

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

(2004/C 101/06)

(Text with EEA relevance)

I. REGULATION 1/2003

1. Regulation 1/2003 ⁽¹⁾ sets up a new enforcement system for Articles 81 and 82 of the Treaty. While designed to restore the focus on the primary task of effective enforcement of the competition rules, the Regulation also creates legal certainty inasmuch as it provides that agreements ⁽²⁾ which fall under Article 81(1) but fulfil the conditions in Article 81(3) are valid and fully enforceable *ab initio* without a prior decision by a competition authority (Article 1 of Regulation 1/2003).
2. The framework of Regulation 1/2003, while introducing parallel competence of the Commission, Member States' competition authorities and Member States' courts to apply Article 81 and 82 in their entirety, limits risks of inconsistent application by a range of measures, thereby ensuring the primary aspect of legal certainty for companies as reflected in the case law of the Court of Justice, i.e. that the competition rules are applied in a consistent way throughout the Community.
3. Undertakings are generally well placed to assess the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or practice and in what form. They are close to the facts and have at their disposal the framework of block exemption regulations, case law and case practice as well as extensive guidance in Commission guidelines and notices ⁽³⁾.
4. Alongside the reform of the rules implementing Articles 81 and 82 brought about by Regulation 1/2003, the Commission has conducted a review of block exemption regulations, Commission notices and guidelines, with a view to further assist self-assessment by economic operators. The Commission has also produced guidelines on the application of Article 81(3) ⁽⁴⁾. This allows undertakings in the vast majority of cases to reliably assess their agreements with regard to Article 81. Furthermore, it is the practice of the Commission to impose more than symbolic fines ⁽⁵⁾ only in cases where it is established, either in horizontal instruments or in the case law and practice that a certain behaviour constitutes an infringement.
5. Where cases, despite the above elements, give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 81 and 82, individual undertakings may wish to seek informal guidance from the Commission. ⁽⁶⁾ Where it considers it appropriate and subject to its enforcement priorities, the Commission may provide such guidance on novel questions concerning the interpretation of Articles 81 and/or 82 in a written statement (guidance letter). The present Notice sets out details of this instrument.

II. FRAMEWORK FOR ASSESSING WHETHER TO ISSUE A GUIDANCE LETTER

6. Regulation 1/2003 confers powers on the Commission to effectively prosecute infringements of Articles 81 and 82 and to impose sanctions ⁽⁷⁾. One major objective of the Regulation is to ensure efficient enforcement of the EC competition rules by removing the former notification system and thus allowing the Commission to focus its enforcement policy on the most serious infringements ⁽⁸⁾.
7. While Regulation 1/2003 is without prejudice to the ability of the Commission to issue informal guidance to individual undertakings ⁽⁹⁾, as set out in this Notice, this ability should not interfere with the primary objective of the Regulation, which is to ensure effective enforcement. The Commission may therefore only provide informal guidance to individual undertakings in so far as this is compatible with its enforcement priorities.

⁽¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pages 1-25).

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

⁽³⁾ All texts mentioned are available at: http://europa.eu.int/comm/competition/index_en.html

⁽⁴⁾ Commission Notice – Guidelines on the application of Article 81(3) of the Treaty (p. 97).

⁽⁵⁾ Symbolic fines are normally set at 1 000 EUR, cf. Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, (OJ C 9, 14.1.1998).

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

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

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

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

8. Subject to point 7, the Commission, seized of a request for a guidance letter, will consider whether it is appropriate to process it. Issuing a guidance letter may only be considered if the following cumulative conditions are fulfilled:
- (a) The substantive assessment of an agreement or practice with regard to Articles 81 and/or 82 of the Treaty, poses a question of application of the law for which there is no clarification in the existing EC legal framework including the case law of the Community Courts, nor publicly available general guidance or precedent in decision-making practice or previous guidance letters.
 - (b) A prima facie evaluation of the specificities and background of the case suggests that the clarification of the novel question through a guidance letter is useful, taking into account the following elements:
 - the economic importance from the point of view of the consumer of the goods or services concerned by the agreement or practice, and/or
 - the extent to which the agreement or practice corresponds or is liable to correspond to more widely spread economic usage in the marketplace and/or
 - the extent of the investments linked to the transaction in relation to the size of the companies concerned and the extent to which the transaction relates to a structural operation such as the creation of a non-full function joint venture.
 - (c) It is possible to issue a guidance letter on the basis of the information provided, i.e. no further fact-finding is required.
9. Furthermore, the Commission will not consider a request for a guidance letter in either of the following circumstances:
- the questions raised in the request are identical or similar to issues raised in a case pending before the European Court of First Instance or the European Court of Justice;
 - the agreement or practice to which the request refers is subject to proceedings pending with the Commission, a Member State court or Member State competition authority.
10. The Commission will not consider hypothetical questions and will not issue guidance letters on agreements or practices that are no longer being implemented by the parties. Undertakings may however present a request for a guidance letter to the Commission in relation to questions raised by an agreement or practice that they envisage, i.e. before the implementation of that agreement or practice. In this case the transaction must have reached a sufficiently advanced stage for a request to be considered.
11. A request for a guidance letter is without prejudice to the power of the Commission to open proceedings in accordance with Regulation 1/2003 with regard to the facts presented in the request.
- ### III. INDICATIONS ON HOW TO REQUEST GUIDANCE
12. A request can be presented by an undertaking or undertakings which have entered into or intend to enter into an agreement or practice that could fall within the scope of Articles 81 and/or 82 of the Treaty with regard to questions of interpretation raised by such agreement or practice.
13. A request for a guidance letter should be addressed to the following address:
- Commission européenne/Europese Commissie
Competition DG
B-1049 Bruxelles/Brussel.
14. There is no form. A memorandum should be presented which clearly states:
- the identity of all undertakings concerned as well as a single address for contacts with the Commission;
 - the specific questions on which guidance is sought;
 - full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation;
 - a detailed reasoning, having regard to point 8 a), why the request presents (a) novel question(s);
 - all other information that permits an evaluation of the request in the light of the aspects explained in points 8-10 of this Notice, including in particular a declaration that the agreement or practice to which the request refers is not subject to proceedings pending before a Member State court or competition authority;

- where the request contains elements that are considered business secrets, a clear identification of these elements;
- any other information or documentation relevant to the individual case.

IV. PROCESSING OF THE REQUEST

15. The Commission will in principle evaluate the request on the basis of the information provided. Notwithstanding point 8 c), the Commission may use additional information at its disposal from public sources, former proceedings or any other source and may ask the applicant(s) to provide supplementary information. The normal rules on professional secrecy apply to the information supplied by the applicant(s).
16. The Commission may share the information submitted to it with the Member States' competition authorities and receive input from them. It may discuss the substance of the request with the Member States' competition authorities before issuing a guidance letter.
17. Where no guidance letter is issued, the Commission shall inform the applicant(s) accordingly.
18. An undertaking can withdraw its request at any point in time. In any case, information supplied in the context of a request for guidance remains with the Commission and can be used in subsequent procedures under Regulation 1/2003 (cf. point 11 above).

V. GUIDANCE LETTERS

19. A guidance letter sets out:
 - a summary description of the facts on which it is based;

- the principal legal reasoning underlying the understanding of the Commission on novel questions relating to Articles 81 and/or 82 raised by the request.

20. A guidance letter may be limited to part of the questions raised in the request. It may also include additional aspects to those set out in the request.
21. Guidance letters will be posted on the Commission's web-site, having regard to the legitimate interest of undertakings in the protection of their business secrets. Before issuing a guidance letter, the Commission will agree with the applicants on a public version.

VI. THE EFFECTS OF GUIDANCE LETTERS

22. Guidance letters are in the first place intended to help undertakings carry out themselves an informed assessment of their agreements and practices.
23. A guidance letter cannot prejudice the assessment of the same question by the Community Courts.
24. Where an agreement or practice has formed the factual basis for a guidance letter, the Commission is not precluded from subsequently examining that same agreement or practice in a procedure under Regulation 1/2003, in particular following a complaint. In that case, the Commission will take the previous guidance letter into account, subject in particular to changes in the underlying facts, to any new aspects raised by a complaint, to developments in the case law of the European Courts or wider changes of the Commission's policy.
25. Guidance letters are not Commission decisions and do not bind Member States' competition authorities or courts that have the power to apply Articles 81 and 82. However, it is open to Member States' competition authorities and courts to take account of guidance letters issued by the Commission as they see fit in the context of a case.