Communication inviting third parties to submit observations on draft Commission notices

(2003/C 243/04)

(Text with EEA relevance)

The Commission invites all interested parties to send their comments on the following texts:

1. Draft Commission Notice on cooperation within the Network of Competition Authorities;

2. Draft Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC;

3. Draft Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EU Treaty;

4. Draft Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters);

5. Draft Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty;


These comments should be sent to the Commission not later than eight weeks after the date of the publication in the Official Journal of the European Union. It is standard Commission practice to publish the submissions received in response to a public consultation. However it is possible to request that submissions or parts thereof remain confidential. Should this be the case, please indicate clearly on the front page of the submission that you request it should not be made publicly available. In this case a non-confidential version of the submission should also be forwarded to the Commission for publication. Comments should be sent either by e-mail to:

COMP-MODERNISATION-PACKAGE@cec.eu.int

Or in writing to:

European Commission
Directorate-General for Competition
Unit A 3 — European Competition Network
Modernisation package
B-1049 Brussel.
I. INTRODUCTION

1. Council Regulation (EC) No 1/2003 (hereafter the 'Council Regulation') creates a system of parallel competences in which the Commission and the Member States' competition authorities (hereafter the 'NCAs') (1) can apply Article 81 and Article 82 of the EC 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 for the 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 EC Treaty are applied and is the basis for the 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: the 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. The enforcement systems of the Member States differ but they have recognised the standards of each other's system as a basis for cooperation (2).

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 is a matter between public enforcers and does not alter any rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring the due process of cases it deals with.

II. DIVISION OF WORK

A. 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 EC 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-proceeding will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of proceedings (see paragraph 18) where either this authority considers that it is not well placed to act or where other authorities consider themselves also well placed to act (see points 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 (3). In any event, re-allocation should be a quick and efficient process and will 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.

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.

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 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.

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 the NCA in B or parallel action by both NCAs.

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.

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.

13. The authorities dealing with a case in parallel action may find it useful to designate one of them as a lead authority and may agree to delegate tasks to the lead authority such as for example the coordination of investigative measures and the information of the parties involved.

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 to be considered particularly well placed if Community interest requires the adoption of a Community decision to develop Community competition policy or to ensure effective enforcement or if a case is closely linked to other Community provisions which are more efficiently applied by the Commission or for which the Commission has exclusive competence.
8. Mechanisms of cooperation for the purpose of case allocation and assistance

1. Information at the beginning of the procedures (Article 11(3))

16. In order to detect multiple proceedings 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. If a case is to be reallocated, it is indeed in the best interest both of the network and of the undertakings concerned that the reallocation 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 Regulation lays down an obligation for NCAs to inform the Commission before or without delay after commencing the first formal investigative measure. It also states that the information may be made available to other NCAs (1). The rationale of Article 11(3) is to allow the network to detect multiple proceedings and address possible case re-allocation issues as soon as an authority starts investigating a case. Information should therefore be provided 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 is/has been taken. The obligation to inform the Commission applies in all cases where Article 81 or Article 82 of the EC Treaty is applied. The Commission has an equivalent obligation by virtue of Article 11(2) of the Regulation.

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, paragraph 2 or 3. 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. Stay or closure of proceedings (Article 13)

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 a proceeding or rejecting a complaint on the grounds that another authority is dealing with the case or has dealt with the case. In Article 13, ‘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 applies when another authority has dealt with or foresees to deal 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-proceeding. This implies that Article 13 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 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 the information provided by the complainant to the authority which is to deal with the case on the basis of Article 12 of the Council Regulation.

24. Article 13 can also be applied to part of a complaint or to part of a proceeding. It may be that only part of a complaint or of an ex-officio proceeding 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 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 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 (7).

3. Exchange and use of confidential information (Article 12)

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 have been collected by them for the purpose of applying Article 81 or Article 82 of the EC 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 EC 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 takes precedence over any contrary law of a Member State.

28. This exchange of information contains, however, a number of safeguards for undertakings and individuals.

(a) First, Article 28 states that 'the Commission and the competition authorities of the Member States, their officials and other servants (...) 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 EC Treaty (see Article 27(2) of Regulation (EC) No 1/2003). The term 'professional secrecy' used in Article 28 of the Council Regulation is a Community law concept and covers 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), information so exchanged can only be used in evidence for the application of Articles 81 and 82 of the EC Treaty and for the subject matter for which it was collected (8). According to Article 12(2), 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 EC 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). Regulation (EC) No 1/2003 only provides for sanctions on undertakings for violations of Articles 81 and 82. Some national laws also provide for sanctions on individuals in connection with violations of Articles 81 and 82. Individuals enjoy normally 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 (9)). Article 12(3) 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 Regulation if 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 have been respected by the transmitting authority to the same standard as they are guaranteed by the receiving authority as regards the collection of evidence. The qualification of the sanctions by national law ('administrative' or 'criminal') is not relevant for the purpose of applying Article 12(3). The 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 of the receiving authority provide for sanctions of the same 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), information exchanged pursuant to Article 12 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 Regulation (EC) No 1/2003). 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 sanction.
4. Investigations (Article 22)

29. The Council Regulation foresees the possibility for an NCA to 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 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), the Commission can request an NCA to carry out an inspection on its behalf. The Commission can either adopt a decision pursuant to Article 20(4) or simply issue a request to the NCA. The agents of the Commission may assist the NCA during the inspection.

C. Position of undertakings

1. General

31. All network members will endeavour to make 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. Allocation of cases therefore does not create individual rights for companies involved in or affected by an infringement to have a 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 ex officio proceedings 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 reallocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved.

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 without prejudice to Article 7(3) of the Commission implementing regulation (9). 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 allows the transfer of information between competition authorities inside the network subject to the safeguards provided in that Article (see paragraph 28).

3. Position of applicants claiming the benefit of a leniency programme

37. The Commission considers (9) that it is in the Community interest to grant favourable treatment to undertakings which cooperate with it in the investigation of cartel infringements. A number of Member States have also adopted leniency programmes (10) 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. 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 EC Treaty in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question (11). 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 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). The Commission has an equivalent obligation by virtue of Article 11(2) of the 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 or other laws. This is without prejudice to any power of the authority to open an investigation on the basis of information received from other sources (12).

40. Save as provided below (13), information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 with the consent of the applicant. Other information that has been obtained as a result of an inspection or other fact-finding measure which could not have been carried out except as a result of the leniency application will also not be transmitted to another authority pursuant to Article 12 unless 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 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 not to use either any information transmitted to it or any other information it may obtain following the date and time of transmission as noted by the transmitting authority, 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) and (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) 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. The principles set out above will be abided by the Commission and by the network members who will have committed themselves to respect them.

III. CONSISTENT APPLICATION OF EC COMPETITION RULES (14)

A. Mechanism of cooperation (Articles 11(4) and 11(5))

43. Within the network of competition authorities the Commission has the ultimate but not the sole responsibility for ensuring consistent application of EC competition law.

44. According to Article 11(4), no later than 30 days before adopting a decision of application of Article 81 or 82 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), 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 and the 30 days deadline has expired, it can adopt its decision 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.
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), 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 can have an interest in discussing them. NCAs can therefore on the basis of Article 11(5) 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 proceedings which have been notified to the network pursuant to Article 11(3) (15).

B. The initiation of proceedings by the Commission under Article 11(6)

50. According to the established case law of the Court of Justice, the Commission, entrusted by Article 85(1) of the EC Treaty with the task of ensuring the application of the principles laid down in Articles 81 and 82 of the EC Treaty, is responsible for defining and implementing the orientation of Community competition policy (16). It can adopt individual decisions under Articles 81 and 82 of the EC 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 Regulation shall relieve all NCAs of their competence to apply Articles 81 and 82 of the EC 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 a proceeding by the Commission is a formal act (17) 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 a procedure, the NCAs can no longer start their own procedure with a view to applying Articles 81 and 82 of the EC 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) that they are acting on a given case. During the initial allocation period (indicative time period of two months, see above point 18), the Commission can initiate proceedings with the effects of Article 11(6) after having consulted the authorities concerned. After the allocation phase, the Commission will in principle only apply Article 11(6) 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

(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 Regulation in writing to the NCA concerned and to the other members of the Network (18).

56. The Commission will announce to the network its intention of applying Article 11(6) in due time, so that Network members 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) has taken place and the Commission has not made use of Article 11(6).

IV. 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.

A. Scope of the consultation

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). 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.

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 EC 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) 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.

3. Implementing measures, block-exemption regulations, guidelines and other notices (art. 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. Besides regulations, the Commission may also adopt notices and guidelines. These more flexible tools are very useful for defining competition policy and explaining how rules are to be applied in individual cases. The Advisory Committee will also be consulted on these notices and guidelines.

B. Procedure

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 introduces the possibility for the Member States to agree upon a shorter period of time between the sending of the invitation and the meeting.

2. Written procedure

67. The Council Regulation has created 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 Regulation (EC) No 1/2003. Where a Member State requests that a meeting takes place, the Commission will arrange for such meeting.

C. 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.
V. 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 EC Treaty published in 1997 (20).

---

(1) In this notice, the European Commission and the NCAs are collectively referred to as 'the competition authorities'.

(2) 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).


(4) 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 2.

(5) See Commission notice on complaints.


(10) 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 penalty granted for other reasons.

(11) See above points to 8 to 15.

(12) Similarly, information transmitted with a view to obtaining assistance from the receiving authority under Articles 20 or 21 of Regulation (EC) No 1/2003 or of carrying out an investigation or other fact-finding measure under Article 22 of that Regulation may only be used for the purposes of the application of the said Articles.

(13) See point 41.

(14) Article 15 of Regulation (EC) No 1/2003 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. This is a very important tool for ensuring consistent application of Community rules. In exercising this power NCAs and the Commission will cooperate closely.

(15) See point 24 of the Joint Statement on the functioning of the network mentioned above in footnote 2.


(17) The Court of justice has defined that concept in the case 48/72 SA Brasserie de Haecht v Wilkin-Janssen, [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.'

(18) See point 22 of the Joint Statement mentioned above.

(19) In accordance with Article 14(2), 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.

(20) OJ C 313, 15.10.1997, p. 3.
Draft 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

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 on 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, since 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), national courts which under their national law have to apply of their own motion national rules of public policy, should also apply Articles 81 and 82 EC of their own motion (6). Where national courts are not required but have the faculty to apply of their own motion binding domestic rules under the conditions set out in their national law when they exercise such faculty, they equally have to apply binding Community rules, such as Articles 81 and 82 EC, while respecting the same conditions set out in national law (6).

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 (7). In particular, where an individual asks the national court to safeguard his subjective 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 (8). Indeed, national courts can draw the consequences resulting from an infringement of Article 81 or 82 EC on the enforcement of a contract or on claims for 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 (11) or to any abuse prohibited by Article 82 EC, they also have to apply EC competition rules to those agreements, decisions or practices (12).

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 (13). 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 admitted under national law (14). 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 decisions, 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 (15).
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 (16) or Commission 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 (17).

8. The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments (18). 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 (19). 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 (20). 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 (21) and in the annual report on competition policy (22).

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, also Community law determines the conditions in which EC competition rules are enforced. Those Community law provisions may offer certain facilities to national courts, e.g. to ask the Commission's opinion on questions concerning the application of EC competition rules (23) or they may impose obligations on them, e.g. to allow the Commission and national competition authorities to submit written observations in proceedings pending before them (24). These Community law provisions prevail over national rules. As a consequence, national courts have to set aside national rules that prevent them from respecting Community law obligations or from using the facilities offered by Community law.

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 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).

Because of the 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 (39). 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, on the progress of proceedings and on 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. . . 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 the information mentioned above or to await the Commission’s decision.

13. Where the Commission reaches a decision 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 wants 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, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings until the Community courts have adopted a definitive decision in the action for annulment against the Commission decision (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 (39).

15. Different from 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 a 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 (39). Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks.

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 25) 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

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 (39). Since Article 10 EC is aimed at 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.

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 (40).

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 (41). 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 (42).

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 the latter's 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 (43). Only when the national court has offered a guarantee that it will protect the confidential information and business secrets, the Commission will transmit the information requested, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be disclosed.
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 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 (44).

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 (45). 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. 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 to request 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.

28. The national court may ask the Commission for its opinion on economic, factual and legal matters (46). 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.

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, different from 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 (47).

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 (48). In line with Article 15(3), second subparagraph, of the regulation, the Commission will only use those documents for the preparation of its observations (49).

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) (50) 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).
8. 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 (51), 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 (52).

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 (53).

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 demand that it be provided with information in the Commission’s file (54). 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 (55).

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 (56).
(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 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’.


(3) Notice on the co-operation within the network of competition authorities (OJ C . . .). 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.


(9) According to the last sentence of recital 8 of Regulation (EC) No 1/2003, the regulation only applies to national laws which impose criminal sanctions on natural persons to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.


(11) For further clarification of the effect on trade concept, see the notice on this issue (OJ C . . .).

(12) Article 3(1) of the regulation.

(13) See also the notice on the application of Article 81(3) EC (OJ C . . .).


(16) 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.


(20) On the parallel or consecutive application of EC competition rules by national courts and the Commission, see also points 11 to 14.

(21) 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 making application of Articles 81 and 82 EC (since 1964), see http://www.europa.eu.int/comm/competition/antitrust/cases/.


(23) On the possibility for national courts to ask the Commission for an opinion, see further in points 27 to 29.

(24) On the submission of observations, see further in points 31 to 35.


Article 16(1) of the regulation.

The Commission may publish in the Official Journal of the European Union the initiation of its proceedings with a view to adopting a decision pursuant to Article 7 to 10 of the regulation (see Article 2(2) of Commission Regulation (EC) No ... relating to proceedings pursuant to Articles 81 and 82 of the EC Treaty (O ...)). 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).


See Article 16(1) of the regulation and case C-344/98 Masterfoods [2000] ECR I-11369, 52 and 57.


On the compatibility of such national procedural rules with the general principles of Community law, see points 9 and 10 of this notice.

On these duties, see e.g. points 22 to 25 of this notice.


See point 8 of this notice.


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.


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.

Joined cases 46/87 and 227/88 Hoechst [1989] ECR, 2859, 33. See also Article 15(3) of the regulation.


Article 20(6) to (8) of the regulation and case C-94/00 Roquette Frères [2002] ECR 59011.

Article 21(3) of the regulation.

Case C-94/00 Roquette Frères [2002] ECR 9011, 39 and 62 to 66.

See also ibidem, 91 and 92.

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 . . .)
   — Guidelines on the application of Article 81(3) of the Treaty (OJ C . . .)

2. Vertical agreements

3. Horizontal co-operation agreements
   — 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 . . . 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L . . .)
   — Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ L . . .)

B. Sector specific rules

1. Insurance
2. Motor vehicles

3. Telecommunications and postal services
   — 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)
1. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Regulation (EC) No 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 (EC) No 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 depend on information supplied by operators 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 paragraph 2 of Regulation (EC) No 1/2003. Under Articles 5 to 9 of Regulation No [. . .] (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 paragraph 2 of Regulation (EC) No 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:

European Commission
Competition DG
B-1049 Brussels.

5. Without prejudice to the interpretation of Regulation (EC) No 1/2003 and of Commission Regulation No [. . .] 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 (EC) No 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 (EC) No 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 (EC) No 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 (EC) No 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 (EC) No 1/2003 empowers Member States' courts and Member States' competition authorities to apply Articles 81 and 82 in their entirety alongside the Commission. Regulation (EC) No 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.

10. Moreover, Article 3 of Regulation (EC) No 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.

8. 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. Only 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 (EC) No 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 (EC) No 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 (EC) No 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 (EC) No 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. 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:

‘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 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;

— 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 may find it useful to designate one of them as a lead authority and may agree to delegate tasks to the lead authority such as for example the coordination of investigative measures and the information of the parties involved.

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 to be considered particularly well placed if Community interest requires the adoption of a Community decision to develop Community competition policy or to ensure effective enforcement or if a case is closely linked to other Community provisions which are more efficiently applied by the Commission or for which the Commission has exclusive competence.’

23. Within the European Competition Network, information on complaints will be made available to the other members of the network before or without delay after commencing the first formal investigative measure. 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 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.

25. The Commission may reject a complaint in accordance with Article 13 of Regulation (EC) No 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 8 of Regulation [...] 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 (EC) No 1/2003

A. General

26. According to Article 7(2) of Regulation (EC) No 1/2003 natural or legal persons that can show a legitimate interest are entitled to lodge a complaint to ask the Commission to find an infringement of Articles 81 and 82 in view of the Commission taking action under Article 7(1) of Regulation (EC) No 1/2003. The present part of this Notice explains the requirements applicable to complaints based on Article 7(2) of Regulation (EC) No 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.

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. 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 without prejudice to Article 7(3) of Regulation No [...] and annexed to that Regulation.

B. Making a complaint pursuant to Article 7(2) of Regulation (EC) No 1/2003

(a) Complaint form

29. A complaint pursuant to Article 7(2) of Regulation (EC) No 1/2003 can only be made about an alleged infringement of Articles 81 or 82 in view of the Commission taking action under Article 7(1) of Regulation (EC) No 1/2003. A complaint under Article 7(2) of Regulation (EC) No 1/2003 has to comply with Form C mentioned in Article 5(2) of Regulation No [...] and annexed to this Notice.

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(3) of Regulation No [...] and annexed to this Notice). Electronic transmission to the Commission is possible via the website indicated, the paper copies should be sent to the following address:

European Commission
Competition DG
B-1049 Brussels.

31. Form C requires complainants to submit relevant information to substantiate 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 part of the information required by Form C (Article 5(2) of Regulation No [...]).

(b) Legitimate interest

32. Correspondence to the Commission that does not comply with the requirements of Article 5 of Regulation No [...] and therefore does not constitute a complaint within the meaning of Article 7(2) of Regulation (EC) No 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).

33. The status of formal complainant under Article 7(2) of Regulation (EC) No 1/2003 is reserved to legal and natural persons who can show a legitimate interest. 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. 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.

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. 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.

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. Where appropriate, the Commission may give priority to a single criterion for assessing the Community interest.

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 (EC) No 1/2003 to the extent that they bring to the attention of the Commission alleged infringements for the public good.

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.

C. Assessment of complaints

(a) Community interest

41. Under the constant case law of the Community Courts, the Commission is not required to conduct an investigation in each case 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, but is entitled to refer to the Community interest in order to determine the degree of priority to be applied to the various complaints it receives. The position is different only if the complaint falls within the exclusive competence of the Commission.

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.

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. Where appropriate, the Commission may give priority to a single criterion for assessing the Community interest.

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 actions to assert his rights before national courts.

— 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.
— 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 (47).

— While the Commission's discretion does not depend on the more or less advanced stage of the investigation of a case, the stage of the investigation forms part of the circumstances of the case which the Commission may have to take into consideration (48).

— The Commission may decide that it is not appropriate to investigate a complaint where the practices in question have ceased (49). 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.

— The Commission may also decide that it is not appropriate to investigate a complaint where the undertakings concerned accept to change their conduct in such a way that it can consider that there is no longer a sufficient Community interest to intervene (50).

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 (51). However, the Commission is not obliged to set aside a complaint for lack of Community interest. It may investigate any suspected infringement of Articles 81 and 82 in view of a prohibition decision (52).

(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 evidence submitted by the complainant, while complying with the requirements of Article 5 of Regulation No [..] and Form C, fails to establish proof of the allegations put forward, a complaint may be rejected on that ground (53). 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 (54).

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 (55), 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 (56).

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 (57).

51. Agreements that fulfil the conditions of a block exemption regulation are deemed to satisfy the conditions of Article 81(3) (58). For the Commission to withdraw the benefit of the block exemption pursuant to Article 29 of Regulation (EC) No 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 (EC) No 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) (59).

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 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 (60).

54. In the Commission's procedure for dealing with complaints, different stages can be distinguished (51).
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 initiate proceedings pursuant to Article 7(1) of Regulation (EC) No 1/2003 against the undertakings complained of. Where the Commission considers that there are insufficient grounds for acting on the complaint, it informs the complainant of its reasons and offers the complainant the opportunity to submit any further comments within a time-limit which it fixes (Article 7(1) of Regulation No [. . .]).

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 No [. . .]). 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 (\(^\text{69}\)).

58. Where the Commission rejects a complaint pursuant to Article 13 of Regulation (EC) No 1/2003 on the grounds that another authority is dealing or has dealt with the case, the Commission proceeds in accordance with Article 8 of Regulation No [. . .].

59. All along the procedure, complainants benefit from a range of rights as provided in particular in Articles 6 to 9 of Regulation No [. . .]. 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 (\(^\text{69}\)).

(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 (\(^\text{69}\)). 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 (\(^\text{61}\)).

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 his case further. This time-limit does not constitute a binding statutory term.

62. The Commission may communicate its proposed course of action to the complainant as an initial reaction within the first phase of the procedure. The Commission may also, where the examination of the complaint has progressed to this stage, directly proceed to informing the complainant about its provisional assessment by a letter pursuant to Article 7(1) of Regulation No [. . .].

63. To ensure the most expeditious treatment of their complaint, it is desirable that complainants cooperate diligently in the procedures (\(^\text{62}\)), 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 No [. . .], 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 No [. . .]). 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 (\(^\text{63}\)).

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 (\(^\text{64}\)). Pursuant to Article 16 of Regulation No [. . .], the Commission may request complainants which have produced 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. In case of disagreement about the confidentiality of a piece of information, the settlement procedure regulated in Article 17 of Regulation No [...] applies. According to this procedure the Commission informs undertakings of its intention to disclose a certain piece of information and states its reasons. If the undertaking maintains its objection to the disclosure the Commission adopts a decision on the disclosure of the information in question. This decision is subject to judicial control by the Community Courts, including the possibility for complainants to ask for interim relief.

68. The qualification of information as confidential does not prevent the Commission from disclosing and using information 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 balance the interest in the protection of such information and the public interest in having the infringement of the competition rules terminated. To that end, it must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

69. Where the Commission takes the orientation 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 No [...]), sets out the reasons that have led the Commission to provisionally conclude in the sense indicated and provides the complainant the opportunity to submit supplementary information or observations within a time-limit set by the Commission. The Commission will also indicate the consequences of an omission to reply pursuant to Article 7(3) of Regulation No [...], as explained below.

70. Pursuant to Article 9(1) of Regulation No [...], 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.

71. The time-limit for observations by the complainant on the letter pursuant to Article 7(1) of Regulation No [...] will be set in accordance with the circumstances of the case. It will not be shorter than four weeks (Article 18(2) of Regulation No [...]). 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 No [...]. Complainants are also entitled to withdraw their complaint at any time if they so wish.

72. The complainant may request an extension of the time-limit for comments. Depending on the circumstances of the case, the Commission may grant such an extension.

73. 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.

74. 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

75. Where the Commission rejects a complaint by decision pursuant to Article 7(2) of Regulation No [...] 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.

76. 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 complainants in support of their complaint. It only needs to set out the facts and legal considerations which are of decisive importance in the context of the decision (67).

77. Where the Commission rejects a complaint in a case that also gives rise to a decision pursuant to Article 10 of Regulation (EC) No 1/2003 (Finding of inapplicability of Articles 81 or 82) or Article 9 of Regulation (EC) No 1/2003 (Commitments), the decision rejecting a complaint may refer to that other decision adopted on the basis of the provisions mentioned.

78. A decision to reject a complaint is subject to appeal before the Community Courts (68).

79. A decision rejecting a complaint prevents complainants from requiring the reopening of the investigation unless they put forward significant new evidence. Accordingly, a 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 closing of a file does not prevent the Commission from re-opening it.
80. A decision to reject a complaint does not definitively rule on the question 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).

81. According to Article 8 of Regulation (EC) No 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 (EC) No 1/2003 makes it clear that interim measures cannot be applied for by complainants under Article 7(2) of Regulation (EC) No 1/2003. Requests of interim measures by undertakings can be brought before Member States’ courts which are well placed to decide on such measures (70).

(e) Specific situations

82. Some persons 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.
(24) For more extensive explanations on this notion in particular, cf. points 33ss. below.


(28) Cf. Article 5(1) of Regulation No [. . .].


(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 of 27.4.1999, p. 24, para 1).


(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.


(45) Case T-77/95, Syndicat français de Express International and Others v Commission of the European Communities [1997] ECR II-1, para 57, upheld on the condition referred to in the same point by 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 country outside the common commercial policy was held not to suffice to establish that the conduct complained of had ceased.


(50) Extensive guidance can be found on the Commission's website at http://europa.eu.int/comm/competition/index_en.html

(51) Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty.


(53) The texts of all block exemption regulations are available on the Commission's website at http://europa.eu.int/comm/competition/index_en.html


(61) 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.

(62) Article 6(2) of Commission Regulation No […].

(63) Article 287 EC, Article 28 of Regulation (EC) No 1/2003 and Articles 15-17 of Regulation No […].


(68) Depending on the case, Member States' competition authorities may equally be well placed to adopt interim measures.

ANNEX

FORM C

Complaint pursuant to Article 7 of Regulation (EC) No 1/2003

I. Information regarding parties concerned

(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) whose conduct the complaint relates to, including 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) 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 (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, note of telephone conversations, etc). State the names and address of the persons able to testify to the facts set out, 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 (for example relating to price trends, quantities sold 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 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
Draft 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)

I. REGULATION (EC) No 1/2003

1. Regulation (EC) No 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 agreements 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 (EC) No 1/2003).

2. The framework of Regulation (EC) No 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 conduct and in what form. They are close to the facts and dispose of the framework of block exemption regulations, case law and case practice as well as extensive guidance in Commission Guidelines and Notices (2).

4. Alongside the reform of the rules implementing Articles 81 and 82 through Regulation (EC) No 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) (3). This allows undertakings in the vast majority of cases to reliably assess their agreements with regard to Article 81.

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 (4).

6. Where it considers it appropriate and subject to its enforcement priorities, the Commission may provide informal guidance on novel questions concerning the interpretation of Articles 81 and/or 82 in a written statement (guidance letter).

The present Notice explains details about this instrument.

II. FRAMEWORK FOR ASSESSING WHETHER TO ISSUE A GUIDANCE LETTER

7. Regulation (EC) No 1/2003 confers powers on the Commission to effectively prosecute and sanction infringements against Articles 81 and 82 (5). 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 (6).

8. While Regulation (EC) No 1/2003 is without prejudice to the ability of the Commission to issue informal guidance to individual undertakings (7), as set out in the present Notice, the primary objective of the Regulation to ensure effective enforcement should not be affected by the possibility to issue informal guidance. The Commission may in any case provide informal guidance to individual undertakings only in so far as this is compatible with the enforcement priorities.

9. Subject to point 8, the Commission seized with a request for a guidance letter will consider whether it is appropriate to process such a request. The issuing of a guidance letter may only be considered if the following cumulative conditions are fulfilled:

(a) The substantive assessment of an agreement, decision 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 or publicly available general guidance nor precedent in case law, 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, decision or practice, and/or

— the extent to which the agreement, decision or practice corresponds or is liable to correspond to a more widely spread economic usage in the marketplace and/or
— the scope of the investments related to the trans-
action in relation to the size of the companies
concerned and the extent to which the transaction
affects a structural operation such as the creation
of a non-full function joint venture.

c) The guidance letter can be issued on the basis of the
information provided, i.e. no further fact-finding is
required.

10. Furthermore, the Commission will not consider a request
for a guidance letter in either of the following circum-
stances:

— 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, decision or practice to which the
request refers is subject to proceedings pending with
the Commission, a Member State court or Member
State competition authority.

11. The Commission will not consider hypothetical questions
and will not issue guidance letters on agreements or
practices that are no longer applied by the parties. Under-
takings may however present a request for a guidance
letter from the Commission in relation to questions
raised by an agreement, decision or practice that they
envision, i.e. before the implementation of that agreement,
decision or practice. In this case the transaction must have
reached a sufficient degree of development for a request to
be considered.

12. A request for a guidance letter is without prejudice to the
power of the Commission to open proceedings in
accordance with Regulation (EC) No 1/2003 with regard
to the facts presented in the request.

III. INDICATIONS ON HOW TO REQUEST GUIDANCE

13. A request can be presented by undertakings or associations
of undertakings within the meaning of Articles 81 and 82
which have entered into or intend to enter into an
agreement, decision 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,
decision or practice.

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

Commission européenne
Competition DG
B-1049 Bruxelles

15. There is no form. A memorandum should be presented
which clearly states:

— the identity of all undertaking(s) or association(s) of
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 9(a), why
the request presents (a) novel question(s) and what are
the exact points on which guidance is sought;

— all other information that permits to evaluate the
request in the light of the aspects explained in points
9-11 of this Notice;

— where the request contains elements that are
considered business secrets, a clear identification of
these elements;

— any other information or documentation relevant in
the specific individual case.

IV. PROCESSING OF THE REQUEST

16. The Commission will in principle evaluate the request on
the basis of the information provided. Notwithstanding
point 9(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.

17. The Commission may share the information submitted to
them with the services of 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. Confidentiality of information provided by the applicants
will be respected.

18. Where no guidance letter is issued, the Commission shall
inform the applicant(s) accordingly.

19. An undertaking can withdraw its request at any point in
time. Information supplied in the context of a request for
guidance remains with the Commission and can be used in
This is also the case if undertakings withdraw their request.
V. GUIDANCE LETTERS

20. 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.

21. 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.

22. Guidance letters will be published on the Commission's web-site. The publication has regard to business secrets.

VI. THE EFFECTS OF GUIDANCE LETTERS

23. Guidance letters are in the first place intended to help undertakings carry out themselves an informed assessment of their agreements and practices.

24. A guidance letter cannot prejudge the assessment of the same question by the Community Courts.

25. A guidance letter does not bind the subsequent assessment of the same issues by the Commission. A guidance letter on questions relating to an agreement, decision or practice does in particular not preclude the Commission from examining a subsequent complaint related to the same agreement, decision or practice. The Commission would however, if it receives a complaint concerning the same facts as those underlying a previous guidance letter, and in the absence of new aspects raised by that complaint that had not been taken into account when the guidance letter was prepared or any development in the case law of the European Courts, normally take a previous guidance letter into account.

26. Guidance letters do not bind Member States' authorities or courts having the power to apply Articles 81 and 82.


(2) All texts mentioned are available at: http://europa.eu.int/comm/competition/index_en.html.

(3) Commission Notice — Guidelines on the application of Article 81(3) of the Treaty . . .


(5) Cf. in particular Articles 7 to 9, 12, 17-24, 29 of Regulation (EC) No 1/2003.


I. INTRODUCTION

1. Articles 81 and 82 of the Treaty are applicable to horizontal and vertical agreements (1) 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 in general are unlikely to be capable of appreciably affecting trade between Member States (the no 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.

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 within the common market (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 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.

II. THE EFFECT ON TRADE CRITERION

A. 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.’

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.’

8. The effect on trade criterion also determines the scope of application of Article 3 of Regulation (EC) No 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) 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, where 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) does not prevent national competition authorities and courts from applying only Articles 81 and 82 to agreements, decisions and concerted practices and to abusive practices. It only obliges them to also apply Articles 81 and 82 when they apply national competition law to such agreements and abusive practices. Moreover, 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.

10. Member States, however, are not under Regulation (EC) No 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 (\(^{\text{4}}\)). 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’ (\(^{\text{5}}\)).

14. In the case of Article 81 of the Treaty, it is the agreement as a whole that must be capable of affecting trade between Member States. It is not required that each individual part of the agreements, including any restriction of competition which may flow from the agreement, is capable of doing so (\(^{\text{6}}\)), provided that the individual restriction forms an integral part of the agreement in question and does not constitute a separate agreement. 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.

15. It is also immaterial whether or not the participation of a particular undertaking in the agreement is having an appreciable effect on trade between Member States (\(^{\text{7}}\)). 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 of 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 clearly capable of affecting trade between Member States.

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 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, it is sufficient for Article 82 to be applicable to all the practices, forming part of this overall strategy, that at least one of these practices is capable of affecting trade between Member States (\(^{\text{8}}\)).

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 particularly three elements must be addressed:

(a) The concept of ‘trade between Member States’,
(b) The notion of ‘may affect’, and
(c) The concept of appreciability.

19. The concept of ‘trade’ is not limited to traditional exchanges of goods and services across borders (\(^{\text{9}}\)). It is a wider concept, covering all cross-border economic activity (\(^{\text{10}}\)). This interpretation, which is consistent with the fundamental objective of the Treaty to promote free movement, implies that the concept of trade encompasses flows of goods and services between Member States as well as other forms of economic activity such as establishment (\(^{\text{11}}\)).

20. According to settled case law the concept of ‘trade’ also encompasses cases where agreements or practices affect the competitive structure on 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 (\(^{\text{12}}\)). 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 engaging.
21. The requirement that there must be an effect on trade ‘between Member States’ implies that there must be an impact on the flow of goods and services or other relevant economic activities involving at least two Member States. It is not required that the agreement or practice affects trade between 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 (i).

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 (ii).

C. The notion of ‘may affect’

23. The function of the notion of ‘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 of ‘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 (iii) (iv). As mentioned in point 0 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.

25. The assessment of trade effects 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 it is not required for Community law jurisdiction to be established 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 (v).

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 in the absence of the agreement the level of parallel trade between the Member States concerned. 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 (vi). 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 (vii).

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 III 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 and 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 means the setting up of a new business 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 D 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 trade between Member States. If there are absolute legal barriers to cross-border trade between Member States, trade is only capable of being affected if these barriers are likely to disappear in the foreseeable future. In cases where legal 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 that do so are capable of affecting trade between Member States. The same is true in cases where there are other high barriers to cross-border activities, which are external to the agreement or practice. To the extent that in spite of such barriers cross-border activities remain possible, agreements and practices that create further obstacles to trade are subject to Articles 81 and 82.

(ii) 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 is 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 likely 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.

(iii) 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 must 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 rebates to distributors 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, 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 is recalled, however, that it is not required that actual effects are demonstrated. It is sufficient that the agreement or practice is 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 when 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 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 and potential effects in the analysis of effects on trade between Member States does not mean that the analysis can be based on abstract and hypothetical effects. The likelihood of a particular agreement to produce indirect and potential effects must be explained by the authority or party claiming that trade between Member States is capable of being appreciably affected. Hypothetical and speculative effects are not sufficient for establishing Community law jurisdiction.

D. The concept of appreciability

(i) 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. 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 have accounted for about 5% of the market (31). 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 (32).

46. 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 of '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 de minimis rule set out in point 0 below.
47. The application of the appreciability test does not necessarily require that relevant markets be defined and market shares calculated (33). 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 point 0 below.

48. 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 (34). 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.

(ii) Quantification of appreciability

49. The assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the products that they cover 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 (35).

50. It is not possible to establish general quantitative rules covering all categories of agreements and practices 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 under Article 81(1) of the Treaty (the de minimis rule) (36) the Commission has stated that agreements between small and medium-sized undertakings (SMEs) as defined in the Annex to Commission Recommendation 96/280/EC (37) 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, SME’s may be subject to Community law jurisdiction in particular where they engage in cross-border economic activity. Secondly, it is in the present context possible to set out a general rule indicating when trade is normally not capable of being appreciably affected, i.e. a negative rebuttable presumption, defining the absence of an appreciable effect on trade between Member States (the NAAT-rule). The NAAT-rule applies 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.

51. Without prejudice to point 0 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 (38) in the products covered by the agreement does not exceed Euro 40 million. 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 purchasing agreements giving rise to buyer power concerns, the relevant turnover shall be that of the buyer(s). 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.
This NAAT-rule remains applicable 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 NAAT-rule does not apply. 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 also holds the view that where an agreement or practice 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 points 52 and 54 exceeds Euro 40 million. This presumption does not imply that trade is not capable of being affected by such agreements and practices even when the turnover threshold is below Euro 40 million but where the market position of the undertakings concerned exceeds 5%. As stated in the previous point the general NAAT-rule only applies where both conditions mentioned above are satisfied.

54. The turnover threshold of Euro 40 million is calculated on the basis of total Community sales excluding tax during the last financial year by the undertakings concerned, cf. point 52 above, of the products covered by the agreement (the contract products). Sales between entities that form part of the same undertaking are excluded (39).

55. In order to apply the market share threshold, it is necessary to determine the relevant market (40). 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 economic transaction constitute a single agreement for the purposes of the NAAT-rule. Undertakings cannot bring themselves inside this rule by dividing up an agreement that from an economic perspective forms a whole.

III. THE APPLICATION OF THE ABOVE PRINCIPLES TO COMMON TYPES OF AGREEMENTS AND ABUSES

58. The condition that agreements and practices must be capable of appreciably affecting trade between Member States is general and does not depend on the nature of the agreement or practice. Accordingly, the NAAT-rule set out in the preceding section applies to all agreements including agreements that by their very nature are capable of affecting trade between Member States, cf. point 0 above, as well as agreements that involve trade with undertakings located in third countries, cf. section C below.

59. However, outside the scope of the NAAT-rule the nature of the agreement or practice is relevant. As already indicated in point 0 above, the capacity of an agreement or practice to affect trade between Member States is, inter alia, a function of its nature. Some types of agreements and practices are by their very nature capable of affecting trade between Member States, whereas that is not so with regard to other types of agreements and practices.

60. In the following sections a principal 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.

A. 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 point 0 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 II above, it is useful to explain what are the factors that are normally used to support a finding of Community law jurisdiction.
(i) 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 (41).

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 (42). 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.

(ii) 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 (43). 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.

(iii) 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 (44). 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 (45). At the level of the Community such full function joint ventures are not dealt with under Articles 81 and 82 (46). 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 (47).

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 (48). 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 sales of the parents and not only those of the joint entity created by the agreement, given that the joint venture does not operate as an autonomous supplier or buyer on any market.
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 the patterns of trade compared to the situation without the agreement (49).

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 his products. Such agreements may limit trade between the Member States in which the agreements are implemented or 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.

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 (50). Such agreements alter the price levels that would likely have existed in the absence of the agreements and thereby affect patterns of trade.

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 down-stream 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 structure inside the Community (51). 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 (52). Once the effective competitive 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 (53). When a dominant undertaking through recourse to abusive conduct further weakens competition, for example by eliminating a competitor, the ability of the abuse to affect trade between Member States is normally appreciable.

B. 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 is 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.

(i) 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. Indeed, the Community Courts have consistently held 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 (54).

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 (55). If they do not, and the product covered by the agreement is tradable (56), 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 appreciable effects 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 thereof 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 (57) 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 (58).

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 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 (59). 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 (60).

83. Horizontal cooperation agreements and in particular non-full function joint ventures, cf. point 66 above, which are confined to a single Member State and which do not directly relate to imports and exports, are not by their very nature 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 possibilities for suppliers from other Member States for gaining access to the national market in question. Trade is therefore capable of being affected (61). 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.

(iii) 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 (63).

87. Foreclosure may, for example, occur when suppliers impose exclusive purchasing obligations on buyers (64). In Delimitis (64), 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 (65).

88. Vertical agreements which cover the whole of a Member State and 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 (66). 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.
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 II 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 market 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 that is susceptible to trade

Where an agreement forecloses access to a regional market, 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 for trade to be appreciably affected. 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. Coverage of areas with a high concentration of demand will thus weigh more heavily than agreements 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. 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.

In cases in this category, guidance may be derived from the case law concerning the concept in Article 82 of a substantial part of the common market. 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.

Abuses of dominant positions covering a single Member State

92. Where an undertaking holds a dominant position, which covers the whole of a Member State, and which 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. In Michelin, 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 the Court similarly held that an abuse in the form of an exclusive purchasing obligation on customers foreclosed products from other Member States.

Exclusionary abuses that affect the competitive structure inside a Member State, for example 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 and where it also operates in other Member States. An effect on trade may arise from the dissipative impact of the abuse on other competitors. If through repeated conduct the dominant undertaking has acquired a reputation of 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.

In the case of exploitative abuses such as price discrimination and excessive pricing, the situation may be more complex. Price discrimination vis-à-vis 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. Practices consisting in 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.
95. As long as an undertaking has a dominant position which covers the whole of a Member State it is normally not material that 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 implementing an 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 are normally by their very nature appreciable. 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.

(vi) Abuse of dominant positions covering only part of a Member State

96. Where a dominant position covers only part of a Member State 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.

97. 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. 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 from the point of view of providing cross-border services, trade between Member States is capable of being affected.

C. Agreements and abuses involving imports and exports with undertakings located in third countries and agreements and practices involving undertakings located in third countries

(i) General remarks

98. 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. Agreements and practices that are implemented or have effects inside the Community are subject to Articles 81 and 82 irrespective of where the undertakings are located or where the agreement has been concluded. 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 II 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.

99. 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. Importation 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 deflection of trade between Member States, thus affecting patterns of trade.

100. 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.
101. 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.

(ii) Arrangements that have as their object the restriction of competition inside the Community

102. In the case of imports, this category includes agreements that bring about an isolation of the internal market (79). 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 (80).

103. 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 may have been sold inside the Community (81).

(iii) Other arrangements

104. 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.

105. 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 party to the agreement or practice (82). In Compagnie maritime belge (83), 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.

106. Trade may also be capable of being affected when the agreement prevents re-imports into the Community. This may, for example, be the case of 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 (84).

107. 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 (85). If these product volumes are small 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.
(1) The terms 'agreements', 'concerted practices' and 'decisions of associations of undertakings' are autonomous concepts of Community law. In the present notice the term 'agreement' encompasses all three concepts.


(8) See in this respect Case 85/76, Hoffmann-La Roche, [1979] ECR p. 461, paragraph 126.

(9) Throughout these guidelines the term 'products' covers both goods and services.


(14) See section III.B. below.


(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 note 11, and Case C-41/90, Hofner and Elser, [1991] ECR I-1979, paragraph 33. The impact of the agreement on the single market objective is thus a factor which can be taken into account.


(20) See in this respect the judgment in Bagnasco cited in note 11.


(28) See paragraph 60 of the AEG judgment cited in the previous note.


(30) See e.g. paragraph 17 of the judgment in Javico cited in note 19, and paragraph 138 of the judgment in BPB Industries and British Gypsum cited in note 22.

(31) See Joined Cases 100/80 and others, Musique Diffusion Française, [1983] ECR p. 1825, paragraph 86. In this 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.

See e.g. Case T-7/93, Langnese-Iglo, [1995] ECR II-1533, paragraph 120.

See paragraph 138 of the judgment in BPB Industries and British Gypsum cited in note 22.


See paragraph 138 of the judgment in BPB Industries and British Gypsum cited in note 22.


See the previous note.

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, see OJ C 372, 9.12.1997, p. 5.

See paragraph 8 of the judgment in Kerpen & Kerpen cited in note 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.

See e.g. the judgment in Volkswagen cited in note 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 3569, paragraph 27.


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). These guidelines deal with the substantive competition assessment of various types of agreements but do not deal with the effect on trade issue.


See e.g. the Commission Decision in Ford/Volkswagen (OJ L 20, 28.1.1993, p. 14).

See in this respect paragraph 146 of the Compagnie Générale Maritime judgment cited in note 23 above.

See in this respect Joined Cases 43/82 and 63/82, VBVB and VBBBB, [1984] ECR 19, paragraph 9.


See paragraphs 32 and 33 of the judgment in Commercial Solvents cited in note 4.

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 note 8.

See for a recent example paragraph 95 of the Wouters judgment cited in note 11.

See e.g. Case 246/86, Belasco, [1989] ECR 2117, paragraph 32-38.

See paragraph 34 of the Belasco judgment cited in the previous note and more recently Joined Cases T-202/98 a.o., British Sugar, [2001] ECR II-2015, 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 note 11.

Guarantees for current account credit facilities.

See the Bagnasco judgment cited in note 11.

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 note 22, where the Court stressed that the agreement in question reduced appreciably the incentive to sell imported products.

See e.g. the judgment in Stichting Sigarettenindustrie, cited in note 15, paragraphs 49 and 50.


See e.g. judgment in Langnese-Iglo, cited in note 34 paragraph 120.

See e.g. judgment of 7.12.2000, Case C-214/99, Neste, ECR I-11121.


See the Langnese-Iglo judgment cited in note 34.

See e.g. Commission Decision in Volkswagen (II), cited in note 21, paragraphs 81 et seq.

See in this respect paragraphs 177 to 181 of the judgment in SCK and FNK cited in note 13.

(10) See e.g. the judgment in BPB Industries and British Gypsum cited in note 22.
(13) See in this respect judgment in Irish Sugar, cited in note 17 paragraph 169.
(14) See paragraph 70 of the judgment in RTE (Magill) cited in note 27.
(15) See the judgment in Irish Sugar cited in note 17.
(16) See e.g. the case law cited in note 68.
(19) See to that effect paragraph 19 of the judgment in Javico cited in note 19.
(22) See paragraph 22 of the judgment in Javico cited in note 19.
(23) See the judgment in Compagnie maritime belge cited in note 12.
(24) See in this respect the judgment in Javico cited in the note 19.
(25) See in this respect paragraphs 24 to 26 of the Javico judgment cited in note 19.
Draft Notice — Communication from the Commission
Guidelines on the application of Article 81(3) of the Treaty

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 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 (EC) No 1/2003 on the implementation of the competition rules laid down in Articles 81 and 82 (1) 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) (7). 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 (7). Block exempted agreements cannot be held invalid by national courts in the context of private litigation.

3. The existing guidelines on vertical restraints and on horizontal cooperation agreements (7) 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 establish an analytical framework for the application of Article 81(3), the purpose of which is to develop a methodology for the application of this Treaty provision. This framework provides more detailed guidance on the application of the four conditions of Article 81(3) than that contained in the guidelines on vertical restraints and horizontal co-operation agreements. The framework of the present guidelines also applies to agreements covered by those guidelines.

5. 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.

6. The present guidelines are without prejudice to the interpretation of Article 81(3) that may be given by the Court of Justice and the Court of First Instance.

II. THE GENERAL FRAMEWORK OF ARTICLE 81 EC

A. The Treaty provisions

7. Article 81(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices (7) which may affect trade between Member States (7) and which have as their object or effect the prevention, restriction or distortion of competition (7).

8. 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.

9. According to Article 1(1) of Regulation (EC) No 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 (7). 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.
10. 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 likely 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). (9)

11. 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).

### B. The prohibition rule of Article 81(1)

1. General remarks

12. The objective of Article 81(1) 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.

13. 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 (10). In view of this the Community Courts have defined 'agreements', 'decisions' and 'concerted practices' as Community law concepts which allow to make a distinction between unilateral conduct of an undertaking and co-ordination of behaviour or collusion between undertakings. 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 (EC) No 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 (11).

14. For co-ordination of behaviour or collusion between undertakings within the meaning of Article 81(1) to be established — whether or not restrictive of competition (12) — it is sufficient that 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 (13). 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 changing its incentives. It is not required that co-ordination is in the interest of all the undertakings concerned (14). Co-ordination must also not necessarily be express. It can for instance be inferred from an ongoing commercial relationship between the parties (15).

15. Co-ordination of market behaviour is caught by the prohibition rule of Article 81(1) when it is likely to have an adverse impact on the parameters of competition on the market, i.e. price, output, product quality, product variety and innovation. Co-ordination can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties.

16. 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. This distinction 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 (16). 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 (17).
2. Restrictions of competition by object and by effect

17. 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 are presumed to have negative effects on competition and in respect of which it is therefore 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.

18. 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 (20). 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.

19. 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 (19). 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 (20).

20. If an agreement is not restrictive of competition by object it must be examined whether it has or is likely to have restrictive effects on competition. Account must be taken of both actual and potential effects (21). 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 be capable of affecting 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. Such negative effects must be appreciable. The prohibition rule of Article 81(1) does not apply when the anti-competitive effects are insignificant (22).

21. Negative effects on competition within the relevant market are likely to occur when at least one of the parties has or obtains 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 in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time.

22. 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.

23. For the purposes of analysing the restrictive effects of an agreement it is normally necessary to define the relevant market (23). 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) (24).
24. 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. 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. In order to ascertain whether an agreement or its individual parts are restrictive of competition within the meaning of Article 81(1) it is relevant to ask the two questions set out below. 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 it is restrictive of competition within the meaning of Article 81(1):

(1) Does the agreement restrict actual or potential competition that would have existed in the absence of the agreement? If so, the agreement is normally caught by Article 81(1) provided that trade between Member States is capable of being appreciably affected. 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 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.

(2) Does the agreement restrict actual or potential competition that would have existed in the absence of the alleged restriction(s) of competition? This question relates to the issue of whether or not the restriction is objectively necessary for the conclusion of the agreement. If so, the agreement with its restraints is not caught by Article 81(1). This assessment is 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 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 have been concluded by undertakings in a similar setting. For instance, territorial restraints in an agreement between a supplier and a distributor may fall outside Article 81(1), if the restraints are objectively necessary in order for the distributor to penetrate a new market. Claims that in the absence of a restriction 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. The initial choice to rely on cooperation rather than vertical integration anyhow already generally indicates that vertical integration was not practicable.

3. Ancillary restraints

25. 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. 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). 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.

26. 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).
27. 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 (31). 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) (32).

4. The exception rule of Article 81(3)

28. 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.

29. 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. 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 (33).

30. 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 improve their competitiveness on the market by offering cheaper or better products to consumers, compensating the latter for the adverse effects of the restrictions of competition.

31. 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 (EC) No 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 is block exempted. The application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements falling within their scope fulfil each of the four conditions laid down in Article 81(3).

32. If in an individual case the conditions of Article 81(3) are not fulfilled the block exemption may be withdrawn. According to Article 29(1) of Regulation (EC) No 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 (EC) No 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).
33. 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 (34). The powers of Member State courts are limited to finding whether or not an agreement is covered by a block exemption regulation.

III. THE APPLICATION OF THE FOUR CONDITIONS OF ARTICLE 81(3)

34. The remainder of these guidelines will consider each of the four conditions of Article 81(3) (35). Given that these four conditions are cumulative (36) 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.

35. 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 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.

A. General principles

36. 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.

37. 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 (EC) No 1/2003 the burden of proof under Article 81(3) rests on the undertaking(s) invoking the benefit of the exception rule.

38. According to settled case law the four conditions of Article 81(3) are cumulative (37), 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 (38). 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). It is not, on the other hand, the role of Article 81 and the authorities enforcing this Treaty provision to allow undertakings to restrict competition in pursuit of general interest aims (39).

39. 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, it is inherent in the condition that consumers (40) must receive a fair share of the benefits 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 (41). 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 closely interrelated, 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 (42). 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 (43).
40. The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur 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. In some cases, however, 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 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.

41. 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. However, severe restrictions of competition are likely to only fulfil the conditions of Article 81(3) in exceptional circumstances. Such restrictions are usually black listed in block exemption regulations or qualified 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 nor do they benefit consumers. 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.

42. 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. 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 and not for undertakings to regulate themselves.

B. First condition of Article 81(3): Efficiency gains

1. General remarks

43. 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. The purpose of this condition is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second, third and fourth conditions of Article 81(3).

44. It follows from the case law of the Court of Justice that only objective benefits can be taken into account. This means that efficiencies are not assessed from the subjective point of view of the parties. 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).
45. For the first condition of Article 81(3) to be met there must be a causal link between the agreement and the claimed efficiencies (14) and the efficiencies must normally 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.

46. All efficiency claims must 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;

(d) How and when each claimed efficiency would be achieved; and

(e) Any cost of achieving the claimed efficiencies.

47. Letter (a) allows the decision-maker to determine whether the nature of the claimed efficiency is such that it can be taken into account under Article 81(3).

48. Letter (b) allows the decision-maker to determine whether there is a sufficient causal link between the restrictive agreement and the claimed efficiencies. Normally, a direct causal link is required. Claims based on indirect effects are as a general rule too uncertain and too difficult to verify to be taken into account.

49. Letters (c) and (d) allow the decision-maker to determine 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 point 89 below. In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as possible calculate the (monetary) value of the efficiencies and describe in detail how the amount has been calculated. 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 will materialise. In the case of claimed efficiencies in the form of new or improved products, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the improvements and how and why they constitute an objective economic benefit compared to existing products. 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.

50. Letter (e) ensures that only net efficiencies are taken into account. If costs are incurred in obtaining the efficiencies such costs must be deducted. If, for example, a cooperation agreement allows the parties to reduce production costs in present values by 50 million EUR over 5 years and it costs 20 million EUR in present values to implement the agreement, then the net cost efficiency generated by the agreement is 30 million EUR.

2. The different categories of efficiencies

51. 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 that create value in the form of new or improved products.

52. 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.

53. 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).
54. In each case where the choice made involves 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. However, 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.

55. The types of efficiencies mentioned in the following are only examples and are not intended to be exhaustive.

(i) Cost efficiencies

56. 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.

57. 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. 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.

58. 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.

59. 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.

60. 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.

(ii) Efficiencies taking the form of new or improved products

61. 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).
62. Agreements capable of producing efficiencies of this nature include, in particular, research and development agreements, 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. Joint research and development agreements and 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 (55). In the telecommunications sector, for example, cooperation agreements have been held to create efficiencies by making available more quickly new global services (56). In the banking sector cooperation agreements that made available improved facilities for making cross-border payments have also been held to create efficiencies within the meaning of Article 81(3) (57).

63. Improvements in product quality and service levels constitute yet another example of efficiencies forming part of this category. 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 (58).

C. Third condition of Article 81(3): Indispensability of the restrictions

64. 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 necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be necessary for the attainment of the efficiencies.

65. 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 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 (59).

66. 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 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 purely hypothetical or theoretical alternatives. They must only explain and demonstrate why seemingly realistic and less restrictive alternatives to the agreement would be significantly less efficient.

67. It is particularly relevant to examine whether the parties could have achieved the efficiencies without the restrictive agreement, either on their own or by means of another less restrictive type of agreement and, if so, when they would be able to obtain the efficiencies. For instance, where the claimed efficiencies take the form of cost reductions resulting from economies of scale or scope the undertakings concerned must 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 (60). 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.

68. 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.
69. 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 (64). Restrictions that are black listed in block exemption regulations or qualified as hardcore restrictions in Commission guidelines and notices are only likely to be considered indispensable in exceptional circumstances.

70. 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 (65).

D. Second condition of Article 81(3): Fair share for consumers

1. General remarks

72. According to the second condition of Article 81(3) consumers must receive a fair share of the efficiencies generated by the restrictive agreement.

73. The concept of 'consumers' encompasses all users of the products covered by the agreement, including wholesalers, retailers and final consumers. 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 private individuals as for instance in the case of buyers of impulse ice cream or bicycles.

74. 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 consumers within each relevant market. 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 within each relevant market (64). When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits because 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.

75. 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 which case consumers obtain a fair share of the overall benefits (66). If a restrictive agreement is likely to lead to higher prices and consumers are not fully compensated through increased quality or other benefits, the second condition of Article 81(3) is not fulfilled.

71. 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 (65). 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.
76. 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. 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 (66). 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 EUR 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 applying an appropriate discount rate.

77. 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 substantially higher price than would otherwise have been the case. If the benefit to consumers of having earlier access to the products is not equally substantial, the second condition of Article 81(3) is unlikely to be fulfilled.

78. 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.

79. 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.

80. 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.

81. 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. 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 (67).

82. 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.

2. Pass-on and balancing of cost efficiencies

83. 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 (68). They may also be able to price discriminate amongst customers.
84. 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, there can be no presumption that residual competition will ensure that consumers receive a fair share of the benefits.

85. The degree of competition remaining on the market and the nature of this competition influences the likelihood of pass-on. 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 (70). 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’ (70).

86. 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 scraping 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 an 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.

87. 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 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 scraping 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 an 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.

87. 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 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 scraping 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 an 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.
88. 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.

89. 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 point 87 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. Pass-on and balancing of other types of efficiencies

90. Consumer pass-on can also take the form of new and improved products, creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase.

91. 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.

92. 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 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.

E. Fourth condition of Article 81(3): No elimination of competition

93. 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 the long term competitive structure is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements in the short term. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including longer-term dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process not only in the short term but also in the long term. 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.

94. 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) (72). However, according to settled case law the application of Article 81(3) cannot prevent the application of Article 82 of the Treaty (73). 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 (74).

95. 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 (75) (76). 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 (77), which is found to be restrictive of competition but at the same time involves a substantial integration of assets. Such agreements may, depending on the circumstances, be considered objectively justified under Article 82 and thus not abusive.
96. The existence of an elimination of competition 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.

97. The application of the last condition of Article 81(3) requires an 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.

98. 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 (78) or competition in respect of innovation and development of new products.

99. The magnitude of remaining sources of actual competition cannot be assessed purely 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.

100. 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.

101. 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’ (79). Such an agreement may change the competitive incentives and capabilities of the competitor and thereby remove an important source of competition in the market.

102. 2. 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.

103. 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.

104. In the assessment of entry barriers and the real possibility for new entry, 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.
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.

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. 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 (\(^{14}\)).

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.

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.

Past entry on a significant scale or the absence thereof.

---

\(^{(1)}\) OJ L 1, 4.1.2003, p. 1.

\(^{(2)}\) All existing block exemption regulations and Commission notices are available on the DG Competition web site: http://www.europa.eu.int/commission/dgs/competition

\(^{(3)}\) See point 32 below.


\(^{(5)}\) In the following the term 'agreement' includes concerted practices and decisions of associations of undertakings.

\(^{(6)}\) 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.

\(^{(9)}\) See 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 in this respect e.g. Case 14/68, Walt Wilhelm, [1969] ECR 1.

\(^{(12)}\) Not all agreements, decisions and concerted practices within the meaning of Article 81(1), which are capable of affecting trade between Member States, are restrictive of competition.

\(^{(13)}\) 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.

\(^{(14)}\) 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.

\(^{(15)}\) See e.g. Joined Cases 25/84 and 26/84, Ford, [1985] ECR 2725.

\(^{(16)}\) See e.g. paragraph 99 of the judgment in Anic Partecipazioni cited in note 10.

\(^{(17)}\) See point 41 below.


Guidance on the issue of appreciability can be found in 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.


For the reference in the OJ see note 4.


See in this respect e.g. Joined Cases 56/64 and 58/66, Consten and Grundig, [1966] ECR 429.

See rule 10 in point 119 of the Guidelines on vertical restraints cited in note 4 above, according to which inter alia passive sales restrictions — a hardcore restraint — are held to fall outside Article 81(1) of a period of 2 years when the restraint is linked to opening up new product or geographic markets.

See paragraph 104 of the judgment in Métropole Télévision (M6) and others, cited in note 9.


See paragraph 107 of the judgment in Métropole Télévision cited in note 9.


See the judgment in Consten and Grundig, cited in note 26.


Article 36(4) of Regulation (EC) No 1/2003 has, inter alia, repealed Article 5 of Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway. However, the Commission's case practice adopted under Regulation (EEC) No 1017/68 remains relevant for the purposes of Article 81(3) in the inland transport sector.

See point 38 below.

See e.g. Case T-185/00 and others, Métropole Télévision SA (M6), [2002] ECR II-, 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.


See to that effect implicitly paragraph 139 of the Matra judgment cited in note 37 and Case 26/76, Metro (I), [1977] ECR 1875, paragraph 43.

As to the concept of consumers see point 73 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).

The test is market specific, see to that effect Case T-331/99, 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.

See in this respect Case T-86/95, Compagnie Générale Maritime and others, [2002] ECR II-1011, paragraphs 343 to 345. This 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. In this case consumers of both services were therefore the same.

See points 126 and 132 of the Guidelines on horizontal co-operation agreements cited in note 4 above.

See the Ford judgment cited in note 15.

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.

See paragraph 85 of the Matra judgment cited in note 37.

As to this requirement see point 44 below.

See e.g. Case T-29/92, Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO), [1995] ECR II-289.

See e.g. Case 258/78, Nungesser, [1982] ECR 2015, paragraph 77, concerning absolute territorial protection.
See in this respect e.g. paragraph 298 of the judgment in SPO cited in note 48.

National measures must, inter alia, comply with the Treaty rules on free movement of goods, services, persons and capital.

See e.g. the judgment in Consten and Grundig cited in note 26.


As to the former question, which may be relevant in the context of Article 81(1), see point 24 above.

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.

See in this respect paragraphs 392 to 395 of the judgment in Compagnie Générale Maritime cited in note 40.


See in this respect the judgment in Consten and Grundig cited in note 26, 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.

See in this respect paragraph 48 of the Metro (I) judgment cited in note 39.

See paragraph 163 of the judgment in Shaw cited in note 41.

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.

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.

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.

This term refers to undertakings that constrain the pricing behaviour of other undertakings in the market and keep their prices lower than they would otherwise have been.

The restrictive agreement may even allow the undertakings in question to charge a higher price to customers with a low elasticity of demand.


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-1377, paragraph 120.

See in this respect Case T-51/89, Tetra Pak (I), [1990] ECR II-309.

This is how point 135 of the Guidelines on vertical restraints and points 36, 71, 105, 134 and 155 of the Guidelines on horizontal cooperation agreements, cited in note 4, should be understood when they state that in principle restrictive agreements concluded by dominant undertakings cannot be exempted.

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 L 257, 21.9.1990, p. 13).

See paragraph 21 of the judgment in Metro (I) cited in note 39.

See point 85 above.