

B. *Determination of the basic amount of the fine*

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales.

22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

23. Horizontal price-fixing, market-sharing and output-limitation agreements [2], which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.

24. In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above) will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.

25. In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.

26. Where the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set for each of them an identical basic amount. Moreover, in determining the basic amount of the fine, the Commission will use rounded figures.

2. **Adjustments to the basic amount**

27. In setting the fine, the Commission may take into account circumstances that result in an increase or decrease in the basic amount as determined in Section 1 above. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.

[1] Such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.

[2] This includes agreements, concerted practices and decisions by associations of undertakings within the meaning of Article 81 of the Treaty.

A. *Aggravating circumstances*

28. The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

— where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established;

— refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

— role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

B. *Mitigating circumstances*

29. The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

— where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);

— where the undertaking provides evidence that the infringement has been committed as a result of negligence;

— where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

— where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

— where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation. ([1])

([1]) This is without prejudice to any action that may be taken against the Member State concerned.

C. *Specific increase for deterrence*

30. The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.

31. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.

D. *Legal maximum*

32. The final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003.

33. Where an infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement.

E. *Leniency Notice*

34. The Commission will apply the leniency rules in line with the conditions set out in the applicable notice.

F. *Ability to pay*

35. In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

FINAL CONSIDERATIONS

36. The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.

37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.

38. These Guidelines will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 23(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62 [1].

[1] Article 15(2) of Regulation 17/62 of 6 February 1962: First Regulation implementing Articles 85 and 86 [now 81 and 82] of the Treaty (OJ 13, 21.2.1962, p. 204).

Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty

(2004/C 101/05)

(Text with EEA relevance)

I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Regulation 1/2003 ([1]) establishes a system of parallel competence for the application of Articles 81 and 82 of the EC Treaty by the Commission and the Member States' competition authorities and courts. The Regulation recognises in particular the complementary functions of the Commission and Member States' competition authorities acting as public enforcers and the Member States' courts that rule on private lawsuits in order to safeguard the rights of individuals deriving from Articles 81 and 82 ([2]).

2. Under Regulation 1/2003, the public enforcers may focus their action on the investigation of serious infringements of Articles 81 and 82 which are often difficult to detect. For their enforcement activity, they benefit from information supplied by undertakings and by consumers in the market.

3. The Commission therefore wishes to encourage citizens and undertakings to address themselves to the public enforcers to inform them about suspected infringements of the competition rules. At the level of the Commission, there are two ways to do this, one is by lodging a complaint pursuant to Article 7(2) of Regulation 1/2003. Under Articles 5 to 9 of Regulation 773/2004 ([3]), such complaints must fulfil certain requirements.

4. The other way is the provision of market information that does not have to comply with the requirements for complaints pursuant to Article 7(2) of Regulation 1/2003. For this purpose, the Commission has created a special website to collect information from citizens and undertakings and their associations who wish to inform the Commission about suspected infringements of Articles 81 and 82. Such information can be the starting point for an investigation by the Commission ([4]). Information about suspected infringements can be supplied to the following address:

http://europa.eu.int/dgcomp/info-on-anti-competitive-practices

or to:

Commission européenne/Europese Commissie
Competition DG
B-1049 Bruxelles/Brussel

5. Without prejudice to the interpretation of Regulation 1/2003 and of Commission Regulation 773/2004 by the Community Courts, the present Notice intends to provide guidance to citizens and undertakings that are seeking relief from suspected infringements of the competition rules. The Notice contains two main parts:

— Part II gives indications about the choice between complaining to the Commission or bringing a lawsuit before a national court. Moreover, it recalls the principles related to the work-sharing between the Commission and the national competition authorities in the enforcement system established by Regulation 1/2003 that are explained in the Notice on cooperation within the network of competition authorities ([5]).

— Part III explains the procedure for the treatment of complaints pursuant to Article 7(2) of Regulation 1/2003 by the Commission.

6. This Notice does not address the following situations:

— complaints lodged by Member States pursuant to Article 7(2) of Regulation 1/2003,

— complaints that ask the Commission to take action against a Member State pursuant to Article 86(3) in conjunction with Articles 81 or 82 of the Treaty,

— complaints relating to Article 87 of the Treaty on state aids,

— complaints relating to infringements by Member States that the Commission may pursue in the framework of Article 226 of the Treaty ([6]).

II. DIFFERENT POSSIBILITIES FOR LODGING COMPLAINTS ABOUT SUSPECTED INFRINGEMENTS OF ARTICLES 81 OR 82

A. COMPLAINTS IN THE NEW ENFORCEMENT SYSTEM ESTABLISHED BY REGULATION 1/2003

7. Depending on the nature of the complaint, a complainant may bring his complaint either to a national court or to a competition authority that acts as public enforcer. The present chapter of this Notice intends to help potential complainants to make an informed choice about whether to address themselves to the Commission, to one of the Member States' competition authorities or to a national court.

8. While national courts are called upon to safeguard the rights of individuals and are thus bound to rule on cases brought before them, public enforcers cannot investigate all complaints, but must set priorities in their treatment of cases. The Court of Justice has held that the Commission, entrusted by Article 85(1) of the EC Treaty with the task of ensuring application of the principles laid down in Articles 81 and 82 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy and that, in order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it ([7]).

9. Regulation 1/2003 empowers Member States' courts and Member States' competition authorities to apply Articles 81 and 82 in their entirety alongside the Commission. Regulation 1/2003 pursues as one principal objective that Member States' courts and competition authorities should participate effectively in the enforcement of Articles 81 and 82 ([8]).

10. Moreover, Article 3 of Regulation 1/2003 provides that Member States' courts and competition authorities have to apply Articles 81 and 82 to all cases of agreements or conduct that are capable of affecting trade between Member States to which they apply their national competition laws. In addition, Articles 11 and 15 of the Regulation create a range of mechanisms by which Member States' courts and competition authorities cooperate with the Commission in the enforcement of Articles 81 and 82.

11. In this new legislative framework, the Commission intends to refocus its enforcement resources along the following lines:

— enforce the EC competition rules in cases for which it is well placed to act ([9]), concentrating its resources on the most serious infringements ([10]);

— handle cases in relation to which the Commission should act with a view to define Community competition policy and/or to ensure coherent application of Articles 81 or 82.

B. THE COMPLEMENTARY ROLES OF PRIVATE AND PUBLIC ENFORCEMENT

12. It has been consistently held by the Community Courts that national courts are called upon to safeguard the rights of individuals created by the direct effect of Articles 81(1) and 82 ([11]).

13. National courts can decide upon the nullity or validity of contracts and only national courts can grant damages to an individual in case of an infringement of Articles 81 and 82. Under the case law of the Court of Justice, any individual can claim damages for loss caused to him by a contract or by conduct which restricts or distorts competition, in order to ensure the full effectiveness of the Community competition rules. Such actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community as they discourage undertakings from concluding or applying restrictive agreements or practices ([12]).

14. Regulation 1/2003 takes express account of the fact that national courts have an essential part to play in applying the EC competition rules ([13]). By extending the power to apply Article 81(3) to national courts it removes the possibility for undertakings to delay national court proceedings by a notification to the Commission and thus eliminates an obstacle for private litigation that existed under Regulation No 17 ([14]).

15. Without prejudice to the right or obligation of national courts to address a preliminary question to the Court of Justice in accordance with Article 234 EC, Article 15(1) of Regulation 1/2003 provides expressly that national courts may ask for opinions or information from the Commission. This provision aims at facilitating the application of Articles 81 and 82 by national courts ([15]).

16. Action before national courts has the following advantages for complainants:

— National courts may award damages for loss suffered as a result of an infringement of Article 81 or 82.

— National courts may rule on claims for payment or contractual obligations based on an agreement that they examine under Article 81.

— It is for the national courts to apply the civil sanction of nullity of Article 81(2) in contractual relationships between individuals ([16]). They can in particular assess, in the light of the applicable national law, the scope and consequences of the nullity of certain contractual provisions under Article 81(2), with particular regard to all the other matters covered by the agreement ([17]).

— National courts are usually better placed than the Commission to adopt interim measures ([18]).

— Before national courts, it is possible to combine a claim under Community competition law with other claims under national law.

— Courts normally have the power to award legal costs to the successful applicant. This is never possible in an administrative procedure before the Commission.

17. The fact that a complainant can secure the protection of his rights by an action before a national court, is an important element that the Commission may take into account in its examination of the Community interest for investigating a complaint ([19]).

18. The Commission holds the view that the new enforcement system established by Regulation 1/2003 strengthens the possibilities for complainants to seek and obtain effective relief before national courts.

C. WORK-SHARING BETWEEN THE PUBLIC ENFORCERS IN THE EUROPEAN COMMUNITY

19. Regulation 1/2003 creates a system of parallel competence for the application of Articles 81 and 82 by empowering Member States' competition authorities to apply Articles 81 and 82 in their entirety (Article 5). Decentralised enforcement by Member States' competition authorities is further encouraged by the possibility to exchange information (Article 12) and to provide each other assistance with investigations (Article 22).

20. The Regulation does not regulate the work-sharing between the Commission and the Member States' competition authorities but leaves the division of case work to the cooperation of the Commission and the Member States' competition authorities inside the European Competition Network (ECN). The Regulation pursues the objective of ensuring effective enforcement of Articles 81 and 82 through a flexible division of case work between the public enforcers in the Community.

21. Orientations for the work sharing between the Commission and the Member States' competition authorities are laid down in a separate Notice ([20]). The guidance contained in that Notice, which concerns the relations between the public enforcers, will be of interest to complainants as it permits them to address a complaint to the authority most likely to be well placed to deal with their case.

22. The Notice on cooperation within the Network of Competition Authorities states in particular ([21]):

'An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:

— the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;

— the authority is able effectively to bring to an end the entire infringement, i.e. it can adopt a cease-and desist order, the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;

— it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is better placed to act (see below [. . .]).

It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory [. . .].

Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end [. . .].

Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately [. . .].

The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets) [. . .].

Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.'.

23. Within the European Competition Network, information on cases that are being investigated following a complaint will be made available to the other members of the network before or without delay after commencing the first formal investigative measure ([22]). Where the same complaint has been lodged with several authorities or where a case has not been lodged with an authority that is well placed, the members of the network will endeavour to determine within an indicative time-limit of two months which authority or authorities should be in charge of the case.

24. Complainants themselves have an important role to play in further reducing the potential need for reallocation of a case originating from their complaint by referring to the orientations on work sharing in the network set out in the present chapter when deciding on where to lodge their complaint. If nonetheless a case is reallocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved ([23]).

25. The Commission may reject a complaint in accordance with Article 13 of Regulation 1/2003, on the grounds that a Member State competition authority is dealing or has dealt with the case. When doing so, the Commission must, in accordance with Article 9 of Regulation 773/2004, inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

III. THE COMMISSION'S HANDLING OF COMPLAINTS PURSUANT TO ARTICLE 7(2) OF REGULATION 1/2003

A. GENERAL

26. According to Article 7(2) of Regulation 1/2003 natural or legal persons that can show a legitimate interest ([24]) are entitled to lodge a complaint to ask the Commission to find an infringement of Articles 81 and 82 EC and to require that the infringement be brought to an end in accordance with Article 7(1) of Regulation 1/2003. The present part of this Notice explains the requirements applicable to complaints based on Article 7(2) of Regulation 1/2003, their assessment and the procedure followed by the Commission.

27. The Commission, unlike civil courts, whose task is to safeguard the individual rights of private persons, is an administrative authority that must act in the public interest. It is an inherent feature of the Commission's task as public enforcer that it has a margin of discretion to set priorities in its enforcement activity ([25]).

28. The Commission is entitled to give different degrees of priority to complaints made to it and may refer to the Community interest presented by a case as a criterion of priority ([26]). The Commission may reject a complaint when it considers that the case does not display a sufficient Community interest to justify further investigation. Where the Commission rejects a complaint, the complainant is entitled to a decision of the Commission ([27]) without prejudice to Article 7(3) of Regulation 773/2004.

B. MAKING A COMPLAINT PURSUANT TO ARTICLE 7(2) OF REGULATION 1/2003

(a) **Complaint form**

29. A complaint pursuant to Article 7(2) of Regulation 1/2003 can only be made about an alleged infringement of Articles 81 or 82 with a view to the Commission taking action under Article 7(1) of Regulation 1/2003. A complaint under Article 7(2) of Regulation 1/2003 has to comply with Form C mentioned in Article 5(1) of Regulation 773/2004 and annexed to that Regulation.

30. Form C is available at http://europa.eu.int/dgcomp/complaints-form and is also annexed to this Notice. The complaint must be submitted in three paper copies as well as, if possible, an electronic copy. In addition, the complainant must provide a non-confidential version of the complaint (Article 5(2) of Regulation 773/2004). Electronic transmission to the Commission is possible via the website indicated, the paper copies should be sent to the following address:

Commission européenne/Europese Commissie
Competition DG
B-1049 Bruxelles/Brussel

31. Form C requires complainants to submit comprehensive information in relation to their complaint. They should also provide copies of relevant supporting documentation reasonably available to them and, to the extent possible, provide indications as to where relevant information and documents that are unavailable to them could be obtained by the Commission. In particular cases, the Commission may dispense with the obligation to provide information in relation to part of the information required by Form C (Article 5(1) of Regulation 773/2004). The Commission holds the view that this possibility can in particular play a role to facilitate complaints by consumer associations where they, in the context of an otherwise substantiated complaint, do not have access to specific pieces of information from the sphere of the undertakings complained of.

32. Correspondence to the Commission that does not comply with the requirements of Article 5 of Regulation 773/2004 and therefore does not constitute a complaint within the meaning of Article 7(2) of Regulation 1/2003 will be considered by the Commission as general information that, where it is useful, may lead to an own-initiative investigation (cf. point 4 above).

(b) **Legitimate interest**

33. The status of formal complainant under Article 7(2) of Regulation 1/2003 is reserved to legal and natural persons who can show a legitimate interest ([28]). Member States are deemed to have a legitimate interest for all complaints they choose to lodge.

34. In the past practice of the Commission, the condition of legitimate interest was not often a matter of doubt as most complainants were in a position of being directly and adversely affected by the alleged infringement. However, there are situations where the condition of a 'legitimate interest' in Article 7(2) requires further analysis to conclude that it is fulfilled. Useful guidance can best be provided by a non-exhaustive set of examples.

35. The Court of First Instance has held that an association of undertakings may claim a legitimate interest in lodging a complaint regarding conduct concerning its members, even if it is not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided that, first, it is entitled to represent the interests of its members and secondly, the conduct complained of is liable to adversely affect the interests of its members ([29]). Conversely, the Commission has been found to be entitled not to pursue the complaint of an association of undertakings whose members were not involved in the type of business transactions complained of ([30]).

36. From this case law, it can be inferred that undertakings (themselves or through associations that are entitled to represent their interests) can claim a legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests. This confirms the established practice of the Commission which has accepted that a legitimate interest can, for instance, be claimed by the parties to the agreement or practice which is the subject of the complaint, by competitors whose interests have allegedly been damaged by the behaviour complained of or by undertakings excluded from a distribution system.

37. Consumer associations can equally lodge complaints with the Commission ([31]). The Commission moreover holds the view that individual consumers whose economic interests are directly and adversely affected insofar as they are the buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest ([32]).

38. However, the Commission does not consider as a legitimate interest within the meaning of Article 7(2) the interest of persons or organisations that wish to come forward on general interest considerations without showing that they or their members are liable to be directly and adversely affected by the infringement (*pro bono publico*).

39. Local or regional public authorities may be able to show a legitimate interest in their capacity as buyers or users of goods or services affected by the conduct complained of. Conversely, they cannot be considered as showing a legitimate interest within the meaning of Article 7(2) of Regulation 1/2003 to the extent that they bring to the attention of the Commission alleged infringements *pro bono publico*.

40. Complainants have to demonstrate their legitimate interest. Where a natural or legal person lodging a complaint is unable to demonstrate a legitimate interest, the Commission is entitled, without prejudice to its right to initiate proceedings of its own initiative, not to pursue the complaint. The Commission may ascertain whether this condition is met at any stage of the investigation ([33]).

C. ASSESSMENT OF COMPLAINTS

(a) **Community interest**

41. Under the settled case law of the Community Courts, the Commission is not required to conduct an investigation in each case ([34]) or, *a fortiori*, to take a decision within the meaning of Article 249 EC on the existence or non-existence of an infringement of Articles 81 or 82 ([35]), but is entitled to give differing degrees of priority to the complaints brought before it and refer to the Community interest in order to determine the degree of priority to be applied to the various complaints it receives ([36]). The position is different only if the complaint falls within the exclusive competence of the Commission ([37]).

42. The Commission must however examine carefully the factual and legal elements brought to its attention by the complainant in order to assess the Community interest in further investigation of a case ([38]).

43. The assessment of the Community interest raised by a complaint depends on the circumstances of each individual case. Accordingly, the number of criteria of assessment to which the Commission may refer is not limited, nor is the Commission required to have recourse exclusively to certain criteria. As the factual and legal circumstances may differ considerably from case to case, it is permissible to apply new criteria which had not before been considered ([39]). Where appropriate, the Commission may give priority to a single criterion for assessing the Community interest ([40]).

44. Among the criteria which have been held relevant in the case law for the assessment of the Community interest in the (further) investigation of a case are the following:

— The Commission can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts ([41]).

— The Commission may not regard certain situations as excluded in principle from its purview under the task entrusted to it by the Treaty but is required to assess in each case how serious the alleged infringements are and how persistent their consequences are. This means in particular that it must take into account the duration and the extent of the infringements complained of and their effect on the competition situation in the Community ([42]).

— The Commission may have to balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil its task of ensuring that Articles 81 and 82 of the Treaty are complied with ([43]).

— While the Commission's discretion does not depend on how advanced the investigation of a case is, the stage of the investigation forms part of the circumstances of the case which the Commission may have to take into consideration ([44]).

— The Commission may decide that it is not appropriate to investigate a complaint where the practices in question have ceased. However, for this purpose, the Commission will have to ascertain whether anti-competitive effects persist and if the seriousness of the infringements or the persistence of their effects does not give the complaint a Community interest ([45]).

— The Commission may also decide that it is not appropriate to investigate a complaint where the undertakings concerned agree to change their conduct in such a way that it can consider that there is no longer a sufficient Community interest to intervene ([46]).

45. Where it forms the view that a case does not display sufficient Community interest to justify (further) investigation, the Commission may reject the complaint on that ground. Such a decision can be taken either before commencing an investigation or after taking investigative measures ([47]). However, the Commission is not obliged to set aside a complaint for lack of Community interest ([48]).

(b) **Assessment under Articles 81 and 82**

46. The examination of a complaint under Articles 81 and 82 involves two aspects, one relating to the facts to be established to prove an infringement of Articles 81 or 82 and the other relating to the legal assessment of the conduct complained of.

47. Where the complaint, while complying with the requirements of Article 5 of Regulation 773/2004 and Form C, does not sufficiently substantiate the allegations put forward, it may be rejected on that ground ([49]). In order to reject a complaint on the ground that the conduct complained of does not infringe the EC competition rules or does not fall within their scope of application, the Commission is not obliged to take into account circumstances that have not been brought to its attention by the complainant and that it could only have uncovered by the investigation of the case ([50]).

48. The criteria for the legal assessment of agreements or practices under Articles 81 and 82 cannot be dealt with exhaustively in the present Notice. However, potential complainants should refer to the extensive guidance available from the Commission ([51]), in addition to other sources and in particular the case law of the Community Courts and the case practice of the Commission. Four specific issues are mentioned in the following points with indications on where to find further guidance.

49. Agreements and practices fall within the scope of application of Articles 81 and 82 where they are capable of affecting trade between Member States. Where an agreement or practice does not fulfil this condition, national competition law may apply, but not EC competition law. Extensive guidance on this subject can be found in the Notice on the effect on trade concept ([52]).

50. Agreements falling within the scope of Article 81 may be agreements of minor importance which are deemed not to restrict competition appreciably. Guidance on this issue can be found in the Commission's *de minimis* Notice ([53]).

51. Agreements that fulfil the conditions of a block exemption regulation are deemed to satisfy the conditions of Article 81(3) ([54]). For the Commission to withdraw the benefit of the block exemption pursuant to Article 29 of Regulation 1/2003, it must find that upon individual assessment an agreement to which the exemption regulation applies has certain effects which are incompatible with Article 81(3).

52. Agreements that restrict competition within the meaning of Article 81(1) EC may fulfil the conditions of Article 81(3) EC. Pursuant to Article 1(2) of Regulation 1/2003 and without a prior administrative decision being required, such agreements are not prohibited. Guidance on the conditions to be fulfilled by an agreement pursuant to Article 81(3) can be found in the Notice on Article 81(3) ([55]).

D. THE COMMISSION'S PROCEDURES WHEN DEALING WITH COMPLAINTS

(a) **Overview**

53. As recalled above, the Commission is not obliged to carry out an investigation on the basis of every complaint submitted with a view to establishing whether an infringement has been committed. However, the Commission is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant, in order to assess whether those issues indicate conduct which is liable to infringe Articles 81 and 82 ([56]).

54. In the Commission's procedure for dealing with complaints, different stages can be distinguished ([57]).

55. During the first stage, following the submission of the complaint, the Commission examines the complaint and may collect further information in order to decide what action it will take on the complaint. That stage may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned. In this stage, the Commission may give an initial reaction to the complainant allowing the complainant an opportunity to expand on his allegations in the light of that initial reaction.

56. In the second stage, the Commission may investigate the case further with a view to initiating proceedings pursuant to Article 7(1) of Regulation 1/2003 against the undertakings complained of. Where the Commission considers that there are insufficient grounds for acting on the complaint, it will inform the complainant of its reasons and offer the complainant the opportunity to submit any further comments within a time-limit which it fixes (Article 7(1) of Regulation 773/2004).

57. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint is deemed to have been withdrawn (Article 7(3) of Regulation 773/2004). In all other cases, in the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant and either initiates a procedure against the subject of the complaint or adopts a decision rejecting the complaint ([58]).

58. Where the Commission rejects a complaint pursuant to Article 13 of Regulation 1/2003 on the grounds that another authority is dealing or has dealt with the case, the Commission proceeds in accordance with Article 9 of Regulation 773/2004.

59. Throughout the procedure, complainants benefit from a range of rights as provided in particular in Articles 6 to 8 of Regulation 773/2004. However, proceedings of the Commission in competition cases do not constitute adversarial proceedings between the complainant on the one hand and the companies which are the subject of the investigation on the other hand. Accordingly, the procedural rights of complainants are less far-reaching than the right to a fair hearing of the companies which are the subject of an infringement procedure ([59]).

(b) **Indicative time limit for informing the complainant of the Commission's proposed action**

60. The Commission is under an obligation to decide on complaints within a reasonable time ([60]). What is a reasonable duration depends on the circumstances of each case and in particular, its context, the various procedural steps followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved ([61]).

61. The Commission will in principle endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the reception of the complaint. Thus, subject to the circumstances of the individual case and in particular the possible need to request complementary information from the complainant or third parties, the Commission will in principle inform the complainant within four months whether or not it intends to investigate its case further. This time-limit does not constitute a binding statutory term.

62. Accordingly, within this four month period, the Commission may communicate its proposed course of action to the complainant as an initial reaction within the first phase of the procedure (see point 55 above). The Commission may also, where the examination of the complaint has progressed to the second stage (see point 56 above), directly proceed to informing the complainant about its provisional assessment by a letter pursuant to Article 7(1) of Regulation 773/2004.

63. To ensure the most expeditious treatment of their complaint, it is desirable that complainants cooperate diligently in the procedures ([62]), for example by informing the Commission of new developments.

(c) **Procedural rights of the complainant**

64. Where the Commission addresses a statement of objections to the companies complained of pursuant to Article 10(1) of Regulation 773/2004, the complainant is entitled to receive a copy of this document from which business secrets and other confidential information of the companies concerned have been removed (non-confidential version of the statement of objections; cf. Article 6(1) of Regulation 773/2004). The complainant is invited to comment in writing on the statement of objections. A time-limit will be set for such written comments.

65. Furthermore, the Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been addressed, if the complainants so request in their written comments ([63]).

66. Complainants may submit, of their own initiative or following a request by the Commission, documents that contain business secrets or other confidential information. Confidential information will be protected by the Commission ([64]). Under Article 16 of Regulation 773/2004, complainants are obliged to identify confidential information, give reasons why the information is considered confidential and submit a separate non-confidential version when they make their views known pursuant to Article 6(1) and 7(1) of Regulation 773/2004, as well as when they subsequently submit further information in the course of the same procedure. Moreover, the Commission may, in all other cases, request complainants which produce documents or statements to identify the documents or parts of the documents or statements which they consider to be confidential. It may in particular set a deadline for the complainant to specify why it considers a piece of information to be confidential and to provide a non-confidential version, including a concise description or non-confidential version of each piece of information deleted.

67. The qualification of information as confidential does not prevent the Commission from disclosing and using information where that is necessary to prove an infringement of Articles 81 or 82 ([65]). Where business secrets and confidential information are necessary to prove an infringement, the Commission must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

68. Where the Commission takes the view that a complaint should not be further examined, because there is no sufficient Community interest in pursuing the case further or on other grounds, it will inform the complainant in the form of a letter which indicates its legal basis (Article 7(1) of Regulation 773/2004), sets out the reasons that have led the Commission to provisionally conclude in the sense indicated and provides the complainant with the opportunity to submit supplementary information or observations within a time-limit set by the Commission. The Commission will also indicate the consequences of not replying pursuant to Article 7(3) of Regulation 773/2004, as explained below.

69. Pursuant to Article 8(1) of Regulation 773/2004, the complainant has the right to access the information on which the Commission bases its preliminary view. Such access is normally provided by annexing to the letter a copy of the relevant documents.

70. The time-limit for observations by the complainant on the letter pursuant to Article 7(1) of Regulation 773/2004 will be set in accordance with the circumstances of the case. It will not be shorter than four weeks (Article 17(2) of Regulation 773/2004). If the complainant does not respond within the time-limit set, the complaint is deemed to have been withdrawn pursuant to Article 7(3) of Regulation 773/2004. Complainants are also entitled to withdraw their complaint at any time if they so wish.

71. The complainant may request an extension of the time-limit for the provision of comments. Depending on the circumstances of the case, the Commission may grant such an extension.

72. In that case, where the complainant submits supplementary observations, the Commission takes cognisance of those observations. Where they are of such a nature as to make the Commission change its previous course of action, it may initiate a procedure against the companies complained of. In this procedure, the complainant has the procedural rights explained above.

73. Where the observations of the complainant do not alter the Commission's proposed course of action, it rejects the complaint by decision ([66]).

(d) **The Commission decision rejecting a complaint**

74. Where the Commission rejects a complaint by decision pursuant to Article 7(2) of Regulation 773/2004, it must state the reasons in accordance with Article 253 EC, i.e. in a way that is appropriate to the act at issue and takes into account the circumstances of each case.

75. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Commission in such a way as to enable the complainant to ascertain the reasons for the decision and to enable the competent Community Court to exercise its power of review. However, the Commission is not obliged to adopt a position on all the arguments relied on by the complainant in support of its complaint. It only needs to set out the facts and legal considerations which are of decisive importance in the context of the decision ([67]).

76. Where the Commission rejects a complaint in a case that also gives rise to a decision pursuant to Article 10 of Regulation 1/2003 (Finding of inapplicability of Articles 81 or 82) or Article 9 of Regulation 1/2003 (Commitments), the decision rejecting a complaint may refer to that other decision adopted on the basis of the provisions mentioned.

77. A decision to reject a complaint is subject to appeal before the Community Courts ([68]).

78. A decision rejecting a complaint prevents complainants from requiring the reopening of the investigation unless they put forward significant new evidence. Accordingly, further correspondence on the same alleged infringement by former complainants cannot be regarded as a new complaint unless significant new evidence is brought to the attention of the Commission. However, the Commission may re-open a file under appropriate circumstances.

79. A decision to reject a complaint does not definitively rule on the question of whether or not there is an infringement of Articles 81 or 82, even where the Commission has assessed the facts on the basis of Articles 81 and 82. The assessments made by the Commission in a decision rejecting a complaint therefore do not prevent a Member State court or competition authority from applying Articles 81 and 82 to agreements and practices brought before it. The assessments made by the Commission in a decision rejecting a complaint constitute facts which Member States' courts or competition authorities may take into account in examining whether the agreements or conduct in question are in conformity with Articles 81 and 82 ([69]).

(e) **Specific situations**

80. According to Article 8 of Regulation 1/2003 the Commission may on its own initiative order interim measures where there is the risk of serious and irreparable damage to competition. Article 8 of Regulation 1/2003 makes it clear that interim measures cannot be applied for by complainants under Article 7(2) of Regulation 1/2003. Requests for interim measures by undertakings can be brought before Member States' courts which are well placed to decide on such measures ([70]).

81. Some persons may wish to inform the Commission about suspected infringements of Articles 81 or 82 without having their identity revealed to the undertakings concerned by the allegations. These persons are welcome to contact the Commission. The Commission is bound to respect an informant's request for anonymity ([71]), unless the request to remain anonymous is manifestly unjustified.

(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).

(2) Cf. in particular Recitals 3-7 and 35 of Regulation 1/2003.

(3) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 123, 27.4.2004).

(4) The Commission handles correspondence from informants in accordance with its principles of good administrative practice.

(5) Notice on cooperation within the Network of competition authorities (p. 43).

(6) For the handling of such complaints, cf. Commission communication of 10 October 2002, COM(2002) 141.

(7) Case C-344/98, Masterfoods v HB Ice Cream, [2000] ECR I-11369, para 46; Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 88; Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, paras 73-77.

(8) Cf. in particular Articles 5, 6, 11, 12, 15, 22, 29, 35 and Recitals 2 to 4 and 6 to 8 of Regulation 1/2003.

(9) Cf. Notice on cooperation within the network of competition authorities . . ., points 5 ss.

(10) Cf. Recital 3 of Regulation 1/2003.

(11) Settled case law, cf. Case 127/73, Belgische Radio en Televisie (BRT) v SABAM and Fonior, [1974] ECR 51, para 16; Case C-282/95 P, Guérin automobiles v Commission of the European Communities, [1997] ECR I-1503, para 39; Case C-453/99, Courage v Bernhard Crehan, [2001] ECR I-6297, para 23.

(12) Case C-453/99, Courage v Bernhard Crehan, [2001] ECR I-6297, paras 26 and 27; the power of national courts to grant damages is also underlined in Recital 7 of Regulation 1/2003.

(13) Cf. Articles 1, 6 and 15 as well as Recital 7 of Regulation 1/2003.

(14) Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty; OJ P 13 of 21 February 1962, p. 204-211; English special edition: Series I Chapter 1959-1962 p. 87. Regulation No 17 is repealed by Article 43 of Regulation 1/2003 with effect from 1 May 2004.

(15) For more detailed explanations of this mechanism, cf. 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 . . .

(16) Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 93.

(17) Case C-230/96, Cabour and Nord Distribution Automobile v Arnor 'SOCO', [1998] ECR I-2055, para 51; Joined Cases T-185/96, T-189/96 and T-190/96, Dalmasso and Others v Commission of the European Communities, [1999] ECR II-93, para 50.

(18) Cf. Article 8 of Regulation 1/2003 and para 80 below. Depending on the case, Member States' competition authorities may equally be well placed to adopt interim measures.

(19) Cf. points 41 ss. below.

(20) Notice on cooperation within the Network of competition authorities (p. 43).

(21) Notice on cooperation within the Network of competition authorities . . ., points 8-15.

(22) Article 11(2) and (3) of Regulation 1/2003; Notice on cooperation within the Network of Competition Authorities . . ., points 16/17.

(23) Notice on cooperation within the Network of Competition Authorities, . . ., point 34.

(24) For more extensive explanations on this notion in particular, cf. points 33 ss. below.

(25) Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 88; Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, paras 73-77 and 85.

(26) Settled case law since Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 85.

(27) Case C-282/95 P, Guérin automobiles v Commission of the European Communities, [1997] ECR I-1503, para 36.

(28) Cf. Article 5(1) of Regulation 773/2004.

(29) Case T-114/92, Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities, [1995] ECR II-147, para 28. Associations of undertakings were also the complainants in the cases underlying the judgments in Case 298/83, Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities, [1985] ECR 1105 and Case T-319/99, Federacion Nacional de Empresas (FENIN) v Commission of the European Communities, not yet published in [2003] ECR.

(30) Joined Cases T-133/95 and T-204/95, International Express Carriers Conference (IECC) v Commission of the European Communities, [1998] ECR II-3645, paras 79-83.

(31) Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities, [1994] ECR II-285, para 36.

([32]) This question is currently raised in a pending procedure before the Court of First Instance (Joined cases T-213 and 214/01). The Commission has also accepted as complainant an individual consumer in its Decision of 9 December 1998 in Case IV/D-2/34.466, Greek Ferries, OJ L 109/24 of 27 April 1999, para 1.

([33]) Joined Cases T-133/95 and T-204/95, International Express Carriers Conference (IECC) v Commission of the European Communities, [1998] ECR II-3645, para 79.

([34]) Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 76; Case C-91/95 P, Roger Tremblay and Others v Commission of the European Communities, [1996] ECR I-5547, para 30.

([35]) Case 125/78, GEMA v Commission of the European Communities, [1979] ECR 3173, para 17; Case C-119/97/P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 87.

([36]) Settled case law since the Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, paras 77 and 85; Recital 18 of Regulation 1/2003 expressly confirms this possibility.

([37]) Settled case law since Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 75. Under Regulation 1/2003, this principle may only be relevant in the context of Article 29 of that Regulation.

([38]) Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities, [1983] ECR 3045, para 19; Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 86.

([39]) Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, paras 79-80.

([40]) Case C-450/98 P, International Express Carriers Conference (IECC) v Commission of the European Communities, [2001] ECR I-3947, paras 57-59.

([41]) Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, paras 88ss.; Case T-5/93, Roger Tremblay and Others v Commission of the European Communities, [1995] ECR II-185, paras 65ss.; Case T-575/93, Casper Koelman v Commission of the European Communities, [1996] ECR II-1, paras 75-80; see also part II above where more detailed explanations concerning this situation are given.

([42]) Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, paras 92/93.

([43]) Settled case law since Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 86.

([44]) Case C-449/98 P, International Express Carriers Conference (IECC) v Commission of the European Communities [2001] ECR I-3875, para 37.

([45]) Case T-77/95, Syndicat français de l'Express International and Others v Commission of the European Communities [1997] ECR II-1, para 57; Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 95. Cf. also Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities, [1994] ECR II-285, para 113, where an unwritten commitment between a Member State and a third county outside the common commercial policy was held not to suffice to establish that the conduct complained of had ceased.

([46]) Case T-110/95, International Express Carriers (IECC) v Commission of the European Communities and Others, [1998] ECR II-3605, para 57, upheld by Case 449/98 P, International Express Carriers (IECC) v Commission of the European Communities and Others, [2001] ECR I-3875, paras 44-47.

([47]) Case C-449/98 P, International Express Carriers (IECC) v Commission of the European Communities e.a. [2001] ECR I-3875, para 37.

([48]) Cf. Case T-77/92, Parker Pen v Commission of the European Communities, [1994] ECR II-549, paras 64/65.

([49]) Case 298/83, Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities, [1985] ECR 1105, paras 21-24; Case T-198/98, Micro Leader Business v Commission of the European Communities, [1999] ECR II-3989, paras 32-39.

([50]) Case T-319/99, Federación Nacional de Empresas (FENIN) v Commission of the European Communities, not yet published in [2003] ECR, para 43.

([51]) Extensive guidance can be found on the Commission's website at http://europa.eu.int/comm/competition/index_en.html

([52]) Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty (p. 81).

([53]) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368 of 22 December 2002, p. 13.

([54]) The texts of all block exemption regulations are available on the Commission's website at http://europa.eu.int/comm/competition/index_en.html

([55]) Commission Notice — Guidelines on the application of Article 81(3) of the Treaty (p. 97).

([56]) Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities, [1983] ECR 3045, para 19; Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 79.

([57]) Cf. Case T-64/89, Automec v Commission of the European Communities, [1990] ECR II-367, paras 45-47; Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities, [1994] ECR II-285, para 29.

([58]) Case C-282/95 P, Guérin automobiles v Commission of the European Communities, [1997] ECR I-1503, para 36.

([59]) Joined Cases 142 and 156/84, British American Tobacco Company and R. J. Reynolds Industries v Commission of the European Communities [1987] ECR 249, paras 19/20.

([60]) Case C-282/95 P, Guérin automobiles v Commission of the European Communities, [1997] ECR I-1503, para 37.

([61]) Joined Cases T-213/95 and T-18/96, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission of the European Communities, [1997] ECR 1739, para 57.

([62]) The notion of 'diligence' on the part of the complainant is used by the Court of First Instance in Case T-77/94, Vereniging van Groothandelaren in Bloemkwekerijprodukten and Others v Commission of the European Communities, [1997] ECR II-759, para 75.

([63]) Article 6(2) of Commission Regulation 773/2004.

([64]) Article 287 EC, Article 28 of Regulation 1/2003 and Articles 15 and 16 of Regulation 773/2004.

([65]) Article 27(2) of Regulation 1/2003.

([66]) Article 7(2) of Regulation 773/2004; Case C-282/95 P, Guérin automobiles v Commission of the European Communities, [1997] ECR I-1503, para 36.

([67]) Settled case law, cf. i.a. Case T-114/92, Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities, [1995] ECR II-147, para 41.

([68]) Settled case law since Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities, [1983] ECR 3045.

([69]) Case T-575/93, Casper Koelman v Commission of the European Communities, [1996] ECR II-1, paras 41-43.

([70]) Depending on the case, Member States' competition authorities may equally be well placed to adopt interim measures.

([71]) Case 145/83, Stanley George Adams v Commission of the European Communities, [1985] ECR 3539.

ANNEX

FORM C

Complaint pursuant to Article 7 of Regulation (EC) No 1/2003

I. **Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint**

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.

2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

II. **Details of the alleged infringement and evidence**

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.

4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations . . .). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).

5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

III. **Finding sought from the Commission and legitimate interest**

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.

7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

IV. **Proceedings before national competition authorities or national courts**

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

.....

Date and signature

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)

(2004/C 101/06)

(Text with EEA relevance)

I. REGULATION 1/2003

1. Regulation 1/2003 [1] sets up a new enforcement system for Articles 81 and 82 of the Treaty. While designed to restore the focus on the primary task of effective enforcement of the competition rules, the Regulation also creates legal certainty inasmuch as it provides that agreements [2] which fall under Article 81(1) but fulfil the conditions in Article 81(3) are valid and fully enforceable *ab initio* without a prior decision by a competition authority (Article 1 of Regulation 1/2003).

2. The framework of Regulation 1/2003, while introducing parallel competence of the Commission, Member States' competition authorities and Member States' courts to apply Article 81 and 82 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, i.e. that the competition rules are applied in a consistent way throughout the Community.

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 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 case practice as well as extensive guidance in Commission guidelines and notices [3].

4. Alongside the reform of the rules implementing Articles 81 and 82 brought about by Regulation 1/2003, the Commission has conducted a review of block exemption regulations, Commission notices and guidelines, with a view to further assist self-assessment by economic operators. The Commission has also produced guidelines on the application of Article 81(3) [4]. This allows undertakings in the vast majority of cases to reliably assess their agreements with regard to Article 81. Furthermore, it is the practice of the Commission to impose more than symbolic fines [5] only in cases where it is established, either in horizontal instruments or in the case law and practice that a certain behaviour constitutes an infringement.

5. Where cases, despite the above elements, give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 81 and 82, individual undertakings may wish to seek informal guidance from the Commission. [6] Where it considers it appropriate and subject to its enforcement priorities, the Commission may provide such guidance on novel questions concerning the interpretation of Articles 81 and/or 82 in a written statement (guidance letter). The present Notice sets out details of this instrument.

II. FRAMEWORK FOR ASSESSING WHETHER TO ISSUE A GUIDANCE LETTER

6. Regulation 1/2003 confers powers on the Commission to effectively prosecute infringements of Articles 81 and 82 and to impose sanctions [7]. One major objective of the Regulation is to ensure efficient enforcement of the EC competition rules by removing the former notification system and thus allowing the Commission to focus its enforcement policy on the most serious infringements [8].

7. 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 the Regulation, which is to ensure effective enforcement. The Commission may therefore only provide informal guidance to individual undertakings in so far as this is compatible with its enforcement priorities.

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(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).

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

(3) All texts mentioned are available at: http://europa.eu.int/comm/competition/index_en.html

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

(5) Symbolic fines are normally set at 1 000 EUR, cf. Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, (OJ C 9, 14.1.1998).

(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.

8. Subject to point 7, 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 the following cumulative conditions are fulfilled:

   (a) The substantive assessment of an agreement or practice with regard to Articles 81 and/or 82 of the Treaty, poses a question of application of the law for which there is no clarification in the existing EC legal framework including the case law of the Community Courts, nor publicly available general guidance or precedent in decision-making practice or previous guidance letters.

   (b) A prima facie evaluation of the specificities and background of the case suggests that the clarification of the novel question through a guidance letter is useful, taking into account the following elements:

   — the economic importance from the point of view of the consumer of the goods or services concerned by the agreement or practice, and/or

   — the extent to which the agreement or practice corresponds or is liable to correspond to more widely spread economic usage in the marketplace and/or

   — the extent of the investments linked to the transaction in relation to the size of the companies concerned and the extent to which the transaction relates to a structural operation such as the creation of a non-full function joint venture.

   (c) It is possible to issue a guidance letter on the basis of the information provided, i.e. no further fact-finding is required.

9. Furthermore, the Commission will 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 European Court of First Instance or the European Court of Justice;

   — the agreement or practice to which the request refers is subject to proceedings pending with the Commission, a Member State court or Member State competition authority.

10. The Commission will not consider hypothetical questions and will not issue guidance letters on agreements or 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 practice that they envisage, i.e. before the implementation of that agreement or practice. In this case the transaction must have reached a sufficiently advanced stage for a request to be considered.

11. 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.

III. INDICATIONS ON HOW TO REQUEST GUIDANCE

12. A request can be presented by an undertaking or undertakings which have entered into or intend to enter into an agreement or practice that could fall within the scope of Articles 81 and/or 82 of the Treaty with regard to questions of interpretation raised by such agreement or practice.

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

    Commission européenne/Europese Commissie
    Competition DG
    B-1049 Bruxelles/Brussel.

14. There is no form. A memorandum should be presented which clearly states:

   — the identity of all undertakings concerned as well as a single address for contacts with the Commission;

   — the specific questions on which guidance is sought;

   — full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation;

   — a detailed reasoning, having regard to point 8 a), why the request presents (a) novel question(s);

   — all other information that permits an evaluation of the request in the light of the aspects explained in points 8-10 of this Notice, including in particular a declaration that the agreement or 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 to the individual case.

IV. PROCESSING OF THE REQUEST

15. The Commission will in principle evaluate the request on the basis of the information provided. Notwithstanding point 8 c), the Commission may use additional information at its disposal from public sources, former proceedings or any other source and may ask the applicant(s) to provide supplementary information. The normal rules on professional secrecy apply to the information supplied by the applicant(s).

16. 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.

17. Where no guidance letter is issued, the Commission shall inform the applicant(s) accordingly.

18. An undertaking can withdraw its request at any point in time. In any case, information supplied in the context of a request for guidance remains with the Commission and can be used in subsequent procedures under Regulation 1/2003 (cf. point 11 above).

V. GUIDANCE LETTERS

19. A guidance letter sets out:

— a summary description of the facts on which it is based;

— the principal legal reasoning underlying the understanding of the Commission on novel questions relating to Articles 81 and/or 82 raised by the request.

20. 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.

21. Guidance letters will be posted on the Commission's webb-site, having regard to the legitimate interest of undertakings in the protection of their business secrets. Before issuing a guidance letter, the Commission will agree with the applicants on a public version.

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 and practices.

23. A guidance letter cannot prejudge the assessment of the same question by the Community Courts.

24. Where an agreement or practice has formed the factual basis for a guidance letter, the Commission is not precluded from subsequently examining that same agreement or practice in a procedure under Regulation 1/2003, in particular following a complaint. 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 raised by a complaint, to developments in the case law of the European Courts or wider changes of the Commission's policy.

25. Guidance letters are not Commission decisions and do not bind Member States' competition authorities or courts that have the power to apply Articles 81 and 82. However, it is open to Member States' competition authorities and courts to take account of guidance letters issued by the Commission as they see fit in the context of a case.

Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004

(2005/C 325/07)

(Text with EEA relevance)

I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Access to the Commission file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. Access to the file is provided for in Article 27(1) and (2) of Council Regulation (EC) No 1/2003 ([1]), Article 15(1) of Commission Regulation (EC) No 773/2004 ('the Implementing Regulation') ([2]), Article 18(1) and (3) of the Council Regulation (EC) No 139/2004 ('Merger Regulation') ([3]) and Article 17(1) of Commission Regulation (EC) No 802/2004 ('the Merger Implementing Regulation') ([4]). In accordance with these provisions, before taking decisions on the basis of Articles 7, 8, 23 and 24(2) of Regulation (EC) No 1/2003 and Articles 6(3), 7(3), 8(2) to (6), 14 and 15 of the Merger Regulation, the Commission shall give the persons, undertakings or associations of undertakings, as the case may be, an opportunity of making known their views on the objections against them and they shall be entitled to have access to the Commission's file in order to fully respect their rights of defence in the proceedings. The present notice provides the framework for the exercise of the right set out in these provisions. It does not cover the possibility of the provision of documents in the context of other proceedings. This notice is without prejudice to the interpretation of such provisions by the Community Courts. The principles set out in this Notice apply also when the Commission enforces Articles 53, 54 and 57 of the EEA Agreement ([5]).

2. This specific right outlined above is distinct from the general right to access to documents under Regulation (EC) No 1049/2001 ([6]), which is subject to different criteria and exceptions and pursues a different purpose.

3. The term access to the file is used in this notice exclusively to mean the access granted to the persons, undertakings or association of undertakings to whom the Commission has addressed a statement of objections.This notice clarifies who has access to the file for this purpose.

4. The same term, or the term access to documents, is also used in the above-mentioned regulations in respect of complainants or other involved parties. These situations are, however, distinct from that of the addressees of a statement of objections and therefore do not fall under the definition of access to the file for the purposes of this notice. These related situations are dealt with in a separate section of the notice.

5. This notice also explains to which information access is granted, when access takes place and what are the procedures for implementing access to the file.

([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, p. 1-25.

([2]) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18-24.

([3]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1-22.

([4]) Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1-39. Corrected in the OJ L 172, 6.5.2004, p. 9.

([5]) References in this Notice to Articles 81 and 82 therefore apply also to Articles 53 and 54 of the EEA Agreement.

([6]) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43. See for instance Case T-2/03, *Verein für Konsumenteninformation v. Commission*, judgment of 13 April 2005, not yet reported.

6. As from its publication, this notice replaces the 1997 Commission notice on access to the file [1]. The new rules take account of the legislation applicable as of 1 May 2004, namely the above referred Regulation (EC) No 1/2003, Merger Regulation, Implementing Regulation and Merger Implementing Regulation, as well as the Commission Decision of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings [2]. It also takes into account the recent case law of the Court of Justice and the Court of First Instance of the European Communities [3] and the practice developed by the Commission since the adoption of the 1997 notice.

II. **SCOPE OF ACCESS TO THE FILE**

A. **Who is entitled to access to the file?**

7. Access to the file pursuant to the provisions mentioned in paragraph 1 is intended to enable the effective exercise of the rights of defence against the objections brought forward by the Commission. For this purpose, both in cases under Articles 81 and 82 EC and in cases under the Merger Regulation, access is granted, upon request, to the persons, undertakings or associations of undertakings [4], as the case may be, to which the Commission addresses its objections [5] (hereinafter, 'the parties').

B. **To which documents is access granted?**

1. *The content of the Commission file*

8. The 'Commission file' in a competition investigation (hereinafter also referred to as 'the file') consists of all documents [6], which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation.

9. In the course of investigation under Articles 20, 21 and 22(2) of Regulation (EC) No 1/2003 and Articles 12 and 13 of the Merger Regulation, the Commission may collect a number of documents, some of which may, following a more detailed examination, prove to be unrelated to the subject matter of the case in question. Such documents may be returned to the undertaking from which those have been obtained. Upon return, these documents will no longer constitute part of the file.

2. *Accessible documents*

10. The parties must be able to acquaint themselves with the information in the Commission's file, so that, on the basis of this information, they can effectively express their views on the preliminary conclusions reached by the Commission in its objections. For this purpose they will be granted access to all documents making up the Commission file, as defined in paragraph 8, with the exception of internal documents, business secrets of other undertakings, or other confidential information [7].

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[1] Commission notice on the internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 [*now 81 and 82*] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, OJ C 23, 23.1.1997, p. 3.

[2] OJ L 162, 19.6.2001, p. 21.

[3] In particular Joint Cases T-25/95 et al., *Cimenteries CBR SA et al. v Commission*, [2000] ECR II-0491.

[4] In the remainder of this Notice, the term 'undertaking' includes both undertakings and associations of undertakings. The term 'person' encompasses natural and legal persons. Many entities are legal persons and undertakings at the same time; in this case, they are covered by both terms. The same applies where a natural person is an undertaking within the meaning of Articles 81 and 82. In Merger proceedings, account must also be taken of persons referred to in Article 3(1)(b) of the Merger Regulation, even when they are natural persons. Where entities without legal personality which are also not undertakings become involved in Commission competition proceedings, the Commission applies, where appropriate, the principles set out in this Notice *mutatis mutandis*.

[5] Cf. Article 15(1) of the Implementing Regulation, Article 18(3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation.

[6] In this notice the term 'document' is used for all forms of information support, irrespective of the storage medium. This covers also any electronic data storage device as may be or become available.

[7] Cf. Article 27(2) of Regulation (EC) No 1/2003, Articles 15(2) and 16(1) of the Implementing Regulation, and Article 17(3) of the Merger Implementing Regulation. Those exceptions are also mentioned in Case T-7/89, *Hercules Chemicals v Commission*, [1991] ECR II-1711, paragraph 54. The Court has ruled that it does not belong to the Commission alone to decide which documents in the file may be useful for the purposes of the defence (Cf. Case T-30/91 *Solvay v. Commission*, [1995] ECR II-1775, paragraphs 81-86, and Case T-36/91 *ICI vs. Commission*, [1995] ECR II-1847, paragraphs 91-96).

11. Results of a study commissioned in connection with proceedings are accessible together with the terms of reference and the methodology of the study. Precautions may however be necessary in order to protect intellectual property rights.

3. *Non-accessible documents*

3.1. Internal documents

3.1.1 *General principles*

12. Internal documents can be neither incriminating nor exculpatory ([1]). They do not constitute part of the evidence on which the Commission can rely in its assessment of a case. Thus, the parties will not be granted access to internal documents in the Commission file ([2]). Given their lack of evidential value, this restriction on access to internal documents does not prejudice the proper exercise of the parties' right of defence ([3]).

13. There is no obligation on the Commission departments to draft any minutes of meetings ([4]) with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents. Where, however, the person or undertaking in question has agreed the minutes, such minutes will be made accessible after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the evidence on which the Commission can rely in its assessment of a case ([5]).

14. In the case of a study commissioned in connection with proceedings, correspondence between the Commission and its contractor containing evaluation of the contractor's work or relating to financial aspects of the study, are considered internal documents and will thus not be accessible.

3.1.2 *Correspondence with other public authorities*

15. A particular case of internal documents is the Commission's correspondence with other public authorities and the internal documents received from such authorities (whether from EC Member States ('the Member States') or non-member countries). Examples of such non-accessible documents include:

— correspondence between the Commission and the competition authorities of the Member States, or between the latter ([6]);

— correspondence between the Commission and other public authorities of the Member States ([7]);

— correspondence between the Commission, the EFTA Surveillance Authority and public authorities of EFTA States ([8]);

— correspondence between the Commission and public authorities of non-member countries, including their competition authorities, in particular where the Community and a third country have concluded an agreement governing the confidentiality of the information exchanged ([9]).

([1]) Examples of internal documents are drafts, opinions, memos or notes from the Commission departments or other public authorities concerned.
([2]) Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, and Article 17(3) of the Merger Implementing Regulation.
([3]) Cf. paragraph 1 above.
([4]) Cf. judgement of 30.9.2003 in Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and others* v *Commission* (*TACA*), [2003] ECR II-3275, paragraphs 349-359.
([5]) Statements recorded pursuant to Article 19 or Article 20(2)(e) of Regulation 1/2003 or Article 13(2)(e) of Merger Regulation will also normally belong to the accessible documents (see paragraph 10 above).
([6]) Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, Article 17(3) of the Merger Implementing Regulation.
([7]) Cf. Order of the Court of First Instance in Cases T-134/94 et al *NMH Stahlwerke and Others v Commission* [1997] ECR II-2293, paragraph 36, and Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389, paragraph 33.
([8]) In this notice the term 'EFTA States' includes the EFTA States that are parties to the EEA Agreement.
([9]) For example, Article VIII.2 of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ No L 95, 27.4.1995, p. 47) stipulates that information provided to it in confidence under the Agreement must be protected 'to the fullest extent possible'. That Article creates an international-law obligation binding the Commission.

16. In certain exceptional circumstances, access is granted to documents originating from Member States, the EFTA Surveillance Authority or EFTA States, after deletion of any business secrets or other confidential information. The Commission will consult the entity submitting the document prior to granting access to identify business secrets or other confidential information.

This is the case where the documents originating from Member States contain allegations brought against the parties, which the Commission must examine, or form part of the evidence in the investigative process, in a way similar to documents obtained from private parties. These considerations apply, in particular, as regards:

— documents and information exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, and information provided to the Commission pursuant to Article 18(6) of Regulation (EC) No 1/2003;

— complaints lodged by a Member State under Article 7(2) of Regulation (EC) No 1/2003.

Access will also be granted to documents originating from Member States or the EFTA Surveillance Authority in so far as they are relevant to the parties' defence with regard to the exercise of competence by the Commission ([1]).

3.2. Confidential information

17. The Commission file may also include documents containing two categories of information, namely business secrets and other confidential information, to which access may be partially or totally restricted ([2]). Access will be granted, where possible, to non-confidential versions of the original information. Where confidentiality can only be assured by summarising the relevant information, access will be granted to a summary. All other documents are accessible in their original form.

3.2.1 *Business secrets*

18. In so far as disclosure of information about an undertaking's business activity could result in a serious harm to the same undertaking, such information constitutes business secrets ([3]). Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

3.2.2 *Other confidential information*

19. The category 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. The Court of First Instance and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures ([4]). Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.

([1]) In the merger control area, this may apply in particular to submissions by a Member State under Article 9 (2) of the Merger Regulation with regard to a case referral.

([2]) Cf. Article 16(1) of the Implementing Regulation and Article 17(3) of the Merger Implementing Regulation; Case T-7/89 *Hercules Chemicals NV v Commission*, [1991] ECR II-1711, paragraph 54; Case T-23/99, *LR AF 1998 A/S v Commission*, [2002] ECR II-1705, paragraph 170.

([3]) Judgement of 18.9.1996 in Case T-353/94, *Postbank NV v Commission*, [1996] ECR II-921, paragraph 87.

([4]) The Community Courts have pronounced upon this question both in cases of alleged abuse of a dominant position (Article 82 of the EC Treaty) (Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389; and Case C-310/93P, *BPB Industries and British Gypsum* [1995] ECR I-865), and in merger cases (Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 69, and Case T-5/02 *Laval* v. *Commission* [2002] ECR II-4381, paragraph 98 et seq.).

20. The category of other confidential information also includes military secrets.

3.2.3 *Criteria for the acceptance of requests for confidential treatment.*

21. Information will be classified as confidential where the person or undertaking in question has made a claim to this effect and such claim has been accepted by the Commission ([1]).

22. Claims for confidentiality must relate to information which is within the scope of the above descriptions of business secrets or other confidential information. The reasons for which information is claimed to be a business secret or other confidential information must be substantiated ([2]). Confidentiality claims can normally only pertain to information obtained by the Commission from the same person or undertaking and not to information from any other source.

23. Information relating to an undertaking but which is already known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential ([3]). Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential. As a general rule, the Commission presumes that information pertaining to the parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential ([4]).

24. In proceedings under Articles 81 and 82 of the Treaty, the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement ('inculpatory document') or could be necessary to exonerate a party ('exculpatory document'). In this case, the need to safeguard the rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties ([5]). It is for the Commission to assess whether those circumstances apply to any specific situation. This calls for an assessment of all relevant elements, including:

— the relevance of the information in determining whether or not an infringement has been committed, and its probative value;

— whether the information is indispensable;

— the degree of sensitivity involved (to what extent would disclosure of the information harm the interests of the person or undertaking in question)

— the preliminary view of the seriousness of the alleged infringement.

Similar considerations apply to proceedings under the Merger Regulation when the disclosure of information is considered necessary by the Commission for the purpose of the procedure ([6]).

25. Where the Commission intends to disclose information, the person or undertaking in question shall be granted the possibility to provide a non-confidential version of the documents where that information is contained, with the same evidential value as the original documents ([7]).

C. **When is access to the file granted?**

26. Prior to the notification of the Commission's statement of objections pursuant to the provisions mentioned in paragraph 1, the parties have no right of access to the file.

([1]) See paragraph 40 below.
([2]) See paragraph 35 below.
([3]) However, business secrets or other confidential information which are given to a trade or professional association by its members do not lose their confidential nature with regard to third parties and may therefore not be passed on to complainants. Cf. Joined Cases 209 to 215 and 218/78, *Fedetab*, [1980] ECR 3125, paragraph 46.
([4]) See paragraphs 35-38 below on asking undertakings to identify confidential information.
([5]) Cf. Article 27(2) of Regulation (EC) No 1/2003 and Article 15(3) of the Implementing Regulation.
([6]) Article 18(1) of the Merger Implementing Regulation.
([7]) Cf. paragraph 42 below.

1. *In antitrust proceedings under Articles 81 and 82 of the Treaty*

27. Access to the file will be granted upon request and, normally, on a single occasion, following the notification of the Commission's objections to the parties, in order to ensure the principle of equality of arms and to protect their rights of defence. As a general rule, therefore, no access will be granted to other parties' replies to the Commission's objections.

A party will, however, be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence — whether of an incriminating or of an exculpatory nature —, pertaining to the allegations concerning that party in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence.

2. *In proceedings under the Merger Regulation*

28. In accordance with Article 18(1) and (3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation, the notifying parties will be given access to the Commission's file upon request at every stage of the procedure following the notification of the Commission's objections up to the consultation of the Advisory Committee. In contrast, this notice does not address the possibility of the provision of documents before the Commission states its objections to undertakings under the Merger Regulation ([1]).

III. PARTICULAR QUESTIONS REGARDING COMPLAINANTS AND OTHER INVOLVED PARTIES

29. The present section relates to situations where the Commission may or has to provide access to certain documents contained in its file to the complainants in antitrust proceedings and other involved parties in merger proceedings. Irrespective of the wording used in the antitrust and merger implementing regulations ([2]), these two situations are distinct — in terms of scope, timing, and rights — from access to the file, as defined in the preceding section of this notice.

A. Provision of documents to complainants in antitrust proceedings

30. The Court of First Instance has ruled ([3]) that complainants do not have the same rights and guarantees as the parties under investigation. Therefore complainants cannot claim a right of access to the file as established for parties.

31. However, a complainant who, pursuant to Article 7(1) of the Implementing Regulation, has been informed of the Commission's intention to reject its complaint ([4]), may request access to the documents on which the Commission has based its provisional assessment ([5]). The complainant will be provided access to such documents on a single occasion, following the issuance of the letter informing the complainant of the Commission's intention to reject its complaint.

32. Complainants do not have a right of access to business secrets or other confidential information which the Commission has obtained in the course of its investigation ([6]).

([1]) This question is dealt with in the Directorate General Competition document 'DG COMP Best Practices on the conduct of EC merger control proceedings', available on the web-site of the Directorate General for Competition: http://europa.eu.int/comm/competition/index_en.html.

([2]) Cf. Article 8(1) of the Implementing Regulation, which speaks about 'access to documents' to complainants and Article 17(2) of Merger Implementing Regulation which speaks about 'access to file' to other involved parties 'in so far as this is necessary for the purposes of preparing their comments'.

([3]) See Case T-17/93 *Matra-Hachette SA v Commission*, [1994] ECR II-595, paragraph 34. The Court ruled that the rights of third parties, as laid down by Article 19 of the Council Regulation No 17 of 6.2.1962 (now replaced by Article 27 of Regulation (EC) No 1/2003), were limited to the right to participate in the administrative procedure.

([4]) By means of a letter issued in accordance with Article 7(1) of the Implementing Regulation.

([5]) Cf. Article 8(1) of the Implementing Regulation.

([6]) Cf. Article 8(1) of the Implementing Regulation.

B. **Provision of documents to other involved parties in merger proceedings**

33. In accordance with Article 17(2) of the Merger Implementing Regulation, access to the file in merger proceedings shall also be given, upon request, to other involved parties who have been informed of the objections in so far as this is necessary for the purposes of preparing their comments.

34. Such other involved parties are parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration ([1]).

IV. **PROCEDURE FOR IMPLEMENTING ACCESS TO THE FILE**

A. **Preparatory procedure**

35. Any person which submits information or comments in one of the situations listed hereunder, or subsequently submits further information to the Commission in the course of the same procedures, has an obligation to clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known ([2]):

a) In antitrust proceedings

— an addressee of a Commission's statement of objections making known its views on the objections ([3]);

— a complainant making known its views on a Commission statement of objections ([4]);

— any other natural or legal person, which applies to be heard and shows a sufficient interest, or which is invited by the Commission to express its views, making known its views in writing or at an oral hearing ([5]);

— a complainant making known his views on a Commission letter informing him on the Commission's intention to reject the complaint ([6]).

b) In merger proceedings

— notifying parties or other involved parties making known their views on Commission objections adopted with a view to take a decision with regard to a request for a derogation from suspension of a concentration and which adversely affects one or more of those parties, or on a provisional decision adopted in the matter ([7]);

— notifying parties to whom the Commission has addressed a statement of objections, other involved parties who have been informed of those objections or parties to whom the Commission has addressed objections with a view to inflict a fine or a periodic penalty payment, submitting their comments on the objections ([8]);

— third persons who apply to be heard, or any other natural or legal person invited by the Commission to express their views, making known their views in writing or at an oral hearing ([9]);

— any person which supplies information pursuant to Article 11 of the Merger Regulation.

([1]) Cf. Article 11(b) of the Merger Implementing Regulation.
([2]) Cf. Article 16(2) of the Implementing Regulation and Article 18(2) of the Merger Implementing Regulation.
([3]) pursuant to Article 10(2) of the Implementing Regulation.
([4]) pursuant to Article 6(1) of the Implementing Regulation.
([5]) pursuant to Article 13(1) and (3) of the Implementing Regulation.
([6]) pursuant to Article 7(1) of the Implementing Regulation.
([7]) Article 12 of the Merger Implementing Regulation.
([8]) Article 13 of the Merger Implementing Regulation.
([9]) pursuant to Article 16 of the Merger Implementing Regulation.

36. Moreover, the Commission may require undertakings [1], in all cases where they produce or have produced documents, to identify the documents or parts of documents, which they consider to contain business secrets or other confidential information belonging to them, and to identify the undertakings with regard to which such documents are to be considered confidential [2].

37. For the purposes of quickly dealing with confidentiality claims referred to in paragraph 36 above, the Commission may set a time-limit within which the undertakings shall: (i) substantiate their claim for confidentiality with regard to each individual document or part of document; (ii) provide the Commission with a non-confidential version of the documents, in which the confidential passages are deleted [3]. In antitrust proceedings the undertakings in question shall also provide within the said time-limit a concise description of each piece of deleted information [4].

38. The non-confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed to be confidential.

B. **Treatment of confidential information**

39. In antitrust proceedings, if undertakings fail to comply with the provisions set out in paragraphs 35 to 37 above, the Commission may assume that the documents or statements concerned do not contain confidential information [5]. The Commission may consequently assume that the undertaking has no objections to the disclosure of the documents or statements concerned in their entirety.

40. In both antitrust proceedings and in proceedings under the Merger Regulation, should the person or undertaking in question meet the conditions set out in paragraphs 35 to 37 above, to the extent they are applicable, the Commission will either:

— provisionally accept the claims which seem justified; or

— inform the person or undertaking in question that it does not agree with the confidentiality claim in whole or in part, where it is apparent that the claim is unjustified.

41. The Commission may reverse its provisional acceptance of the confidentiality claim in whole or in part at a later stage.

42. Where the Directorate General for Competition does not agree with the confidentiality claim from the outset or where it takes the view that the provisional acceptance of the confidentiality claim should be reversed, and thus intends to disclose information, it will grant the person or undertaking in question an opportunity to express its views. In such cases, the Directorate General for Competition will inform the person or undertaking in writing of its intention to disclose information, give its reasons and set a time-limit within which such person or undertaking may inform it in writing of its views. If, following submission of those views, a disagreement on the confidentiality claim persists, the matter will be dealt with by the Hearing Officer according to the applicable Commission terms of reference of Hearing Officers [6].

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[1] In merger proceedings the principles set out in the present and subsequent paragraphs also apply to the persons referred to in Article 3(1)(b) of Merger Regulation.
[2] Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation. This also applies to documents gathered by the Commission in an inspection pursuant to Article 13 of the Merger Regulation and Articles 20 and 21 of Regulation (EC) No 1/2003.
[3] Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation.
[4] Cf. Article 16(3) of the Implementing Regulation.
[5] Cf. Article 16 of the Implementing Regulation.
[6] Cf. Article 9 of the Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162 19.6.2001, p. 21.

43. Where there is a risk that an undertaking which is able to place very considerable economic or commercial pressure on its competitors or on its trading partners, customers or suppliers will adopt retaliatory measures against those, as a consequence of their collaboration in the investigation carried out by the Commission ([1]), the Commission will protect the anonymity of the authors by providing access to a non-confidential version or summary of the responses in question ([2]). Requests for anonymity in such circumstances, as well as requests for anonymity according to point 81 of the Commission Notice on the handling of complaints ([3]) will be dealt with according to paragraphs 40 to 42 above.

C. **Provision of access to file**

44. The Commission may determine that access to the file shall be granted in one of the following ways, taking due account of the technical capabilities of the parties:

— by means of a CD-ROM(s) or any other electronic data storage device as may become available in future;

— through copies of the accessible file in paper form sent to them by mail;

— by inviting them to examine the accessible file on the Commission's premises.

The Commission may choose any combination of these methods.

45. In order to facilitate access to the file, the parties will receive an enumerative list of documents setting out the content of the Commission file, as defined in paragraph 8 above.

46. Access is granted to evidence as contained in the Commission file, in its original form: the Commission is under no obligation to provide a translation of documents in the file ([4]).

47. If a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. If the services of the Directorate General for Competition are not in a position to accept the request and if the party disagrees with that view, the matter will be resolved by the Hearing Officer, in accordance with the applicable terms of reference of Hearing Officers ([5]).

48. Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings ([6]). Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

49. With the exception of paragraphs 45 and 47, this section C applies equally to the grant of access to documents to complainants (in antitrust proceedings) and to other involved parties (in merger proceedings).

([1]) Cf. paragraph 19 above.
([2]) Cf. Case T-5/02, *Tetra Laval vs. Commission*, [2002] ECR II-4381, paragraph 98, 104 and 105.
([3]) Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65.
([4]) Cf. Case T-25/95 et al. *Cimenteries*, paragraph 635.
([5]) Cf. Article 8 of the Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001, p. 21.
([6]) Cf. Articles 15(4) and 8(2) of the Implementing Regulation, respectively, and Article 17(4) of the Merger Implementing Regulation.

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases

(Text with EEA relevance)

(2008/C 167/01)

1. INTRODUCTION

1. This Notice sets out the framework for rewarding cooperation in the conduct of proceedings commenced in view of the application of Article 81 of the EC Treaty ([1]) to cartel cases ([2]). The settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence. The cooperation covered by this Notice is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is covered by the Commission Notice on Immunity from fines and reduction of fines in cartel cases ([3]) (the Leniency Notice). Provided that the cooperation offered by an undertaking qualifies under both Commission Notices, it can be cumulatively rewarded accordingly ([4]).

2. When parties to the proceedings are prepared to acknowledge their participation in a cartel violating Article 81 of the Treaty and their liability therefore, they may also contribute to expediting the proceedings leading to the adoption of the corresponding decision pursuant to Article 7 and Article 23 of 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 ([5]) in the way and with the safeguards specified in this Notice. Whilst the Commission, as the investigative authority and the guardian of the Treaty empowered to adopt enforcement decisions subject to judicial control by the Community Courts, does not negotiate the question of the existence of an infringement of Community law and the appropriate sanction, it can reward the cooperation described in this Notice.

3. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty ([6]) lays down the core practical rules concerning the conduct of proceedings in antitrust cases including those applicable in the variant for settlement. In this regard, Regulation (EC) No 773/2004 bestows on the Commission the discretion whether to explore the settlement procedure or not in cartel cases, while ensuring that the choice of the settlement procedure cannot be imposed on the parties.

4. Effective enforcement of Community competition law is compatible with full respect of the parties' rights of defence, which constitutes a fundamental principle of Community law to be respected in all circumstances, and in particular in antitrust procedures which may give rise to

([1]) References in this text to Article 81 also cover Article 53 EEA when applied by the Commission in accordance with the rules laid down in Article 56 of the EEA Agreement.

([2]) Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC.

([3]) OJ C 298, 8.12.2006, p. 17.

([4]) See point 33.

([5]) OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

([6]) OJ L 123, 27.4.2004, p. 18. Regulation as last amended by Regulation (EC) No 622/2008 (OJ L 171, 1.7.2008, p. 3).

penalties. It follows that the rules established to conduct the Commission proceedings to enforce Article 81 of the Treaty should ensure that the undertakings and associations of undertakings concerned are afforded the opportunity effectively to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission ([1]), throughout the administrative procedure.

2. PROCEDURE

5. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including the scale of burden involved in providing access to non-confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent might apply. The Commission may also decide to discontinue settlement discussions if the parties to the proceedings coordinate to distort or destroy any evidence relevant to the establishment of the infringement or any part thereof or to the calculation of the applicable fine. Distortion or destruction of evidence relevant to the establishment of the infringement or any part thereof may also constitute an aggravating circumstance within the meaning of point 28 of the Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ([2]) (the Guidelines on fines), and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. The Commission may only engage in settlement discussions upon the written request of the parties concerned.

6. While parties to the proceedings do not have a right to settle, should the Commission consider that a case may, in principle, be suitable for settlement, it will explore the interest in settlement of all parties to the same proceedings.

7. The parties to the proceedings may not disclose to any third party in any jurisdiction the contents of the discussions or of the documents which they have had access to in view of settlement, unless they have a prior explicit authorization by the Commission. Any breach in this regard may lead the Commission to disregard the undertaking's request to follow the settlement procedure. Such disclosure may also constitute an aggravating circumstance, within the meaning of point 28 of the Guidelines on fines and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice.

2.1. Initiation of proceedings and exploratory steps regarding settlement

8. Where the Commission contemplates the adoption of a decision pursuant to Article 7 and/or Article 23 of Regulation (EC) No 1/2003, it is required in advance to identify and recognize as parties to the proceedings the legal persons on whom a penalty may be imposed for an infringement of Article 81 of the Treaty.

9. To this end, the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 in view of adopting such a decision can take place at any point in time, but no later than the date on which the Commission issues a statement of objections against the parties concerned. Article 2(1) of Regulation (EC) No 773/2004 further specifies that, should the Commission consider it suitable to explore the parties' interest in engaging in settlement discussions, it will initiate proceedings no later than the date on which it either issues a statement of objections or requests the parties to express in writing their interest to engage in settlement discussions, whichever is the earlier.

10. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission becomes the only competition authority competent to apply Article 81 of the Treaty to the case in point.

11. Should the Commission consider it suitable to explore the parties' interest to engage in settlement discussions, it will set a time-limit of no less than two weeks pursuant to Articles 10a(1) and 17(3) of Regulation (EC) No 773/2004 within which parties to the same proceedings should declare in writing whether they envisage engaging in settlement discussions in view of possibly introducing settlement submissions at a later stage. This written declaration does not imply an admission by the parties of having participated in an infringement or of being liable for it.

12. Whenever the Commission initiates proceedings against two or more parties within the same undertaking, the Commission will inform each of them of the other legal entities which it identifies within the same undertaking and which are also concerned by the proceedings. In such a case, should the concerned parties wish to engage in settlement discussions, they must appoint joint representatives duly empowered to act on their behalf by the end of the time-limit referred to in point 11. The appointment of joint representatives aims solely to facilitate the settlement discussions and it does not prejudge in any way the attribution of liability for the infringement amongst the different parties.

([1]) Case 85/76, *Hoffmann-La Roche* v *Commission* [1979] ECR 461, at paragraphs 9 and 11.
([2]) OJ C 210, 1.9.2006, p. 2.

13. The Commission may disregard any application for immunity from fines or reduction of fines on the ground that it has been submitted after the expiry of the time-limit referred to in point 11.

2.2. **Commencing the settlement procedure: settlement discussions**

14. Should some of the parties to the proceedings request settlement discussions and comply with the requirements referred to in points 11 and 12, the Commission may decide to pursue the settlement procedure by means of bilateral contacts between the Commission Directorate-General for Competition and the settlement candidates.

15. The Commission retains discretion to determine the appropriateness and the pace of the bilateral settlement discussions with each undertaking. In line with Article 10a(2) of Regulation (EC) No 773/2004, this includes determining, in view of the progress made overall in the settlement procedure, the order and sequence of the bilateral settlement discussions as well as the timing of the disclosure of information, including the evidence in the Commission file used to establish the envisaged objections and the potential fine ([1]). Information will be disclosed in a timely manner as settlement discussions progress.

16. Such an early disclosure in the context of settlement discussions pursuant to Article 10a(2) and Article 15(1a) of Regulation (EC) No 773/2004 will allow the parties to be informed of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections. This will enable the parties effectively to assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle. Upon request by a party, the Commission services will also grant it access to non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as this is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other aspect of the cartel ([2]).

([1]) Reference to the 'potential fine' in Article 10a(2) of Regulation (EC) No 773/2004 affords the Commission services the possibility to inform the parties concerned by settlement discussions of an estimate of their potential fine in view of the guidance contained in the Guidelines on fines, the provisions of this Notice and the Leniency Notice, where applicable.

([2]) For that purpose, the parties will be provided with a list of all accessible documents in the case file at that point in time.

17. When the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Commission, and the Commission takes the preliminary view that procedural efficiencies are likely to be achieved in view of the progress made overall, the Commission may grant a final time-limit of at least 15 working days for an undertaking to introduce a final settlement submission pursuant to Articles 10a(2) and 17(3) of Regulation (EC) No 773/2004. The time-limit can be extended following a reasoned request. Before granting such time-limit, the parties will be entitled to have the information specified in point 16 disclosed to them upon request.

18. The parties may call upon the Hearing Officer at any time during the settlement procedure in relation to issues that might arise relating to due process. The Hearing Officer's duty is to ensure that the effective exercise of the rights of defence is respected.

19. Should the parties concerned fail to introduce a settlement submission, the procedure leading to the final decision in their regard will follow the general provisions, in particular Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004, instead of those regulating the settlement procedure.

2.3. **Settlement submissions**

20. Parties opting for a settlement procedure must introduce a formal request to settle in the form of a settlement submission. The settlement submission provided for in Article 10a(2) of Regulation (EC) No 773/2004 should contain:

(a) an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;

(b) an indication ([3]) of the maximum amount of the fine the parties foresee to be imposed by the Commission and which the parties would accept in the framework of a settlement procedure;

(c) the parties' confirmation that, they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission;

([3]) This would result from the discussions as set out in points 16 and 17.

(d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision;

(e) the parties' agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in an agreed official language of the European Community.

21. The acknowledgments and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the expeditious handling of the case following the settlement procedure. However, those acknowledgments and confirmations are conditional upon the Commission meeting their settlement request, including the anticipated maximum amount of the fine.

22. Settlement requests cannot be revoked unilaterally by the parties which have provided them unless the Commission does not meet the settlement requests by reflecting the settlement submissions first in a statement of objections and ultimately, in a final decision (see in this regard points 27 and 29). The statement of objections would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in point 20(a). Additionally, for a final decision to be deemed to have reflected the settlement submissions, it should also impose a fine which does not exceed the maximum amount indicated therein.

2.4. **Statement of objections and reply**

23. Pursuant to Article 10(1) of Regulation (EC) No 773/2004, the notification of a written statement of objections to each of the parties against whom objections are raised is a mandatory preparatory step before adopting any final decision. Therefore, the Commission will issue a statement of objections also in a settlement procedure ([1]).

24. For the parties' rights of defence to be exercised effectively, the Commission should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate ([2]). The Commission must be able not only to accept or reject the parties' relevant arguments expressed during the administrative procedure, but also to make its own analysis of the matters put forward by them in order to either abandon such objections because they have been shown to be unfounded or to supplement and reassess its arguments both in fact and in law, in support of the objections which it maintains.

25. By introducing a formal settlement request in the form of a settlement submission prior to the notification of the statement of objections, the parties concerned enable the Commission to effectively take their views into account ([3]) already when drafting the statement of objections, rather than only before the consultation of the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter the 'Advisory Committee') or before the adoption of the final decision ([4]).

26. Should the statement of objections reflect the parties' settlement submissions, the parties concerned should within a time-limit of at least two weeks set by the Commission in accordance with Articles 10a(3) and 17(3) of Regulation (EC) No 773/2004, reply to it by simply confirming (in unequivocal terms) that the statement of objections corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure. In the absence of such a reply, the Commission will take note of the party's breach of its commitment and may also disregard the party's request to follow the settlement procedure.

27. The Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submission. If so, the general provisions in Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004 will apply. The acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used in evidence against any of the parties to the proceedings. Hence, the parties concerned would no longer be bound by their settlement submissions and would be granted a time-limit allowing them, upon request, to present their defence anew, including the possibility to access the file and to request an oral hearing.

2.5. **Commission decision and settlement reward**

28. Upon the parties' replies to the statement of objections confirming their commitment to settle, Regulation (EC) No 773/2004 allows the Commission to proceed, without any other procedural step, to the adoption of the

([1]) In the context of settlement procedures, statements of objections should contain the information necessary to enable the parties to corroborate that it reflects their settlement submissions.

([2]) In line with settled case-law, the Commission shall base its decisions only on objections on which the parties concerned have been able to comment and, to this end, they shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets.

([3]) In this regard, recital 2 of Regulation (EC) No 622/2008 states: '*(…) Such early disclosure should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability*'.

([4]) As required by Article 11(1) of Regulation (EC) No 773/2004 and Article 27(1) of Regulation (EC) No 1/2003, respectively.

subsequent final decision pursuant to Articles 7 and/or 23 of Regulation (EC) No 1/2003, after consultation of the Advisory Committee pursuant to Article 14 of Regulation (EC) No 1/2003. In particular, this implies that no oral hearing or access to the file may be requested by those parties once their settlement submissions have been reflected by the statement of objections, in line with Articles 12(2) and 15(1a) of Regulation (EC) No 773/2004.

29. The Commission retains the right to adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' settlement submissions, either in view of the opinion provided by the Advisory Committee or for other appropriate considerations in view of the ultimate decisional autonomy of the Commission to this effect. However, should the Commission opt to follow that course, it will inform the parties and notify to them a new statement of objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure. It follows that the parties would then be entitled to have access to the file, to request an oral hearing and to reply to the statement of objections. The acknowledgments provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.

30. The final amount of the fine in a particular case is determined in the decision finding an infringement pursuant to Article 7 and imposing a fine pursuant to Article 23 of Regulation (EC) No 1/2003.

31. In line with the Commission's practice, the fact that an undertaking cooperated with the Commission under this Notice during the administrative procedure will be indicated in the final decision, so as to explain the reason for the level of the fine.

32. Should the Commission decide to reward a party for settlement in the framework of this Notice, it will reduce by 10 % the amount of the fine to be imposed after the 10 % cap has been applied having regard to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ([1]). Any specific increase for deterrence ([2]) used in their regard will not exceed a multiplication by two.

33. When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward.

3. GENERAL CONSIDERATIONS

34. This Notice applies to any case pending before the Commission at the time of or after its publication in the Official Journal of the European Union.

35. Access to settlement submissions is only granted to those addressees of a statement of objections who have not requested settlement, provided that they commit — together with the legal counsels getting access on their behalf — not to make any copy by mechanical or electronic means of any information in the settlement submissions to which access is being granted and to ensure that the information to be obtained from the settlement submission will solely be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related proceedings. Other parties such as complainants will not be granted access to settlement submissions.

36. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceedings, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

37. Settlement submissions made under this Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation (EC) No 1/2003, provided that the conditions set out in the Network Notice ([3]) are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

38. Upon the applicant's request, the Commission may accept that settlement submissions be provided orally. Oral settlement submissions will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Regulation (EC) No 1/2003 and Articles 3(3) and 17(3) of Regulation (EC) No 773/2004 undertakings making oral settlement submissions will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral settlement submissions and the accuracy of the transcript without delay.

39. The Commission will not transmit settlement submissions to national courts without the consent of the relevant applicants, in line with the provisions in the Commission 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 ([4]).

40. The Commission considers that normally public disclosure of documents and written or recorded statements (including settlement submissions) received in the context of this Notice would undermine certain public or private

([1]) OJ C 210, 1.9.2006, p. 2.
([2]) Point 30 of the Guidelines on fines.
([3]) Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43).
([4]) OJ C 101, 27.4.2004, p. 54; point 26.

interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ([1]), even after the decision has been taken.

41. Final decisions taken by the Commission under Regulation (EC) No 1/2003 are subject to judicial review in accordance with Article 230 of the Treaty. Moreover, as provided in Article 229 of the Treaty and Article 31 of Regulation (EC) No 1/2003, the Court of Justice has unlimited jurisdiction to review decisions on fines adopted pursuant to Article 23 of Regulation (EC) No 1/2003.

Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003

I. **Investigation as usual**

— Parties may express their interest in a hypothetical settlement.

II. **Exploratory steps regarding settlement**

— Letter to all companies (and MS) informing of the decision to initiate proceedings in view of settlement (Article 11(6)) and requesting them to express their interest in settlement.

III. **Bilateral rounds of settlement discussions**

— Disclosure and exchange of arguments on potential objections, liability, fines range.

— Disclosure of evidence used to establish potential objections, liability, fines.

— Disclosure of other non-confidential versions of documents in the file, when justified.

IV. **Settlement**

— Conditional settlement submissions by the companies, jointly represented where applicable.

— DG COMP sends acknowledgement of receipt.

V. **'Settled' statement of objections**

— Notification of streamlined SO endorsing company's settlement submissions, where appropriate.

— Company's reply to SO confirming clearly that it reflects its settlement submission.

VI. **'Settlement' Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003**

— Advisory Committee on a draft streamlined final decision.

If College of Commissioners agrees:

— Adoption of streamlined final decision.

([1]) OJ L 145, 31.5.2001, p. 43.

Commission Notice on Immunity from fines and reduction of fines in cartel cases

(Text with EEA relevance)

(2006/C 298/11)

I. INTRODUCTION

(1) This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC [1].

(2) By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. They ultimately result in artificial prices and reduced choice for the consumer. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.

(3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.

(4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.

(5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.

(6) In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.

(7) The supervisory task conferred on the Commission by the Treaty in competition matters does not only include the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy. The protection of corporate statements in the public interest is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Commission, to the extent that it is technically possible to combine both interests by rendering corporate statements accessible only at the Commission premises and normally on a single occasion following the formal notification of the objections. Moreover, the Commission will process personal data in the context of this notice in conformity with its obligations under Regulation (EC) No 45/2001. [2]

II. IMMUNITY FROM FINES

A. Requirements to qualify for immunity from fines

(8) The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel

[1] Reference in this text to Article 81 EC also covers Article 53 EEA when applied by the Commission according to the rules laid down in Article 56 of the EEA Agreement.

[2] OJ L 8, 12.1.2001, p. 1.

affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel ([1]); or

(b) find an infringement of Article 81 EC in connection with the alleged cartel.

(9) For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardize the inspections:

(a) A corporate statement ([2]) which includes, in so far as it is known to the applicant at the time of the submission:

— A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.

— The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;

— The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;

— Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and

(b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

(10) Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.

(11) Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC,.

(12) In addition to the conditions set out in points (8)(a), (9) and (10) or in points (8)(b) and 11, all the following conditions must be met in any case to qualify for any immunity from a fine:

(a) The undertaking cooperates genuinely ([3]), fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This includes:

— providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;

— remaining at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts;

— making current (and, if possible, former) employees and directors available for interviews with the Commission;

— not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and

— not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed;

([1]) The assessment of the threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.

([2]) Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally.

([3]) This requires in particular that the applicant provides accurate, not misleading, and complete information. Cfr judgement of the European Court of Justice of 29 June 2006 in case C-301/04 P, Commission v SGL Carbon AG a.o., at paragraphs 68-70, and judgement of the European Court of Justice of 28 June 2005 in cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, Dansk Rørindustri A/S a.o. v. Commission, at paragraphs 395-399.

(b) The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections;

(c) When contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

(13) An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor.

B. **Procedure**

(14) An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines in order to meet the conditions in points (8)(a) or (8)(b), as appropriate. The Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued.

(15) The Commission services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. Undertakings which have been granted a marker cannot perfect it by making a formal application in hypothetical terms. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

(16) An undertaking making a formal immunity application to the Commission must:

(a) provide the Commission with all information and evidence relating to the alleged cartel available to it, as specified in points (8) and (9), including corporate statements; or

(b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of the applying undertaking and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.

(17) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for immunity from fines, confirming the date and, where appropriate, time of the application.

(18) Once the Commission has received the information and evidence submitted by the undertaking under point (16)(a) and has verified that it meets the conditions set out in points (8)(a) or (8)(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

(19) If the undertaking has presented information and evidence in hypothetical terms, the Commission will verify that the nature and content of the evidence described in the detailed list referred to in point (16)(b) will meet the conditions set out in points (8)(a) or (8)(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

(20) If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the Commission will inform the undertaking in writing. In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section III of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

(21) The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement, irrespective of whether the immunity application is presented formally or by requesting a marker.

(22) If at the end of the administrative procedure, the undertaking has met the conditions set out in point (12), the Commission will grant it immunity from fines in the relevant decision. If at the end of the administrative procedure, the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favorable treatment under this Notice. If the Commission, after having granted conditional immunity ultimately finds that the immunity applicant has acted as a coercer, it will withhold immunity.

III. **REDUCTION OF A FINE**

A. **Requirements to qualify for reduction of a fine**

(23) Undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions under section II above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

(24) In order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must meet the cumulative conditions set out in points (12)(a) to (12)(c) above.

(25) The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.

(26) The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

— first undertaking to provide significant added value: a reduction of 30-50 %,

— second undertaking to provide significant added value: a reduction of 20-30 %,

— subsequent undertakings that provide significant added value: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which it represents added value.

If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.

B. **Procedure**

(27) An undertaking wishing to benefit from a reduction of a fine must make a formal application to the Commission and it must present it with sufficient evidence of the alleged cartel to qualify for a reduction of a fine in accordance with point (24) of this Notice. Any voluntary submission of evidence to the Commission which the undertaking that submits it wishes to be considered for the beneficial treatment of section III of this Notice must be clearly identified at the time of its submission as being part of a formal application for a reduction of a fine.

(28) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for a reduction of a fine and of any subsequent submissions of evidence, confirming the date and, where appropriate, time of each submission. The Commission will not take any position on an application for a reduction of a fine before it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel.

(29) If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value within the meaning of points (24) and (25), and that the undertaking has met the conditions of points (12) and (27), it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point (26). The Commission will also, within the same time frame, inform the undertaking in writing if it comes to the preliminary conclusion that the undertaking does not qualify for a reduction of a fine. The Commission may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued.

(30) The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted. The Commission will determine in any such final decision:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;

(c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).

If the Commission finds that the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favourable treatment under this Notice.

IV. CORPORATE STATEMENTS MADE TO QUALIFY UNDER THIS NOTICE

(31) A corporate statement is a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice. Any statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file and can thus be used in evidence.

(32) Upon the applicant's request, the Commission may accept that corporate statements be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Council Regulation (EC) No 1/2003 [1] and Articles 3 and 17 of Commission Regulation (EC) No 773/2004 [2], undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral statements within a given time limit. Undertakings may waive these rights within the said time-limit, in which case the recording will from that moment on be deemed to have been approved. Following the explicit or implicit approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Commission's premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under this Notice.

(33) Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf -, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements. The Commission considers that this specific protection of a corporate statement is not justified as from the moment when the applicant discloses to third parties the content thereof.

(34) In accordance with the Commission Notice on rules for access to the Commission file [3], access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points (12) and (27) of this Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceeding, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

(35) Corporate statements made under the present Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation No 1/2003, provided that the conditions set out in the Network Notice [4] are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

V. GENERAL CONSIDERATIONS

(36) The Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose.

[1] OJ L 1, 4.1.2003, p. 1.
[2] OJ L 123, 27.4.2004, p. 18.
[3] OJ C 325, 22.12.2005, p. 7.
[4] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43.

(37) From the date of its publication in the Official Journal, this notice replaces the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. However, points (31) to (35) of the current notice will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.

(38) The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.

(39) In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.

(40) The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 [1], even after the decision has been taken.

[1] OJ L 145, 31.5.2001, p. 43.

I.E EEA AGREEMENT

AGREEMENT ON THE EUROPEAN ECONOMIC AREA[1]

PART IV
COMPETITION AND OTHER COMMON RULES

CHAPTER 1
RULES APPLICABLE TO UNDERTAKINGS

Article 53

1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;

- any decision or category of decisions by associations of undertakings;

- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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[1] See also:

- DECISION OF THE COUNCIL AND THE COMMISSION of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation* (94/1/ECSC, EC); OJ L1/1, 3.1.1994;

**The present agreement has not been ratified by the Swiss Confederation.*

- COUNCIL REGULATION (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area

Article 54

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 55

1. Without prejudice to the provisions giving effect to Articles 53 and 54 as contained in Protocol 21 and Annex XIV of this Agreement, the EC Commission and the EFTA Surveillance Authority provided for in Article 108(1) shall ensure the application of the principles laid down in Articles 53 and 54.

The competent surveillance authority, as provided for in Article 56, shall investigate cases of suspected infringement of these principles, on its own initiative, or on application by a State within the respective territory or by the other surveillance authority. The competent surveillance authority shall carry out these investigations in cooperation with the competent national authorities in the respective territory and in cooperation with the other surveillance authority, which shall give it its assistance in accordance with its internal rules.

If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the competent surveillance authority shall record such infringement of the principles in a reasoned decision.

The competent surveillance authority may publish its decision and authorize States within the respective territory to take the measures, the conditions and details of which it shall determine, needed to remedy the situation. It may also request the other surveillance authority to authorize States within the respective territory to take such measures.

Article 56

1. Individual cases falling under Article 53 shall be decided upon by the surveillance authorities in accordance with the following provisions:

(a) individual cases where only trade between EFTA States is affected shall be decided upon by the EFTA Surveillance Authority;

(b) without prejudice to subparagraph (c), the EFTA Surveillance Authority decides, as provided for in the provisions set out in Article 58, Protocol 21 and the rules adopted for its implementation, Protocol 23 and Annex XIV, on cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33% or more of their turnover in the territory covered by this Agreement;

(c) the EC Commission decides on the other cases as well as on cases under (b) where trade between EC Member States is affected, taking into account the provisions set out in Article 58, Protocol 21, Protocol 23 and Annex XIV.

2. Individual cases falling under Article 54 shall be decided upon by the surveillance authority in the territory of which a dominant position is found to exist. The rules set out in paragraph 1(b) and (c) shall apply only if dominance exists within the territories of both surveillance authorities.

3. Individual cases falling under subparagraph (c) of paragraph 1, whose effects on trade between EC Member States or on competition within the Community are not appreciable, shall be decided upon by the EFTA Surveillance Authority.

4. The terms 'undertaking` and 'turnover` are, for the purposes of this Article, defined in Protocol 22.

Article 57

1. Concentrations the control of which is provided for in paragraph 2 and which create or strengthen a dominant position as a result of which effective competition would be significantly impeded within the territory covered by this Agreement or a substantial part of it, shall be declared incompatible with this Agreement.

2. The control of concentrations falling under paragraph 1 shall be carried out by:

(a) the EC Commission in cases falling under Regulation (EEC) No 4064/89 in accordance with that Regulation and in accordance with Protocols 21 and 24 and Annex XIV to this Agreement. The EC Commission shall, subject to the review of the EC Court of Justice, have sole competence to take decisions on these cases;

(b) the EFTA Surveillance Authority in cases not falling under subparagraph (a) where the relevant thresholds set out in Annex XIV are fulfilled in the territory of the EFTA States in accordance with Protocols 21 and 24 and Annex XIV. This is without prejudice to the competence of EC Member States.

Article 58

With a view to developing and maintaining a uniform surveillance throughout the European Economic Area in the field of competition and to promoting a homogeneous implementation, application and interpretation of the provisions of this Agreement to this end, the competent authorities shall cooperate in accordance with the provisions set out in Protocols 23 and 24.

Article 59

1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall,

where necessary, address appropriate measures to the States falling within their respective territory.

Article 60

Annex XIV contains specific provisions giving effect to the principles set out in Articles 53, 54, 57 and 59.

CHAPTER 2
STATE AID

Article 61

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

2. The following shall be compatible with the functioning of this Agreement:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

Article 62

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;

(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

Article 63

Annex XV contains specific provisions on State aid.

Article 64

1. If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f).

If a commonly agreed solution has not been found by the end of this two-week period, the competent authority of the affected Contracting Party may immediately adopt appropriate interim measures in order to remedy the resulting distortion of competition.

Consultations shall then be held in the EEA Joint Committee with a view to finding a commonly acceptable solution.

If within three months the EEA Joint Committee has not been able to find such a solution, and if the practice in question causes, or threatens to cause, distortion of competition affecting trade between the Contracting Parties, the interim measures may be replaced by definitive measures, strictly necessary to offset the effect of such distortion. Priority shall be given to such measures that will least disturb the functioning of the EEA.

2. The provisions of this Article will also apply to State monopolies, which are established after the date of signature of the Agreement.

CHAPTER 3

OTHER COMMON RULES

Article 65

1. Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.

2. Protocol 28 and Annex XVII contain specific provisions and arrangements concerning intellectual, industrial and commercial property, which, unless otherwise specified, shall apply to all products and services.

PROTOCOL 21

ON THE IMPLEMENTATION OF COMPETITION RULES APPLICABLE TO UNDERTAKINGS

Article 1

The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community, enabling the EFTA Surveillance Authority to give effect to the principles laid down in Articles 1(2)(e) and 53 to 60 of the Agreement, and in Protocol 25.

The Community shall, where necessary, adopt the provisions giving effect to the principles laid down in Articles 1(2)(e) and 53 to 60 of the Agreement, and in Protocol 25, in order to ensure that the EC Commission has equivalent powers and similar functions under this Agreement to those which it has, at the time of the signature of the Agreement, for the application of the competition rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.

Article 2

If, following the procedures set out in Part VII of the Agreement, new acts for the implementation of Articles 1(2)(e) and 53 to 60 and of Protocol 25, or on amendments of the acts listed in Article 3 of this Protocol are adopted, corresponding amendments shall be made in the agreement setting up the EFTA Surveillance Authority so as to ensure that the EFTA Surveillance Authority will be entrusted simultaneously with equivalent powers and similar functions to those of the EC Commission.

Article 3

1. In addition to the acts listed in Annex XIV, the following acts reflect the powers and functions of the EC Commission for the application of the competition rules of the Treaty establishing the European Economic Community:

Control of concentrations

1.**{[1]}** **32004 R 0139**: Article 4(4) and (5) and Articles 6 to 26 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

2.**{[2]}** **32004 R 0802:** Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1), as corrected by OJ L 172, 6.5.2004, p. 9, as amended by:

- **32006 R 1792:** Commission Regulation (EC) No 1792/2006 of 23 October 2006 (OJ L 362, 20.12.2006, p. 1),
- **32008 R 1033**: Commission Regulation (EC) No 1033/2008 of 20 October 2008 (OJ L 279, 22.10.2008, p. 3).

{[1]} Text of point 1 (Council Regulation (EEC) No 4064/89) replaced by Decision No 78/2004 (OJ No L 219, 19.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004, and subsequently replaced by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005.

{[2]} This point, introduced by Decision No 77/98 (OJ No L 172, 8.7.1999, p. 56 and EEA Supplement No 30, 8.7.1999, p. 153), e.i.f. 1.9.1998, replaces former point 2. See also Decision No 13/97 (OJ No L 182, 10.7.1997, p. 44 and EEA Supplement No 29, 10.7.1997, p. 59), e.i.f. 1.4.1997 and subsequently replaced by Decision No 117/2009 (OJ No L 334, 17.12.2009, p. 20 and EEA Supplement No 68, 17.12.2009, p. 20) e.i.f. 23.10.2009

General procedural rules

3.**{[3]}** **32003 R 0001**: 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, p. 1), as amended by:

-**{[4]}** **32004 R 0411**: Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ L 68, 6.3.2004, p. 1),

-**{[5]}** **32006 R 1419**: Council Regulation (EC) No 1419/2006 of 25 September 2006 (OJ L 269, 28.9.2006, p. 1).

4.**{[6]}** **32004 R 0773**: Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18), as amended by:

-**{[7]}** **32006 R 1792**: Commission Regulation (EC) No 1792/2006 of 23 October 2006 (OJ L 362, 20.12.2006, p. 1),

-**{[8]}** **32008 R 0622**: Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ L 171, 1.7.2008, p. 3).

5. [ ] **{[9]}**

Transport

6. [ ] **{[10]}**

7. [ ] **{[11]}**

8. [ ] **{[12]}**

9. [ ] **{[13]}**

10. **374 R 2988**: Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ No L 319, 29.11.1974, p. 1), as amended by:

{[3]} Text replaced by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[4]} Indent and words ", as amended by:", added by Decision No 40/2005 (OJ No L 198, 28.7.2005, p. 38 and EEA Supplement No 38, 28.7.2005, p. 22), e.i.f. 19.5.2005.

{[5]} Indent added by Decision No 153/2006 (OJ No L 89, 29.3.2007, p. 25 and EEA Supplement No 15, 29.3.2007, p. 20), e.i.f. 1.8.20076.

{[6]} Text of point 4 (Commission Regulation (EC) No 3385/94) replaced by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

{[7]} Indent and words ", as amended by:", added by Decision No 132/2007 (OJ No L 100, 10.4.2008, p. 1 and EEA Supplement No 19, 10.4.2008, p.1), e.i.f. pending.

{[8]} Indent added by Decision No 118/2009 (OJ No L 334, 17.12.2009, p. 22 and EEA Supplement No 68, 17.12.2009, p. 22), e.i.f. 23.10.2009.

{[9]} Text of point 5 (Commission Regulation (EC) No 2842/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

{[10]} Text of point 6 (Council Regulation (EEC) No 141/62) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[11]} Text of point 7 (Article 6 and articles 10 to 31 of Council Regulation (EEC) No 1017/68) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[12]} Text of point 8 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

{[13]} Text of point 9 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

-{[14]} **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1).

11. [ ] **{[15]}**

12. [ ] **{[16]}**

13. **387 R 3975**: Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ No L 374, 31.12.1987, p. 1), as amended by:

- **391 R 1284**: Council Regulation (EEC) No 1284/91 of 14 May 1991 (OJ No L 122, 17.5.1991, p. 2),

-{[17]} **392 R 2410**: Council Regulation (EEC) No 2410/92 of 23 July 1992 (OJ No L 240, 24.8.1992, p. 18),

-{[18]} **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1),

-{[19]} **32004 R 0411**: Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ L 68, 6.3.2004, p. 1).

14.**{[20]}**

15. [ ] **{[21]}**

16. [ ] **{[22]}**

2. In addition to the acts listed in Annex XIV, the following acts reflect the powers and functions of the EC Commission for the application of the competition rules of the Treaty establishing the European Coal and Steel Community (ECSC):

1. Article (ECSC) 65(2), subparagraphs 3 to 5, (3), (4), subparagraph 2, and (5).

2. Article (ECSC) 66(2), subparagraphs 2 to 4, and (4) to (6).

3. **354 D 7026**: High Authority Decision No 26/54 of 6 May 1954 laying down in implementation of Article 66(4) of the Treaty a regulation concerning information to be furnished (OJ of the European Coal and Steel Community No 9, 11.5.1954, p. 350/54).

{[14]} Indent and words ", as amended by:", added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[15]} Text of point 11 (Section II of Council Regulation (EEC) No 4056/86) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[16]} Text of point 12 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

{[17]} Indent added by Decision No 3/94 (OJ No L 85, 30.3.1994, p. 65 and EEA Supplement No 1, 30.3.1994, p. 5), e.i.f. 1.7.1994.

{[18]} Indent and words ", as amended by:", added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[19]} Indent added by Decision No 40/2005 (OJ No L 198, 28.7.2005, p. 38 and EEA Supplement No 38, 28.7.2005, p. 22), e.i.f. 19.5.2005.

{[20]} Text deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

{[21]} Text of point 15 (Commission Regulation (EC) No 2842/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

{[22]} Text of point 16 (Commission Regulation (EC) No 2843/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

4. **378 S 0715**: Commission Decision No 715/78/ECSC of 6 April 1978 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community (OJ No L 94, 8.4.1978, p. 22).

5. **384 S 0379**: Commission Decision No 379/84/ECSC of 15 February 1984 defining the powers of officials and agents of the Commission instructed to carry out the checks provided for in the ECSC Treaty and decisions taken in application thereof (OJ No L 46, 16.2.1984, p. 23).

Article 4 **{[23]}**

Article 5 **{[24]}**

Article 6 **{[25]}**

Article 7 **{[26]}**

Article 8 **{[27]}**

Applications submitted to the EC Commission prior to the date of entry into force of the Agreement shall be deemed to comply with the provisions on application under the Agreement.

The competent surveillance authority pursuant to Article 56 of the Agreement and Article 10 of Protocol 23 may require a duly completed form as prescribed for the implementation of the Agreement to be submitted to it within such time as it shall appoint. In that event, applications shall be treated as properly made only if the forms are submitted within the prescribed period and in accordance with the provisions of the Agreement.

*Article 9***{[28]}**

Article 10

The Contracting Parties shall ensure that the measures affording the necessary assistance to officials of the EFTA Surveillance Authority and the EC Commission, in order to enable them to make their investigations as foreseen under the Agreement, are taken within six months of the entry into force of the Agreement.

Article 11

As regards agreements, decisions and concerted practices already in existence at the date of entry into force of the Agreement which fall under Article 53(1), the prohibition in Article 53(1) shall not apply where the agreements, decisions or practices are modified within six months from the date of entry into force of the Agreement so as to fulfil the conditions contained in the block exemptions provided for in Annex XIV.

{[23]} Text of article 4 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[24]} Text of article 5 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[25]} Text of article 6 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[26]} Text of article 7 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[27]} Words "and notifications" deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[28]} Text of article 9 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

Article 12

As regards agreements, decisions of associations of undertakings and concerted practices already in existence at the date of entry into force of the Agreement which fall under Article 53 (1), the prohibition in Article 53(1) shall not apply, from the date of entry into force of the Agreement, where the agreements, decisions or practices are modified within six months from the date of entry into force of the Agreement so as not to fall under the prohibition of Article 53(1) any more.

Article 13

Agreements, decisions of associations of undertakings and concerted practices which benefit from an individual exemption granted under Article 85(3) of the Treaty establishing the European Economic Community before the entry into force of the Agreement shall continue to be exempted as regards the provisions of the Agreement, until their date of expiry as provided for in the decisions granting these exemptions or until the EC Commission otherwise decides, whichever date is the earlier.

Review clause{[29]}

By the end of 2005 and at the request of one of the Contracting Parties, the Parties shall review the mechanisms for the enforcement of Articles 53 and 54 of the Agreement as well as the co-operation mechanisms of Protocol 23 to the Agreement, with a view to ensuring the homogenous and effective application of those Articles. The Parties shall in particular review the decision of the EEA Joint Committee No 130/2004 of 24 September 2004 in light of the Parties' experiences with the new system of enforcing the competition rules and explore the possibility of mirroring in the EEA the system established in the EU by Council Regulation (EC) No 1/2003 as regards the application of Articles 81 and 82 of the Treaty by national competition authorities, the horizontal co-operation between national competition authorities and the mechanism for ensuring uniform application of the competition rules by national authorities.

{[29]} Review clause added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

PROTOCOL 22

CONCERNING THE DEFINITION OF 'UNDERTAKING' AND 'TURNOVER' (ARTICLE 56)

Article 1

For the purposes of the attribution of individual cases pursuant to Article 56 of the Agreement, an 'undertaking' shall be any entity carrying out activities of a commercial or economic nature.

Article 2

'Turnover' within the meaning of Article 56 of the Agreement shall comprise the amounts derived by the undertakings concerned, in the territory covered by the Agreement, in the preceding financial year from the sale of products and the provision of services falling within the undertaking's ordinary scope of activities after deduction of sales rebates and of value-added tax and other taxes directly related to turnover.

Article 3[1]

In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC, after deduction of value added tax and other taxes directly related to those items, where appropriate:

  (i) interest income and similar income;

  (ii) income from securities:

    - income from shares and other variable yield securities,

    - income from participating interests,

    - income from shares in affiliated undertakings;

  (iii) commissions receivable;

  (iv) net profit on financial operations;

  (v) other operating income.

  The turnover of a credit or financial institution in the territory covered by the Agreement shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the territory covered by the Agreement;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3) of Council Regulation (EC) No 139/2004, gross premiums received from residents in the territory covered by the Agreement shall be taken into account.

{[1]} Text of Article 3 replaced by Decision No 78/2004 (OJ No L 219, 16.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004.

Article 4

1. In derogation from the definition of the turnover relevant for the application of Article 56 of the Agreement, as contained in Article 2 of this Protocol, the relevant turnover shall be constituted:

   (a) as regards agreements, decisions of associations of undertakings and concerted practices related to distribution and supply arrangements between non-competing undertakings, of the amounts derived from the sale of goods or the provision of services which are the subject matter of the agreements, decisions or concerted practices, and from the other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use;

   (b) as regards agreements, decisions of associations of undertakings and concerted practices related to arrangements on transfer of technology between non-competing undertakings, of the amounts derived from the sale of goods or the provision of services which result from the technology which is the subject matter of the agreements, decisions or concerted practices, and of the amounts derived from the sale of those goods or the provision of those services which that technology is designed to improve or replace.

2. However, where at the time of the coming into existence of arrangements as described in paragraph 1(a) and (b) turnover as regards the sale of goods or the provision of services is not in evidence, the general provision as contained in Article 2 shall apply.

Article 5

1. Where individual cases concern products falling within the scope of application of Protocol 25, the relevant turnover for the attribution of those cases shall be the turnover achieved in these products.

2. Where individual cases concern products falling within the scope of application of Protocol 25 as well as products or services falling within the scope of application of Articles 53 and 54 of the Agreement, the relevant turnover is determined by taking into account all the products and services as provided for in Article 2.

PROTOCOL 23 {[1]}

CONCERNING THE COOPERATION BETWEEN THE SURVEILLANCE AUTHORITIES (ARTICLE 58)

GENERAL PRINCIPLES

Article 1

1. The EFTA Surveillance Authority and the EC Commission shall exchange information and consult each other on general policy issues at the request of either of the surveillance authorities.

2. The EFTA Surveillance Authority and the EC Commission, in accordance with their internal rules, respecting Article 56 of the Agreement and Protocol 22 and the autonomy of both sides in their decisions, shall cooperate in the handling of individual cases falling under Article 56(1)(b) and (c), (2), second sentence and (3), as provided for in the provisions below.

3. For the purposes of this Protocol, the term 'territory of a surveillance authority' shall mean for the EC Commission the territory of the EC Member States to which the Treaty establishing the European Community applies, upon the terms laid down in that Treaty, and for the EFTA Surveillance Authority the territories of the EFTA States to which the Agreement applies.

{[2]}Article 1A

In the interests of homogeneous interpretation by the EFTA Surveillance Authority and the EC Commission of Articles 53 and 54 of the Agreement and of Articles 81 and 82 of the Treaty, the EFTA Surveillance Authority and the competent authorities of the EFTA States may also be allowed to participate in meetings of the network of public authorities referred to in recital 15 of Council Regulation (EC) No 1/2003 for the purposes of discussion of general policy issues only. The EFTA Surveillance Authority, the EC Commission and the competent authorities of the EFTA states and of the EC Member States shall have the power to make available all information necessary for the purpose of such general policy discussion in that network. Information made available in this context shall not be used for enforcement purposes. This participation shall be without prejudice to rights of participation of the EFTA States and the EFTA Surveillance Authority granted under the EEA Agreement.

THE INITIAL PHASE OF THE PROCEEDINGS

Article 2

1. In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other complaints to the extent that it is not apparent that these have been addressed to both surveillance authorities. They shall also inform each other when opening *ex officio* procedures.

{[1]} Text of protocol 23 replaced by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{[2]} Article inserted by Decision No 147/2007 (OJ No L 100, 10.4.2008, p. 99 and EEA Supplement No 19, 10.4.2008, p.96), e.i.f. 27.10.2007.

2. The EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other information received from the national competition authorities within their respective territories concerning the commencement of the first formal investigative measure in cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement.

3. The surveillance authority which has received information as provided for in the first paragraph may present its comments thereon within 30 working days of its receipt.

Article 3

1. The competent surveillance authority shall, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, consult the other surveillance authority when:

   - addressing to the undertakings or associations of undertakings concerned its statement of objections,

   - publishing its intention to adopt a decision declaring Article 53 or 54 of the Agreement not applicable, or

   - publishing its intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.

2. The other surveillance authority may deliver its comments within the time limits set out in the abovementioned publication or statement of objections.

3. Observations received from the undertakings concerned or third parties shall be transmitted to the other surveillance authority.

Article 4

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall transmit to the other surveillance authority the administrative letters by which a file is closed or a complaint rejected.

Article 5

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall invite the other surveillance authority to be represented at hearings of the undertakings concerned. The invitation shall also extend to the States falling within the competence of the other surveillance authority.

ADVISORY COMMITTEES

Article 6

1. In cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall, in due time, inform the other surveillance authority of the date of the meeting of the Advisory Committee and transmit the relevant documentation.

2. All documents forwarded for that purpose from the other surveillance authority shall be presented to the Advisory Committee of the surveillance authority which is competent to decide on a case in accordance with Article 56 together with the material sent out by that surveillance authority.

3. Each surveillance authority and the States falling within its competence shall be entitled to be present in the Advisory Committees of the other surveillance authority and to express their views therein; they shall not have, however, the right to vote.

4. Consultations may also take place by written procedure. However, if the surveillance authority which is not competent to decide on a case in accordance with Article 56 so requests, the competent surveillance authority shall convene a meeting.

REQUEST FOR DOCUMENTS AND THE RIGHT

TO MAKE OBSERVATIONS

Article 7

The surveillance authority which is not competent to decide on a case in accordance with Article 56 of the Agreement may request from the other surveillance authority at all stages of the proceedings copies of the most important documents concerning cases falling under Article 56(1)(b) and (c), (2) second sentence and (3) of the Agreement, and may furthermore, before a final decision is taken, make any observations it considers appropriate.

ADMINISTRATIVE ASSISTANCE

Article 8

1. When the competent surveillance authority, as defined in Article 56 of the Agreement, by simple request or by decision requires an undertaking or association of undertakings located within the territory of the other surveillance authority to supply information, it shall at the same time forward a copy of the request or decision to the other surveillance authority.

2. At the request of the competent surveillance authority, as defined in Article 56 of the Agreement, the other surveillance authority shall, in accordance with its internal rules, undertake inspections within its territory in cases where the competent surveillance authority so requesting considers it to be necessary.

3. The competent surveillance authority is entitled to be represented and take an active part in inspections carried out by the other surveillance authority in respect of paragraph 2.

4. All information obtained during such inspections on request shall be transmitted to the surveillance authority which requested the inspections immediately after their finalization.

5. Where the competent surveillance authority, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, carries out inspections within its territory, it shall inform the other surveillance authority of the fact that such inspections have taken place and, on request, transmit to that authority the relevant results of the inspections.

6. When the competent surveillance authority as defined in Article 56 of the Agreement interviews a consenting natural or legal person in the territory of the other surveillance authority, the latter shall be informed thereof. The surveillance authority which is not competent may be present during such an interview, as well as officials from the competition authority on whose territory the interviews are conducted.

EXCHANGE AND USE OF INFORMATION

Article 9

1. For the purpose of applying Articles 53 and 54 of the Agreement, the EFTA Surveillance Authority and the EC Commission shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information acquired or exchanged pursuant to this Protocol shall only be used in evidence for the purpose of procedures under Articles 53 and 54 of the Agreement and in respect of the subject matter for which it was collected.

3. Where the information referred to in Article 2 (1) and (2) concerns a case which has been initiated as a result of an application for leniency, that information cannot be used by the receiving surveillance authority as the basis for starting an inspection on its own behalf. This is without prejudice to any power of the surveillance authority to open an inspection on the basis of information received from other sources.

4. Save as provided under paragraph 5, information voluntarily submitted by a leniency applicant will only be transmitted to the other surveillance authority with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to the other surveillance authority if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. Once the leniency applicant has given consent to the transmission of information to the other surveillance authority, that consent may not be withdrawn. This paragraph is

without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.

5. Notwithstanding paragraph 4, the consent of the applicant for the transmission of information to the other surveillance authority is not required in any of the following circumstances:

a) no consent is required where the receiving surveillance authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting surveillance authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving surveillance authority;

b) no consent is required where the receiving surveillance authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting surveillance authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the leniency applicant or on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme or on any employee or former employee of the leniency applicant or of any of the aforementioned persons. A copy of the receiving authority's written commitment will be provided to the applicant.

c) in the case of information collected by a surveillance authority under Article 8(2) at the request of the surveillance authority to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the surveillance authority to whom the application was made.

PROFESSIONAL SECRECY

Article 10

1. For the purpose of carrying out the tasks entrusted to it by this Protocol, the EC Commission and the EFTA Surveillance Authority can forward to the States falling within their respective territories all information acquired or exchanged by them pursuant to this Protocol.

2. The EC Commission, the EFTA Surveillance Authority, the competent authorities of the EC Member States and the EFTA States, their officials, servants and other persons working under the supervision of these authorities as well as officials and servants of other authorities of the States shall not disclose information acquired or exchanged by them as a result of the application of this Protocol and of the kind covered by the obligation of professional secrecy.

3. Rules on professional secrecy and restricted use of information provided for in the Agreement or in the legislation of the Contracting Parties shall not prevent exchange of information as set out in this Protocol.

ACCESS TO THE FILE{[3]}

Article 10A

When a surveillance authority grants access to the file to the parties to whom it has addressed a statement of objections, the right of access to the file shall not extend to internal documents of the other surveillance authority or of the competition authorities of the EC Member States and the EFTA States. The right of access to the file shall also not extend to correspondence between the surveillance authorities, between a surveillance authority and the competition authorities of the EC Member States or EFTA States or between the competition authorities of the

{[3]} Heading and article 10A inserted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

EC Member States or EFTA States where such correspondence is contained in the file of the competent surveillance authority.

COMPLAINTS AND TRANSFERRAL OF CASES

Article 11

1. Complaints may be addressed to either surveillance authority. Complaints addressed to the surveillance authority which, pursuant to Article 56, is not competent to decide on a given case shall be transferred without delay to the competent surveillance authority.

2. If, in the preparation or initiation of ex officio proceedings, it becomes apparent that the other surveillance authority is competent to decide on a case in accordance with Article 56 of the Agreement, this case shall be transferred to the competent surveillance authority.

3. Once a case is transferred to the other surveillance authority as provided for in paragraphs 1 and 2, the case may not be transferred back. A case may not be transferred after

   - the statement of objections has been sent to the undertakings or associations of undertakings concerned,

   - a letter has been sent to the complainant informing him that there are insufficient grounds for pursuing the complaint,

   - the publication of the intention to adopt a decision declaring Article 53 or 54 not applicable, or the publication of the intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.

LANGUAGES

Article 12

Any natural or legal person shall be entitled to address and be addressed by the EFTA Surveillance Authority and the EC Commission in an official language of an EFTA State or the European Community which they choose as regards complaints. This shall also cover all instances of a proceeding, whether it be opened following a complaint or *ex officio* by the competent surveillance authority.

I.F INTERNATIONAL COOPERATION

Overview of bilateral and multilateral agreements

Bilateral relations on competition issues

The European Commission has engaged actively in cooperation with competition authorities of many countries outside the EU. Cooperation with some of them is based on bilateral agreements dedicated entirely to competition (the so-called "dedicated agreements"). In other cases, competition provisions are included as part of wider general agreements such as free Trade Agreements, Partnership and Cooperation Agreements, Association Agreements, etc.

The full text of the agreement as published in the Official Journal of the European Union (OJ) is provided where available on the Competition Web site (http://ec.europa.eu/competition/international/bilateral/index.html).

Overview of dedicated agreements:

- Agreement between the Government of the **United States of America** and the Commission of the European Communities regarding the application of their competition laws (1995)

- Agreement between the European Communities and the Government of the **United States of America** on the application of positive comity principles in the enforcement of their competition laws (1998)

- Agreement between the European Communities and the Government of **Canada** regarding the application of their competition laws (1999)

- Agreement between the European Community and the Government of **Japan** concerning cooperation on anti-competitive activities (2003)

- Terms of Reference of the **EU-China Competition Policy Dialogue** (Ministry of Commerce of China and the Directorate General for Competition of European Commission) (2004)

- Memorandum of Understanding on Cooperation in the area of anti-monopoly law between on the one side The State Administration for Industry and Commerce and The National Development and Reform Commission of The People's Republic of China and on the other side The European Commission (Directorate-General for Competition) (2012)

- Agreement between the EU and the **Republic of Korea** concerning cooperation on anti-competitive activities (2009)

- Memorandum of Understanding on Cooperation between Ministry of Justice and the heads of the Competition Authorities of **Brazil** and the Competition Directorate-General of the European Commission (2009)

- Memorandum of Understanding on Cooperation between Federal Anti-Monopoly Service of the Russian Federation and the Competition Directorate-General of the European (2011)

Overview of general agreements containing competition provisions:

- Agreement between the European Economic Community and the **Swiss Confederation** (1972)

- Agreement between the European Community and the **Swiss Confederation** on Air Transport (2002)

- Annex to the Framework Agreement for cooperation between the European Economic Community and the Federative Republic of **Brazil** - Exchange of letters between the European Economic Community and the Federative Republic of Brazil on maritime transport (1995)

- Association Agreement with **Turkey** (1995)

- Agreement between the European Coal and Steel Community and the Republic of **Turkey** (1996)

- Agreement between the European Community and the Government of **Denmark** and the Home Government of the **Faroe Islands** (1996)

- Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States and the **United Mexican States** (1997)

- Decision No 2/2000 of the **EC-Mexico Joint Council**- Joint Declarations (2000)

- Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community and the **Palestine Liberation Organisation** (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip (1997)

- Euro-Mediterranean Agreement establishing an association between the EU and **Algeria** (2005), between the EC and the **Arab Republic of Egypt** (2004), between the EC and the **State of Israel** (2005), between the EC and the **Hashemite Kingdom of Jordan** (1997), between the EC and the **Republic of Lebanon** (2006), between the EC and the **Republic of Morocco** (2000), between the EC and the **Republic of Tunisia** (1998)

- Agreement on Trade, Development and Cooperation between the European Community and its Member States and the **Republic of South Africa** (1999)

- Cotonou Agreement (**ACP countries**, 2000)

- Partnership and Cooperation Agreement (with **Armenia** in 2005, with the Republic of **Moldova** in 1998, with the **Russian Federation** in 1997, with **Ukraine** in 1998)

- Stabilisation and Association Agreement (with **Albania** in 2006, with **Croatia** in 2004, with Former Yugoslav **Republic of Macedonia** in 2004, with **Montenegro** in 2007)

- Agreement establishing an association between the European Community and its Member States and the **Republic of Chile** (2002)

- Council Decision no. 1/2004 of the **EU-Morocco Association Council** of 19 April 2004 adopting the necessary rules for the implementation of the competition rules (2004)

- Economic partnership agreement with the **CARIFORUM States** (2008)

- **EU-Korea** Free Trade Agreement (2011)

- Agreement on the European Economic Area (1993)

Multilateral relations on competition policy

For many years, the Commission has participated actively in the work of international forums dealing with competition policy issues. The main organisations concerned are:

- International Competition Network (ICN)
- Organisation of Economic Cooperation and Development (OECD). DG Competition submissions to the OECD Round Tables are available on the Competition Web site (http://ec.europa.eu/competition/international/multilateral/oecd_submissions.html).
- United Nations Conference on Trade and Development (UNCTAD)
- World Trade Organisation (WTO)

I.G OTHERS

EUROPEAN COMMISSION
Competition DG

DG COMPETITION

BEST PRACTICES FOR THE SUBMISSION OF ECONOMIC EVIDENCE AND DATA COLLECTION IN CASES CONCERNING THE APPLICATION OF ARTICLES 101 AND 102 TFEU AND IN MERGER CASES

STAFF WORKING PAPER

1 SCOPE AND PURPOSE

1. Economic analysis plays a central role in competition enforcement. Economics as a discipline provides a framework to think about the way in which each particular market operates and how competitive interactions take place. This framework further allows formulating the possible consequences of the practices under review, whether a merger, an agreement between firms, or single firm conduct. In certain cases it may also provide tools to identify the direction and magnitude of these effects empirically, if appropriate and relevant. In a number of cases, economic analysis may involve the production, handling and assessment of voluminous sets of quantitative data, including, when appropriate, the development of econometric models[1].

2. Economic analysis needs to be framed in such a way that the Commission and the EU Courts can understand and evaluate its relevance and significance. As an administrative authority the Commission is required to take a decision within an appropriate or sometimes a statutory time limit. It is therefore necessary to: (i) ensure that economic analysis meets certain minimum technical standards at the outset, (ii) facilitate the effective gathering and exchange of facts and evidence, in particular any underlying quantitative data, and (iii) use in an effective way reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative.

3. In order to determine the relevance and significance of an economic analysis for a particular case, it is first necessary to assess its intrinsic quality from a technical perspective, i.e. whether it has been generated and presented in a way that meets adequate technical requirements prevalent in the profession. This involves, in particular, an evaluation of whether the hypothesis to be tested is formulated without ambiguity and clearly related to facts, whether the assumptions of the economic model are consistent with the institutional features and other relevant facts of the industry, whether economic models are well established in the relevant literature, whether the empirical methods and the data are appropriate, whether the results are properly interpreted and robust and whether counterarguments have been given adequate consideration.

4. Second, one must assess the congruence and consistency of the economic analysis with other pieces of quantitative and qualitative evidence (such as customer responses, or documentary evidence)[2].

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[1] The assessment of mergers and potential infringements "by effect" often requires a complex economic assessment by the Commission, as well as the use of statistical or econometric analysis.

[2] Economic models or econometric analysis, as is the case with other types of evidence will rarely, if ever, prove conclusive by themselves. The Commission can always take into account different items of evidence. The General Court has held that "*It is the Commission's task to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation.*

5. The present document formulates best practices concerning the generation as well as the presentation of relevant economic and empirical evidence that may be taken into account in the assessment of a case concerning the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)[3] or merger case[4]. These Best Practices are organised along two themes.

   i) First of all, it provides recommendations regarding the content and presentation of economic or econometric analysis. This is meant to facilitate its assessment and the replication of any empirical results by the Commission and/or other parties.

   ii) Second, the document provides guidance to respond to Commission requests for quantitative data[5] to ensure that timely and relevant input for the investigation can be provided.

6. The desire to ensure transparency and accountability, these Best Practices apply to all parties involved in proceedings concerning the application of Articles 101 and 102 TFEU and mergers, that is the parties to the case and interested third parties (including complainants), as well as the Commission.

7. These Best Practices do not create any new rights or obligations, nor alter the rights and obligations which arise from the TFEU, secondary EU law and the case-law of the Court of Justice of the European Union. The Best Practices also do not alter the Commission's interpretative notices and established decisional practice.

8. The principles contained here may be further developed and refined by the Commission in individual cases when appropriate in light of future developments. The specificity of an individual case or particular circumstances may require an adaptation of, or deviation from, these Best Practices. The recommendations contained in this document should be interpreted in light of procedural and resource constraints.

It is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted. That examination and the associated reasoning are subject to a review of legality which the Court carries out in relation to Commission decisions on concentrations". See Case T-342/07, Ryanair v Commission, [2010] paragraph 136

[3] Proceedings before the European Commission concerning Articles101 and 102 TFEU, in accordance with 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, p.1, as amended).

[4] Proceedings under the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

[5] Quantitative data means, generally, observations or measurements, expressed as numbers. For the purposes of these Best Practices, this concept is used to refer to large sets of quantitative data submitted and/or obtained for the purposes of the conduct of an assessment of an economic (and often econometric) nature.

2 BEST PRACTICES REGARDING THE CONTENT AND PRESENTATION OF ECONOMIC AND ECONOMETRIC SUBMISSIONS

9. Economic reasoning is employed in competition cases notably in order to develop in a consistent manner or, conversely, to rebut because of its inconsistency, the economic evidence and arguments in a given case.

10. Any economic model which explicitly or implicitly supports a theoretical claim must rely on assumptions that are consistent with the facts of the industry under consideration. These assumptions should be carefully laid out and the sensitivity of its predictions to changes to the assumptions should be made explicit. While it is not necessary for economic submissions to actually formalize verbal arguments in a model, this will sometimes be helpful to clearly spell out the assumptions underlying an argument, to check its logic consistency, to assess effects of a high degree of complexity, or to use the model as the theoretical basis for an empirical estimation[6].

11. An economic analysis may support an assessment of the anticompetitive or pro-competitive effects of a merger. Such analysis usually involves a comparison of the actual or likely future situation in the relevant market with the absence of the proposed merger.

12. By their very nature, economic models and arguments are based on simplifications of reality. It is therefore normally not sufficient to disprove a particular argument or model, to point out that it is "based on seemingly unrealistic assumptions". It is also necessary to explicitly identify which aspects of reality should be better reflected in the model or argumentation, and to indicate why this would alter the conclusions.

13. In many cases, economic theory is used to develop a testable hypothesis that is later checked against the data. In that case, the economic analysis makes predictions about reality that can be tested by observations and potentially rejected or verified. Thus, whenever feasible, an economic model should be accompanied by an appropriate empirical model - i.e. a model which is capable of testing the relevant hypotheses given the data available.

14. Very often simple but well focused measurement of economic variables (prices, cost, margins, capacity constraints, R&D intensity) will provide important insights into the significance of particular factors. Occasionally, more advanced statistical and econometric techniques may provide more useful evidence[7]. In any case, otherwise

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[6] If an economic submission is well-reasoned, then the fact that a particular argument is "theoretical" or "general" is often a strength rather than a weakness of the submission. This is the case when one has deduced a general conclusion (which holds irrespective of the precise magnitudes of the parameters of the analysis) from a set of assumptions that are considered consistent with the facts of the case. For instance, an economic submission may try to substantiate that irrespective of the size or existence of efficiencies, a particular conduct cannot possibly harm consumers.

[7] For instance, an econometric analysis of the extent to which prices of an undertaking have been affected by the observed entry of a competitor may provide evidence of the competitive constraint exercised by that entrant. In turn this could provide insights with respect to the likely degree of harm, that would result if an incumbent dominant undertaking were to engage in practices resulting in anticompetitive foreclosure in that or related markets.

valid economic analysis may not always produce unambiguous results when applied to the facts of a competition or merger case. Contradictions may result from differences in the data, differences in the approach to economic modelling or in the assumptions used to interpret the data or differences in the empirical techniques and methodologies.

15. The following sections provide practical advice on the generation and communication of economic and econometric analyses. The goal of these recommendations is to ensure that every economic or econometric analysis developed by any party involved submitted for consideration in a case states to the largest possible extent the economic reasoning and the observations on which it relies and explains the relevance of its findings and the robustness of the results. This should allow the Commission and all interested parties to scrutinise the economic evidence submitted during the proceedings so as to avoid that empirical results that are not robust be disguised as such and key assumptions in theoretical reasoning be presented as innocuous. Economic or econometric analysis that does not strictly meet the standards set out in these Best Practices will normally be attached less probative value than otherwise and may not be taken into consideration.

2.1 Formulating the relevant question

16. The first step in any economic analysis, theoretical or empirical, is the formulation of a question that is relevant to the case at hand.

17. The question of interest should be:

(a) precisely formulated so that its answer can be interpreted without ambiguity,

(b) properly motivated taking into account the nature of the competition or merger case, the institutional features of the markets under consideration and the relevant economic theory[8].

18. An economic or econometric report should explicitly formulate not only the hypothesis to be tested (the "null hypothesis"[9]) but also the alternative hypothesis (or hypotheses) under consideration, so that rejection of the null hypothesis can be properly interpreted[10].

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[8] Occasionally the parties might submit a literature survey or review regarding an economic question of particular relevance for the case. A literature review may be useful when it is accompanied by an explanation on the merits and shortcomings, of the existing studies and explains how the party's own reasoning or analysis relates to past research, academic or otherwise.

[9] The null hypothesis is generally that which is presumed to be true initially. A null hypothesis is a hypothesis set up to be nullified or refuted in order to support an alternative hypothesis.

[10] For example, consider an empirical project aimed at testing whether certain conduct would lead to higher prices. One could define as the null hypothesis that prices did not increase in which case a rejection of the null hypothesis would imply that the agreement had a positive price impact. Alternatively, one could have defined as the null hypothesis that prices did not change as a result of

19. Sometimes, an empirical exercise which is being carried out may provide only partial verification of an accompanying economic model or theory of competitive effects. This evidence may be nonetheless useful but should be properly qualified[11].

2.2 Data relevance and reliability

20. The intrinsic quality of an economic theory depends on the extent to which the underlying assumptions match the corresponding economic facts. Likewise, empirical analysis depends on the relevance and the reliability of the underlying data.

21. First, it is necessary to identify the relevant facts to validate the theoretical assumptions and employ data which is appropriate to respond to the empirical question under investigation[12].

22. Second, not all facts can be observed or measured with high accuracy and most datasets are incomplete or otherwise imperfect. Hence, parties and/or the Commission should become familiar with the facts and data and acknowledge its limitations explicitly. As regards quantitative data, for example, this requires (i) a thorough inspection of the data, including summary statistics and graphs, and (ii) a sufficient understanding of how the data were gathered, the sample selection process, the measurement of the variables and whether they bear a close relationship with their theoretical counterparts. Quantitative data may contain anomalies because of miscoding or other errors, which should be discussed with the data providers to decide how to best adjust the data to address these problems.

23. Failure to observe and validate all key assumptions or deficiencies in the data should not prevent an economic analysis to be given weight, though caution must be exercised before relying on its conclusions[13]. Furthermore, statistical techniques have been developed to deal with measurement errors, missing observations and sample selection problems. While these techniques may not be able to improve the data, they may help to deal with some of its imperfections.

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the agreement. A rejection of the null hypothesis in that case would be harder to interpret: did prices rise or fall as a result of the specific relationship between buyer and seller?

[11] For example, the analysis of scanner data (retail prices and quantities) may provide valuable evidence in the context of a merger between producers of fast moving consumption goods, even when the direct impact of the transaction would be felt at the wholesale level and not at the consumer level.

[12] For example when discounts are important, the analysis of the price impact of a merger, agreement or practice must focus on prices paid by consumers rather than on list prices.

[13] For example, assumptions regarding firms' expectations regarding the identity of the market leader may be inferred indirectly through observation of which firm first announces its future prices.

2.3 Choice of empirical methodology

24. The choice of methodology to empirically test a hypothesis or to validate the predictions of an economic model should be properly motivated, and its pros and cons should be made explicit, including potential identification problems[14].

25. Identification can be understood as clarifying the basis upon which one theory can be preferred to another. Similarly, the term can be used to refer to any situation where an econometric model will invariably have more than one set of parameters which generate the same distribution of observations.

26. One should explain how the chosen methodology exploits the variation in the data, to at least partially discriminate between the tested (or null) hypothesis and the alternative hypotheses. At the very least, an economic model or argument should generate predictions that are consistent with a significant number of relevant observed facts.

27. The choice of methodology must take due account of (a) the dataset and its potential limitations, (b) the features of the market under investigation, and (c) the economic issues under consideration — i.e., it should be designed to test the hypothesis of interest (see also section 2.1 above).

28. If statistical and/or econometric methods are used, it is strongly recommended that important methodological choices are explicitly justified, in particular:

    i) specification (what is the range of sensible general forms for the relationship under evaluation, including the relevant variables, the way they could interact, and the nature of errors or uncertainty?).

    ii) observation (how well do the measurements approximate the variables they are intended to represent?).

    iii) estimation (what do the data in the sample suggest as to the range of plausible relationships among variables?).

29. Moreover, a reasoned justification should be given when applying statistical techniques that deviate from generally accepted methods commonly used to assess the question of interest. In particular, one should motivate the changes, describe the modified technique or model, and document the likely biases, if any, that the new or adapted method is likely to introduce.

30. In general, it is recommended to follow a "bottom-up" approach. In the context of multiple regression analysis, this would mean estimating simple models first and then

[14] Problems of inference can be separated into statistical and identification problems. Studies of identification seek to characterize the conclusions that could be drawn if one could use the sampling process to obtain an unlimited number of observations. Studies of statistical inference seek to characterize the generally weaker conclusions that can be drawn from a finite number of observations.

engage in more refined estimation exercises if necessary in order to avoid bias[15]. Large-scale surveys of final consumers may usefully supplement qualitative or other documentary evidence obtained from targeted requests of information to market participants. Whilst the evidential value of replies to information requests from market participants lies in the substance of the information provided by players with intrinsic industry or market knowledge, the specific purpose of large-scale surveys of final consumers is to obtain statistically relevant data in order to estimate the characteristics, behaviour and views of a larger group of final consumers from the responses received from a smaller sample. The objectives of a high quality sample survey should be specific, clear-cut and unambiguous. Further, the definition of the relevant population of consumers (and the associated sampling frame) is crucial because there may be systematic differences in the responses of various differentiated consumer segments. Identification of a survey population must be followed by selection of a sample that accurately represents that population. The researcher can apply probability sampling in large-scale surveys of final consumers to some aspects of respondent selection to reduce the likelihood of biased selection[16].

31. The use of probability sampling techniques in large-scale surveys of final consumers enhances both the reliability and representativeness of the survey results and the ability to assess the accuracy of quantitative estimates obtained from the survey as regards the relevant population of consumers. Probability sampling in large-scale surveys of final consumers offers two important advantages over other types of sampling. First, the sample can provide an unbiased quantitative estimate of the responses of the relevant consumers from which the sample was drawn; that is, the expected value of the sample estimate is the population value being estimated. Second, the researcher can calculate a confidence interval that describes explicitly how reliable the sample estimate of the population is likely to be.

32. If possible, given time and data constraints, conducting multiple empirical analyses relying on different methodologies would help determine whether the conclusions of the empirical investigation are robust to different tests or models (see also section 2.5 below).

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[15] For example, it is sound practice to estimate an Ordinary Least Squares (OLS) regression first and then, to the extent endogeneity is suspected to be a problem in the case at hand, move on to an instrumental variable (IV) estimation.

[16] Probability samples range from simple random samples to complex multistage sampling designs that use stratification, clustering of population elements into various groupings, or both. In simple random sampling, the most basic type of probability sampling, every element in the population has a known, equal probability of being included in the sample, and all possible samples of a given size are equally likely to be selected. In all forms of probability sampling, each element in the relevant population has a known, nonzero probability of being included in the sample.

2.4 Reporting and interpreting the results

33. The results of economic and econometric analysis must be presented clearly, taking the reader through each step of the reasoning[17]. All empirical analysis, even descriptive statistics of relevant variables (e.g. price series) should be accompanied by all the documentation needed to allow timely replication, as well as a deep understanding of the methodology of any prior data management efforts. Reports which do not allow for replication and in particular econometric analysis not including the code and data in electronic form will receive less consideration and are consequently unlikely to be given much weight.

34. An empirical submission should not only discuss the statistical significance of the results but also their practical relevance. In general, with very large samples coefficients may be statistically significant even if they are of trivial magnitude[18]. This creates the potentially misleading impression that certain variables are important. Therefore, the magnitude of the coefficients must always be examined and discussed. This requires interpreting the results in connection with the hypothesis that is being tested, so as to draw implications for the case under investigation.

35. Commonly, results from economic analysis and statistical information are presented in tables. Although it is not necessary to comment on or restate every piece of information that a table contains an interpretation of the data in it must be provided.

36. The results of the empirical analyses should be reported in the standard format found in academic papers. For example, when reporting multiple regression results, one should report on the statistical significance[19] of the parameter estimates by following the convention of reporting coefficients, p-values, standard errors and the size of the sample. Where the coefficient of interest is economically significant, the emphasis should be on statistically significant findings, for example to the 5% or 10% level (i.e. p-value<0.05 or 0.10). However, just because some hypothesis cannot be rejected in a statistical sense does not necessarily mean that the empirical analysis has no evidentiary value.

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[17] Any mathematical notation should either (a) follow the standard notation in the literature or (b) be very self-explanatory.

[18] Statistical significance is determined, in part, by the number of observations in the data set. The more observations used to calculate the regression coefficients, the smaller the standard error of each coefficient. A smaller standard error reflects less random variability in the estimated coefficient (or estimate). Other things being equal, the statistical significance of a regression coefficient increases as the sample size increases. If the data set is sufficiently large, results that are economically significant are often also statistically significant. However, when the sample size is small it is not uncommon to obtain results that are economically significant but statistically insignificant.

[19] A statistically significant result is one that is unlikely to have occurred by chance. In hypothesis testing, the significance level is the criterion used for rejecting the null hypothesis. The p-value is the probability of obtaining a test statistic at least as extreme as the one that was actually observed, assuming that the null hypothesis is true. If the obtained p-value is smaller than or equal to the significance level, then the null hypothesis is rejected and the outcome is said to be statistically significant.

37. It may be that a particular analysis can be criticized in terms of its accuracy. However, it is often possible to evaluate that inaccuracy, for example by providing confidence intervals around an estimate. Also, depending on the question of interest, an approximate economic or econometric result can be informative if, for example, it is the direction of the effects rather than its magnitude that are most relevant. Similarly a particular estimate may be criticized because some facet of the methodology introduces bias. However, it is often the case that an estimate is biased in a particular direction; if this is the case it may be known that the estimate is too large, or too small. This may not matter in the context of a particular case. If it is known that the estimate is too large, and yet it is insufficient in size to reach some critical value, then the bias does not invalidate the conclusion that the critical value will not be reached. Detailed information should also be provided on all other specification tests and statistical diagnoses (see also section 2.5 on robustness).

38. The results of any statistical or econometric analysis should also be assessed with respect to the relevant economic theory[20]. When discussing the results of a multiple regression analysis, this requirement includes assessing not only the coefficient(s) of direct interest, but also the coefficients of all other explanatory variables, as they often provide a signal on the reliability of the analysis. For example, a finding that the sign of a particular coefficient is counter to what would be expected by economic theory[21] may be an indication of an omitted-variable problem[22], a selection bias[23], or some other identification problem[24].

39. In the case of large-scale surveys of final consumers the report should disclose essential information about how the research was conducted to allow judging the reliability and validity of the results. All data must be fully documented and made available (subject to appropriate safeguards to maintain privacy and confidentiality). Non-sampling error, in particular the non-response rate and response bias[25] should also be taken into account in the analysis. Conclusions from large-scale surveys of final consumers should be carefully distinguished from the factual findings.

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[20] For example, econometric estimates of the elasticity of demand for a given product implying an upward sloping demand curve should be discarded in almost all cases, unless the product in question can be shown to be a Giffen good—i.e., a product for which a rise in price of this product makes people buy even more of the product.

[21] For example, a study showing that an increase in the marginal costs of production of a given good is associated with lower prices for that product should, ceteris paribus, be discarded automatically.

[22] That is, when a relevant explanatory variable, which is correlated with the dependent variable has been omitted from the analysis, so that the coefficients of some or all other explanatory variables suffer from a bias of a priori unknown sign or magnitude.

[23] The bias that arises when the selection process influences the availability of data in a way that is related to the dependent variable.

[24] See note 13 *supra.*

[25] Response bias refers to situations were, for a host of reasons, respondents fail to answer questions truthfully, fully and/or were influenced by the interviewer.

2.5 Robustness (non implemented proposal: place robustness before reporting)

40. Economic and econometric analysis should to the greatest possible extent be accompanied by a thorough robustness analysis, except where its absence is appropriately justified. In any event, any formal economic model or econometric analysis needs to be generally consistent and reasonably predict observed past outcomes and behaviour.

41. Other common robustness checks that may be appropriate include assessing whether empirical results are sensitive to changes in (a) the data, (b) the choice of empirical method, and (c) the precise modelling assumptions[26]. Similarly, the relevance and credibility of an economic model can be significantly enhanced if accompanied by a sensitivity analysis with respect to the key variables.

42. It is strongly recommended to address explicitly (i) to what extent, the results of the analysis are in line with past results using similar methods, and whether the results can be generalised[27]. Congruent and convergent results based on methods supported by academic and practitioners' are likely to be given greater significance than widely divergent results.

2.6 Further recommendations

43. The credibility of an economic submission may be enhanced when the limitations with regards to accuracy or explanatory power of the underlying data and methodology are explicitly acknowledged. In this regard it is often advisable to address rather than minimize uncertainty.

44. The parties rely sometimes on data that they do not have the means to audit and verify. Hence, they should be careful not to misleadingly present economic opinions as statements of fact. The sources of information should be carefully acknowledged, and the facts properly documented and described without ambiguity. This applies whether the economic or econometric analysis is a stand alone report or part of a broader submission.

45. It is advisable that the parties consult DG Competition regarding the types of empirical analyses that they consider useful in testing the anticompetitive and/or efficiencies theories. In particular, the parties can suggest potential analyses which may be easier for DG Competition to conduct, given its access to data from third

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[26] For example, in a multiple regression analysis, one should indicate whether the results are severely affected by how the variables were defined, by the set of explanatory variables incorporated to the analysis, or the functional form.

[27] For example, if the elasticity of demand for a given product has been estimated for a given country, where data is available, but the case at hand would require estimates of the elasticity of demand for various countries, one should consider whether or not, and under which assumptions, her results for one country apply to the others. Similarly, if an economic model assumes that firms make take-it-or-leave-it offers when interacting with intermediate buyers with certain characteristics, it may be necessary to assess whether such assumption extends to all types of intermediate buyers.

parties. DG Competition, in turn, may propose analyses it believes might be useful for the parties to conduct. Similarly, it is recommended that the parties consult the DG Competition regarding the most suitable robustness checks for a given methodology. Experience suggests that such consultation can be most effective if the parties are prepared to share any relevant preliminary results in advance of a formal submission.

46. Where economic submissions rely on quantitative data the parties should provide the data and codes timely, in an appropriate format and in accordance with the criteria laid down in section 3 of this document. In particular, the absence of all the necessary elements needed for replication and assessment of an economic submission can constitute grounds for not taking it further into consideration.

47. When granting access to the file, the Commission may provide upon request the data and codes underlying its final economic analysis or, to the extent that they have been made available to the Commission, that of third parties on which it intends to rely or take into account. Where necessary to protect the confidentiality of other parties' data, access to the data and codes will be granted only at Commission premises in a so-called data room procedure[28], subject to strict confidentiality obligations and secure procedures[29]. Third parties or complainants are equally expected to submit all the underlying data used in the analysis. They are also expected to authorise the Commission, where appropriate, to offer data room access to the parties upon request.

48. When conducting large-scale surveys of final consumers to address a case-specific issue the parties might want to involve the Commission in the questionnaire development and design[30]. Subject to time and resource constraints it is often desirable to conduct a pre-test or pilot[31].

3 BEST PRACTICES ON RESPONDING TO REQUESTS FOR QUANTITATIVE DATA

49. Pursuant to Article 18 of Regulation 1/2003 and Article 11 of the Merger Regulation, the Commission is empowered, in order to carry out its duties, to require undertakings and associations of undertakings to provide it with all necessary

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[28] See Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and102, paragraphs 97 and 98.

[29] Similarly, the Commission will endeavour to organise access to a data room, normally to the parties' economic advisors and external counsel, if necessary to ensure their rights of defence are fully respected.

[30] Occasionally, the Commission may take the initiative to commission its own large scale consumer survey. In that case, it will normally consult the parties and interested third parties on the questionnaire design and instruments of data collection, subject to confidentiality safeguards and to the extent such consultation does not delay or otherwise jeopardize the investigation.

[31] All questions should be pretested to ensure that (i) questions are understood by respondents, (ii) can be properly administered by interviewers, and (iii) do not adversely affect survey cooperation

information. It is the Commission that defines the scope and the format of requests for information.

50. Most competition or merger investigations involve (1) collecting data, (2) analyzing data, and (3) drawing inferences from data. In most antitrust and merger cases, the Commission will gather evidence by sending targeted requests for information pursuant to Article 11 of the Merger Regulation and Article 18 of Regulation 1/2003 to the main players in the market (e.g. competitors, direct customers and other parties with specific knowledge of the market). This document, however, provides specific guidance to respond to a request for quantitative data[32]. However, many of the principles here identified apply, more generally, to responses to any request for economic information, quantitative or qualitative.

51. Quantitative data may help the Commission to conduct statistical analysis to define markets, establish a counterfactual, assess the potential anti-competitive effects of a notified merger, validate efficiency claims or predict the impact of remedies. In order to do that the Commission needs to get accurate data, with sufficient time to analyze it.

52. The Commission is aware of the costs that its procedures may impose on undertakings. An important objective of this section is, therefore, to provide recommendations to reduce the burden on the involved parties and on the Commission posed by the production and processing of quantitative data, while at the same time ensuring and enhancing the effectiveness of the Commission's substantive review.

53. These best practices are intended as general guidance and do not supersede any specific instructions in any Data Request issued by the Commission in specific cases.

3.1 General motivation for Data Requests

54. The primary objective of a Data Request is to obtain accurate information concerning quantitative variables such as prices, turnover, capacity and entry or exit decisions within the possible relevant markets over a reasonable period. Quantitative data may be necessary to understand current market conditions and competitive dynamics. In some cases, reliable quantitative data may allow to conduct statistical or econometric analysis to be submitted as evidence in an antitrust or merger investigation.

55. The Commission will endeavour to ask for the appropriate amount of data to carry out the required analyses. The Commission is mindful of time constraints and must balance the usefulness of each request against the time left before any legal or procedural deadline. In appropriate cases, DG Competition may discuss in advance with the addressees or other affected parties the scope and the format of the Data Request. DG Competition may also explain the analysis that it intends to perform

[32] For statistical purposes, “quantitative data” means a series of observations or measurements, expressed as numbers. A statistic may refer to a particular numerical value, derived from the data. For example, an HHI measure and a correlation coefficient are statistics.

with the requested data in order to improve the efficiency of the data collecting process and to ensure the data is of adequate quality. This is particularly the case in the later stages of an investigation as early requests could be of a more general nature and aimed primarily at better understanding the functioning of the market in question.

56. The Commission will carefully consider what the proper sample to characterize a population is. Inferences from the part to the whole are justified only when the sample is representative[33].

57. A further issue that may influence the scope of the Data Request is whether third party data will be necessary and available to conduct any meaningful analysis.

3.2 Common elements of a Data Request

58. Examples of data necessary for a competition investigation include data on costs, output, sales, prices, capacity, product characteristics, delivery flows, customer characteristics, tender details, entry barriers, business strategies, and market shares of the parties involved and of the other participants in the relevant market.

59. The source of the information can be the parties involved in the procedure, third parties, trade associations, trade press, independent consultants, survey information or government sources.

60. Data may be costly to collect or hardly accessible in the relevant time frame. Often, however, requests for quantitative data in merger proceedings seek data that is readily available to the involved parties. Readily available data refers to data that is routinely collected and maintained for a reasonable period as part of the firm's normal business operations, for example to inform business strategy or for internal reporting. Readily available data also includes data that is regularly purchased from third parties, such as scanner data or survey data[34]. In any event, in its investigations, the Commission is not limited to request only data that is readily available to the parties (see point 77 below). Deadlines for submitting data which is difficult or costly to retrieve will be decided by the Commission on a case-by-case basis.

61. A Data Request often includes the following sections, but each request will be tailored to the specific information needs and circumstances of the case:

    (i) a glossary of terms, in particular key variables;
    (ii) a list of the variables;

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[33] For example, in certain circumstances it may be appropriate to limit the data request to a certain representative subset of the involved firms' customers, or to a particular geographic market which stands out for a valid given reason.

[34] Where econometric analyses are to be conducted, the sample needs to be of sufficient size for meaningful inference. For instance, in the absence of cross-section variability, requests would generally cover at least a three year period of monthly observations.

(iii) for each variable: the units of measurement; the level of aggregation over time (e.g. monthly); the time range (e.g. the last three fiscal years) and the geographic scope (e.g. countries, regions or cities);
(iv) the preferred electronic format (stata file, excel file, etc);
(v) suggestions or specific requests on data formatting, variable classification and tests to detect data inconsistencies;
(vi) deadline for compliance with the request.

62. In some instances, particularly where data is requested from different parties, DG Competition may provide a template to ensure all submissions are compatible and can be efficiently combined with minimal risk of error.

3.3 Main criteria to consider when responding to a Data Request

63. Responses to a Data Request must be: (i) complete, (ii) correct, and (iii) timely.

64. The Commission may impose on undertakings and associations of undertakings fines where, intentionally or negligently, they supply incorrect or misleading information or when, in response to a request made by decision, they supply incomplete information or do not supply information within the required time-limit[35]. Furthermore, in merger cases, the relevant time limits for initiating proceedings and for the adoption of decisions may exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision or to order an inspection[36].

3.3.1 Completeness

65. The parties should provide all data requested, in any of the stated formats and follow indications regarding presentation and consistency checks. Subsidiary data that is necessary to construct or to understand any variable requested should also be provided, except when adequately justified and with prior approval by the Commission.

66. It is strongly encouraged that problems of missing data are flagged to the Commission well in advance of the deadline for compliance with the Data Request to allow, if appropriate, for either a modification of the request or an extension of the deadline. Any data missing from the original Data Request must be adequately justified. In any event, a response to a Data Request may not be considered complete unless accompanied by a memo:

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[35] Article 23(1)(a) and (b) of Regulation 1/2003 and Article 14(1)(a), (b) and (c) of the Merger Regulation.

[36] Article 10(4) of the Merger Regulation, but see also Article 8(6) thereof.

(i) describing the data compilation process: from raw data through aggregation and merging operations to the final database submitted. How was the sample selected and was it necessary to eliminate certain kinds of observations;
(ii) identifying all relevant sources;
(iii) labelling and thoroughly describing all variables;
(iv) reporting on the reasons for potential measurement error such as missing information or any changes in the collection process;
(v) describing any assumptions and estimations used to fill incomplete data; and
(vi) reporting on consistency checking and all data cleaning operations.

3.3.2 Correctness

67. It is up to interested parties to ensure the correctness of the data submitted. Tests for accuracy of all variables should always be undertaken and reported[37].

68. In order to detect incorrectness in data it will be expected that consistency checks are performed and documented prior to submission. In particular:

i) Responses to the Data Request should be consistent with responses provided to other requests for information (e.g. turnover, market shares, etc);

ii) Individual values within a variable must be consistent with the economic reality[38];

iii) When aggregation of raw data is necessary, one needs to ensure the aggregation algorithm is sensible and applied consistently;

iv) Coherence between different variables is necessary[39];

v) Over time consistency across and within variables must also be ensured.

3.3.3 Timely submission

69. Deadlines for responses to Data Requests must be strictly respected. Where parties plan to submit data in connection with an empirical analysis conducted at their own initiative, it is useful to warn in advance DG Competition of the planned timing and scope of such a submission. Results that the parties intend to rely upon or discuss in a meeting with DG Competition should be submitted, including data and code to facilitate replication, at least 2 working days before the said meeting.

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[37] For example, negative sales volumes or zero transaction prices are normally inaccurate and are often indicative of data extraction errors, systematic measurement errors or inadequate accounting of rebates or taxes.

[38] For example, transaction prices (net of discounts) should generally be positive, missing or unexpected values (i.e. sales not in line with historical levels) should be checked.

[39] For example, shipments of one product must be related to shipments of any by-products. Also, charged prices should generally remain above transportation costs (i.e. ex-works negative prices cast doubts on either the correctness of the charged price and/or the transportation cost).

3.4 Other Recommendations

70. This section sets down further recommended best practices concerning responses to a Data Request.

3.4.1 Cooperation in good-faith

71. Data production is an area where cooperation between the parties and the Commission is especially important. The parties will need to explain clearly the complexities that can be associated with requests that the Commission may regard as simple[40]. The Commission endeavours to define its requests as specifically and quickly as possible so the parties can understand what is being sought. This dialogue may help both sides deal more efficiently with data issues. In any event, it is for the Commission to decide the scope, format and timing of the Data Request.

72. It is important to emphasise in that regard that the integrity and efficiency of the process are undermined if, inter alia, the parties make representations about what data exist without reasonably diligent efforts to confirm their accuracy, if they ignore a carefully drafted and limited Data Request and produce large amounts of data points disregarding the submission format, scope, or data processing requirements, if they use non-obvious "definitions" of common terms in construing requests, or if they make unilateral and undisclosed inferences about what the Commission is effectively seeking.

3.4.2 Early consultation with the Commission to inform about what type of data is available

73. In some cases, the burden of compliance with Data Requests may be significantly reduced if the parties inform the Commission at the earliest opportunity on the availability of quantitative data. Early consultation allows to determine not only what data is available and its suitability, but also in what form it can be provided, thereby making it easier and faster for the parties to provide the data, in the event the Commission makes a Data Request. However, the Commission is not limited to request only data that is readily available to the parties.

74. To make these early discussions fruitful, parties must be prepared to thoroughly explain their information management systems and should be prepared to discuss certain issues such as: every field of information captured, how the underlying data is collected and formatted, the frequency of collection, what software is used, the size of the data set, what reports are routinely generated from that database, etc. It is recommended that the involved firms provide any written documentation and/or training materials to the Commission in advance of any discussion. It is also generally useful that parties create a diagram to show how the relevant data is

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[40] Why, for example, it may be difficult, impossible or useless to simply "turn over" a "database," or the burdens and costs associated with providing data in the manner the Commission seeks.

distributed throughout the organization. In any event, as a general rule, parties should provide relevant documents to support their contentions concerning the availability, scope and production time of quantitative data.

75. Preliminary meetings or telephone conversations with those responsible for data collection or analysis in the firms are often quite useful. Parties are advised to make such personnel available as early as possible. These discussions should involve descriptions of the type of electronic (or other) data that the parties maintain (both in the ordinary course of business and what is archived, and in what form).

76. In the case of mergers, pre-notification discussions should routinely deal with data issues. Although, the Commission will endeavour to identify all issues that may require a Data Request as soon as possible, certain issues may not be identified until later in the proceedings.

3.4.3 Consultation on a Draft Data Requests and data samples

77. When appropriate and useful, DG Competition will send a "draft" Data Request for quantitative data in order to facilitate a better identification of the format, and to allow for basic consistency checks (see section 3.3.2). The purpose of the draft Data Request is to invite parties to propose any modifications that could alleviate the compliance burden while producing the necessary information. Any reduction on the scope of the Data Request can only be accepted if it does not risk harming the investigation and may trigger, particularly in merger cases, a reduction in the deadline for response initially anticipated.

78. In this connection, providing samples of the data is generally very helpful as it helps the Commission to determine what data is available and would be useful. As a result, on the basis of the sample it may be possible to draft a more focused Data Request, limiting the eventual burden on the parties.

3.4.4 Transparency regarding data collection, formatting and submission

79. A transparent process allows for all parties involved to be aware of any incidences during the data collection process and thus react more rapidly and effectively.

80. The parties are advised to submit quantitative data in a format that minimises the time and manipulation required to process the data for analysis. Parties should always be able to answer all the following questions:

    i) How applicable is the data to the analyses under consideration;

    ii) How reliable or "clean" is the data;

    iii) Is it enough to conduct a meaningful analysis;

    iv) What institutional factors specific to the industry setting and/or company may impact the proper interpretation of the data?

81. The involved parties should draw the Commission's attention early on to any limitations in the data. They should make clear how raw data has been compiled and what steps have been taken to ensure its reliability[41].

82. The involved parties are also strongly encouraged to conduct their own descriptive analysis to detect data problems before submitting the data to the Commission. Also the Commission may sometimes welcome efforts by the involved parties to deal with any remaining data imperfections using statistical analysis. In some cases statistics allow in various ways to average out errors in measurement and yield statistically sound estimates. All such statistical analysis should be adequately reported. In any event, raw data should be provided wherever possible because the aggregation and cleaning of data may have a significant impact on the outcome of statistical or econometric analysis. Also parties should provide the program files that manipulate, clean and complete the raw data in preparation for the analysis.

3.4.5 Direct access

83. In some instances, the Commission will accept that as part of its response to a Data Request the involved parties provide direct electronic access to the underlying data. This alternative can provide an inexpensive and fast way to provide access to large amounts of data. Limited direct access can also provide a means to assess the value of certain corporate information.

84. The terms and conditions for direct access can be discussed in advance, addressing issues such as the availability of technical assistance, the ability to print or otherwise retrieve the data, the number of log-ins the company should provide, assurances that the activities of the services of the Commission will not be tracked, that underlying data will not be removed without agreement of the Commission and, most importantly, continued access throughout the entire course of the investigation. In limited instances, when providing direct access to corporate resources is unworkable, the Commission may submit a set of queries to the firm so that reports can be generated.

[41] For example, if the raw data is based on a sample of individual customer accounts, an explanation of how these accounts have been chosen and why they are representative of all customers should also be provided.

ANNEX 1

STRUCTURE AND BASIC ELEMENTS OF A SOUND EMPIRICAL SUBMISSION

This Annex briefly describes how to structure an empirical submission in a competition or merger case according with the principles set out in the preceding sections (esp. section 2 above). A sound economic or econometric submission should contain the following sections and elements:

A. The relevant question

- The research question must be: (i) formulated unambiguously and (ii) properly motivated, taking into account both the nature of the competition issue, the institutional features of the markets and industries under consideration, and the relevant economic theory.
- The hypothesis to be tested (or null hypothesis) must be clearly spelled out as well as the alternative hypothesis or hypotheses under consideration.

B. The data

- A clear description of data sources must be provided as well as hard copies of the databases employed in the analysis. Normally, an accompanying memo would describe how previous intermediate data sets and programs were employed to create the final dataset as well as the software code employed to generate the final dataset. All efforts made to correct for anomalies in the data should be clearly explained.
- One should also report how the data were gathered, the sample selection process, the measurement of the variables and whether they match with their theoretical counterparts, etc.
- In addition, the data should be thoroughly described. This includes reporting the sample time frame and the statistical population under consideration, the units of observation, a clear definition of each variable, any data cleaning procedures, etc. This information should be accompanied by descriptive statistics (including means, standard errors, maximums, minimums, correlations, and histograms, residual plots, etc) of all relevant variables.

C. Methodology

- The choice of empirical methodology should be properly motivated. One should discuss their methodological choices in light of: (a) their data limitations, (b) the features of the market under investigation, and (c) the economic issues under consideration (the relevant question).
- Alternative methodologies should also be discussed and if possible, given time and data constraints, employed to verify the robustness of the results to the choice of

model. An economic model or argument must generate predictions that are consistent with a significant number of relevant observed facts.

D. Results and implications

- Parties should explain the details of their models, and share any documentation needed to allow timely replication (e.g. the programming code used to run the analysis).
- The results of the empirical analyses should be reported in the standard format found in academic papers. For example, when reporting multiple regression results, one should report both the estimated coefficients and their standard errors for all relevant variables. They should also provide detailed information on all other specification tests and statistical diagnoses.
- One should discuss not only the statistical significance of their results but also their practical relevance. This requires interpreting the results in connection with the hypothesis that is being tested, so as to draw implications for the case under investigation. The results of the statistical and econometric analyses should also be assessed with respect to the relevant economic theory.

E. Robustness tests

- All empirical work should be accompanied by a thorough robustness analysis that (i) checks whether the empirical results are sensitive to changes in the data, the choice of empirical method, and the precise modelling assumptions; (ii) tests whether the results of the analysis can be generalised; and (iii) compares the results of the empirical work in question with previous results in the relevant literature.
- An economic model should generally be accompanied by a sensitivity analysis with respect to the key variables, to the extent only the plausible but not the exact value of each variable can be determined. All results from the sensitivity analysis conducted should also be reported and not only those that support the argument.

Antitrust Correspondance

In all your correspondence, please specify the name of the case and the case number

I. General

All correspondence relating to a case must be sent to the Registry, even when addressed to a specific Directorate or Unit with DG Competition.

Delivery by post:

European Commission
Directorate-General for Competition
For the attention of the Antitrust Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË
Fax: +32 2 295.01.28

Delivery by hand:

European Commission
DG Competition
For the attention of the Antitrust Registry
Avenue du Bourget/ Bourgetlaan 1
1140 Evere
Bruxelles/Brussel

- In its efforts “towards the e-Commission”, the European Commission encourages use of electronic information.

- Precaution : Emails should not exceed 8 MB

- Secure email can be sent encrypted using "Qualified PKI Certificates". If you don't have such certificate you can obtain them via certificates providers or any national certification authority.

- If, nevertheless, you want to send paper documents, please respect following rules :

  - No bound documents, stapled documents, no cardboard dividers, no double-sided pages

  - Format: only A4 weighing less than 120 gr/m2

The Registry reserves the right to request electronic copies for voluminous paper documents.

To inform the Commission about suspected infringements of the competition rules.

II. Complaints

The Commission encourages citizens and firms to inform about suspected infringements of competition rules. There are two ways to do this.

If you are directly affected by the practice which you suspect restricts competition and are able to provide specific information, you may want to lodge a formal complaint, which must fulfil certain requirements. The complaint form ("Form C") is available on the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. Official Journal L 123, 27.04.2004, p.18-24 (see the form on the last page "Annex").

Information on how the Commission handles complaints is available on the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Official Journal C 101 , 27/04/2004 p. 65-77).

The other way is the provision of market information that does not have to comply with the same requirements. You can report your concerns by e-mail to comp-market-information@ec.europa.eu. Please indicate your name and address, identify the firms and products concerned and describe the practice you have observed. This will help the Commission to detect problems in the market and be the starting point for an investigation. We invite you to read our e-services privacy policy before contacting us. You can also send your complaint by post: European Commission, Competition DG, B - 1049 Brussels.

If the situation you have encountered is specific and limited to the country or the area in which you live, or involves no more than three member States you may want to contact a national competition authority. The competition authorities of all EU Member States now apply the same competition rules as the European Commission and very often they are well placed to deal with your problem. If you think that a larger number of Member States are concerned, you may primarily chose to contact the European Commission. If you are not sure about the scope of the problem, do not hesitate to contact either the European Commission or the national competition authority because the authorities cooperate among them and will allocate the case as appropriate.

III. Leniency contact information[1]

In order to benefit from the Notice, companies can approach the Commission directly or through a legal adviser. To apply for leniency please contact the Commission only through the following dedicated fax number:

Leniency fax: +32 2 299.45.85

The use of this fax ensures that the precise time and date of the contact is duly recorded and that the information is treated with the utmost confidentiality within the Commission. Before sending the actual submission by fax, however, it is advisable to seek assistance from one of the Commission officials involved in leniency by calling the following dedicated telephone numbers:

Telephone numbers: +32 2 298.41.90 or +32 2 298.41.91

Because of the need for confidentiality of leniency applications, companies are requested not to send any application to the Commission by any other channel than the leniency fax.

Please note that these telephone numbers are only to be used for leniency applications. Given the importance of keeping these lines clear so that companies can make their applications promptly, no other queries will be answered.

The telephones are monitored from 09.00 to 17.00 on weekdays. Outside of these times, please use the leniency fax.

[1] See http://ec.europa.eu/competition/cartels/leniency/leniency.html

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