Cartel legislation

and other reference texts

on 1 January 2013
EU Competition Law
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<p>| | |</p>
<table>
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<tr>
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</tr>
</thead>
</table>
| 1 | **Article 101 TFEU**  
(Consolidated version: OJ C 83, 30.3.2010, p. 47) |
| 2 | **Regulation 1/2003**  
| 3 | **Procedural Regulation 773/2004**  
| 4 | **Recitals of Transport Regulation 411/2004**  
(OJ L 68, 6.3.2004, p. 1) |
| 5 | **Art. 53–65, 108-110 EEA Agreement** |
| 6 | **Protocol 21 on the implementation of competition rules applicable to undertakings** |
| 7 | **Protocol 23 concerning the cooperation between the surveillance authorities** |
| 8 | **Best Practices Notice on Articles 101, 102 TFEU**  
(OJ C 308, 20.10.2011, p. 6) |
| 9 | **2006 Leniency Notice**  
| 10 | **2002 Leniency Notice**  
(OJ C 45, 19.10.2002, p. 3) |
| 11 | **1996 Leniency Notice**  
(OJ C 207, 18.7.1996, p. 4) |
| 12 | **ECN model leniency programme (rev. 11/2012)** |
| 13 | **Leniency contact information** |
| 14 | **Settlement Notice**  
(OJ C 167, 2.7.2008, p. 1) |
| 15 | **Recitals of the Settlement Regulation 622/2008**  
(OJ L 171, 1.7.2008, p. 3) |
| 16 | **2006 Guidelines on Fines**  
(OJ C 210, 1.9.2006, p. 2) |
| 17 | **1998 Guidelines on Fines**  
(OJ C 9, 14.01.1998, p. 3) |
| 18 | **ITP Information Note**  
| 19 | **Notice on Access to File**  
| 20 | **Hearing Officer's Terms of Reference**  
<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
</table>
| **VI. Cooperation with Member States** | **21** | Notice on Cooperation within the Network of Competition Authorities  
(OJ C 101, 27.4.2004, p. 43) |
| **22** | Notice on Cooperation between National Courts and the Commission  
| **VII. Human Rights** | **23** | Article 6 of the Treaty on European Union  
(Consolidated version: OJ C 83, 30.3.2010, p. 13) |
| **24** | EU Charter of Fundamental Rights  
| **25** | Explanations Relating to the Charter of Fundamental Rights  
| **26** | Articles 6-8 European Convention on Human Rights  
(as amended by Protocols No. 11 and 14) |
| **VIII. Access to Documents** | **27** | Article 15 TFEU (ex. Art. 255 TEC)  
(Consolidated version: OJ C 83, 30.3.2010, p. 47) |
| **28** | Regulation on Public Access to Documents 1049/2001  
(OJ L 145, 31.5.2001, p. 43) |
| **29** | Data Protection Regulation 45/2001  
(OJ L 8, 12.1.2001, p. 1) |
| **IX. General** | **30** | Regulation on Languages  
(OJ L 17, 6.10.1958, p. 385) |
| **31** | Regulation on Time Periods, Dates and Time Limits  
(OJ L 124, 8.6.1971, p. 1) |
| **32** | Code of Good Administrative Behaviour  
(OJ L 267, 20.10.2000, p. 64) |
| **X. Empowerments** | **33** | List of Empowerments |
CONSOLIDATED VERSION
OF
THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION
1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

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

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

(c) share markets or sources of supply;

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

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

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

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

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,
— any concerted practice or category of concerted practices,

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

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

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

[...]
COUNCIL REGULATION (EC) No 1/2003
of 16 December 2002
on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
(Text with EEA relevance)
(OJ L 1, 4.1.2003, p. 1)

Amended by:

Official Journal

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<th>No</th>
<th>page</th>
<th>date</th>
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</thead>
<tbody>
<tr>
<td>M1</td>
<td>68</td>
<td>1 6.3.2004</td>
</tr>
<tr>
<td>M2</td>
<td>269</td>
<td>1 28.9.2006</td>
</tr>
</tbody>
</table>
COUNCIL REGULATION (EC) No 1/2003
of 16 December 2002

on the implementation of the rules on competition laid down in
Articles 81 and 82 of the Treaty

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

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

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

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

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

Whereas:

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

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

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

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

(3) OJ C 155, 29.5.2001, p. 73.
(*) The title of Regulation No 17 has been adjusted to take account of the
renumbering of the Articles of the EC Treaty, in accordance with Article
12 of the Treaty of Amsterdam; the original reference was to Articles 85 and
86 of the Treaty.
(‡) OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC)
In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

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

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

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

Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible...
with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

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

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

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

(2) Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices (OJ L 148, 15.6.1999, p. 1). Regulation as last amended by Amendment (EC) No 1215/99 (OJ L 148, 15.6.1999, p. 1).

(3) Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.

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

(5) Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (Consortia) (OJ L 55, 29.2.1992, p. 3). Regulation amended by the Act of Accession of 1994.
or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.

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

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

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

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

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

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

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

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

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

(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.
In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

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

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

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

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

Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.
(28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.

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

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

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

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

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

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

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

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

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

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

HAS ADOPTED THIS REGULATION:

CHAPTER I

PRINCIPLES

Article 1

Application of Articles 81 and 82 of the Treaty

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

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

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

Article 2

Burden of proof

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

Article 3

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

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

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

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition
authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II
POWERS

Article 4
Powers of the Commission

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

Article 5
Powers of the competition authorities of the Member States

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

— requiring that an infringement be brought to an end,
— ordering interim measures,
— accepting commitments,
— imposing fines, periodic penalty payments or any other penalty provided for in their national law.

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

Article 6
Powers of the national courts

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

CHAPTER III
COMMISSION DECISIONS

Article 7
Finding and termination of infringement

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

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

Article 8

Interim measures

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

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

Article 9

Commitments

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

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

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

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

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

Article 10

Finding of inapplicability

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

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

Article 11

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

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

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

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

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

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

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

Article 12

Exchange of information

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

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and
does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:
   — the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,
   — the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13
Suspension or termination of proceedings

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

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

Article 14
Advisory Committee

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

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

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

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

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

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

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

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

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

Article 15

Cooperation with national courts

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

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

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

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

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.
Article 16
Uniform application of Community competition law
1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

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

CHAPTER V
POWERS OF INVESTIGATION

Article 17
Investigations into sectors of the economy and into types of agreements
1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

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

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

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

Article 18
Requests for information
1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

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

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

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

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

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**Article 19**

**Power to take statements**

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

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

**Article 20**

**The Commission's powers of inspection**

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

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

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

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

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

   (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

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

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

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

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

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

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

Article 21

Inspection of other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of
transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

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

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

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

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

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**Article 22**

**Investigations by competition authorities of Member States**

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

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

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

Article 23
Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:
   (a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
   (b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
   (c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);
   (d) in response to a question asked in accordance with Article 20(2)(e),
      — they give an incorrect or misleading answer,
      — they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
      — they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);
   (e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:
   (a) they infringe Article 81 or Article 82 of the Treaty; or
   (b) they contravene a decision ordering interim measures under Article 8;
   (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

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

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

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

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

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require
payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

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

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

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

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

Article 24

Periodic penalty payments

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

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

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

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

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

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

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

CHAPTER VII

LIMITATION PERIODS

Article 25

Limitation periods for the imposition of penalties

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

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
(b) five years in the case of all other infringements.

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

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

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

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

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

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

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

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

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

**Article 26**

**Limitation period for the enforcement of penalties**

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

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

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

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

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

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:
(a) time to pay is allowed;

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

CHAPTER VIII

HEARINGS AND PROFESSIONAL SECRECY

Article 27

Hearing of the parties, complainants and others

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

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

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

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

Article 28

Professional secrecy

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

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

CHAPTER IX
EXEMPTION REGULATIONS

Article 29
Withdrawal in individual cases

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

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

CHAPTER X
GENERAL PROVISIONS

Article 30
Publication of decisions

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

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

Article 31
Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.
Article 33

Implementing provisions

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

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

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

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

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

CHAPTER XI

TRANSITIONAL, AMENDING AND FINAL PROVISIONS

Article 34

Transitional provisions

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

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

Article 35

Designation of competition authorities of Member States

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

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

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

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different
from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

**Article 36**

**Amendment of Regulation (EEC) No 1017/68**

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

1. Article 2 is repealed;

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

3. Article 4 is amended as follows:
   (a) In paragraph 1, the words ‘The agreements, decisions and concerted practices referred to in Article 2’ are replaced by the words ‘Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty’;
   (b) Paragraph 2 is replaced by the following:
      ‘2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease.’

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

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

**Article 37**

**Amendment of Regulation (EEC) No 2988/74**

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

‘**Article 7a**

**Exclusion**

This Regulation shall not apply to measures taken under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*)

(*) OJ L 1, 4.1.2003, p. 1.’

**Article 38**

**Amendment of Regulation (EEC) No 4056/86**

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

1. Article 7 is amended as follows:
   (a) Paragraph 1 is replaced by the following:
1. Breach of an obligation

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*) adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed.


(b) Paragraph 2 is amended as follows:

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

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

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

2. Article 8 is amended as follows:

(a) Paragraph 1 is deleted.

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

(c) Paragraph 3 is deleted;

3. Article 9 is amended as follows:

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

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

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

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

Article 39

Amendment of Regulation (EEC) No 3975/87

Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.
Article 40
Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91

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

Article 41
Amendment of Regulation (EEC) No 3976/87

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

1. Article 6 is replaced by the following:

   'Article 6
   The Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*) before publishing a draft Regulation and before adopting a Regulation.

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

   2. Article 7 is repealed.

Article 42
Amendment of Regulation (EEC) No 479/92

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

1. Article 5 is replaced by the following:

   'Article 5
   Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*)

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

   2. Article 6 is repealed.

Article 43
Repeal of Regulations No 17 and No 141

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

2. Regulation No 141 is repealed.

3. References to the repealed Regulations shall be construed as references to this Regulation.
Article 44

Report on the application of the present Regulation

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

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

Article 45

Entry into force

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

It shall apply from 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

►B

COMMISSION REGULATION (EC) No 773/2004
of 7 April 2004
relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty
(Text with EEA relevance)
(OJ L 123, 27.4.2004, p. 18)

Amended by:

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<td>L 362</td>
<td>1</td>
<td>20.12.2006</td>
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<tr>
<td>M2</td>
<td>L 171</td>
<td>3</td>
<td>1.7.2008</td>
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I - Cartels - 3
COMMISSION REGULATION (EC) No 773/2004
of 7 April 2004
relating to the conduct of proceedings by the Commission pursuant
to Articles 81 and 82 of the EC Treaty
(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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

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

Whereas:

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

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

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

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

(1) OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No
establish a procedure enabling it to add any rectification, amendment or supplement to the explanations given by the member of staff who is not or was not authorised to provide explanations on behalf of the undertaking. The explanations given by a member of staff should remain in the Commission file as recorded during the inspection.

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

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

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

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

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

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

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

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

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

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

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

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

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


HAS ADOPTED THIS REGULATION:

CHAPTER I
SCOPE

Article 1
Subject-matter and scope

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

CHAPTER II
INITIATION OF PROCEEDINGS

Article 2
Initiation of proceedings

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

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

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

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

CHAPTER III
INVESTIGATIONS BY THE COMMISSION

Article 3
Power to take statements

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

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

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

Article 4
Oral questions during inspections

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

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

3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.
Article 5
Admissibility of complaints

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

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

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

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

Article 6
Participation of complainants in proceedings

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

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

Article 7
Rejection of complaints

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

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

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.
Article 8
Access to information

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

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

Article 9
Rejections of complaints pursuant to Article 13 of Regulation (EC) No 1/2003

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

CHAPTER V
EXERCISE OF THE RIGHT TO BE HEARD

Article 10
Statement of objections and reply

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

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

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

Article 10a
Settlement procedure in cartel cases

1. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly
introducing settlement submissions. The Commission shall not be obliged to take into account replies received after the expiry of that time limit.

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

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

(a) the objections it envisages to raise against them;
(b) the evidence used to determine the envisaged objections;
(c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and
(d) the range of potential fines.

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

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

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

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

Article 11

Right to be heard

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.
2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

Article 12

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

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

Article 13

Hearing of other persons

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

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

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

Article 14

Conduct of oral hearings

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

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

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

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

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

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

7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited
to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

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

CHAPTER VI
ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

Article 15
Access to the file and use of documents

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

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

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

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

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

Article 16
Identification and protection of confidential information

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

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.
3. Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.

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

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

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

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

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

CHAPTER VII
GENERAL AND FINAL PROVISIONS

Article 17
Time-limits

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

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

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

4. Where appropriate and upon reasoned request made before the expiry of the original time-limit, time-limits may be extended.
Article 18

Repeals

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

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

Article 19

Transitional provisions

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

Article 20

Entry into force

This Regulation shall enter into force on 1 May 2004.

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

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

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

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

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

II. Details of the alleged infringement and evidence

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

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

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

III. Finding sought from the Commission and legitimate interest

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

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

IV. Proceedings before national competition authorities or national courts

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

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

Date and signature.
THE COUNCIL OF THE EUROPEAN UNION,

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

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

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

Whereas:


(2) Consequently, the Commission does not enjoy powers of investigation and enforcement with regard to infringements of Articles 81 and 82 of the Treaty in respect of air transport between the Community and third countries. In particular, the Commission lacks the requisite fact-finding tools and the powers to impose remedies which are necessary to bring infringements to an end or to impose penalties in respect of proven infringements. Furthermore, the specific rights, powers and obligations assigned to national courts and the competition authorities of the Member States by Regulation (EC) No 1/2003 do not apply to air transport between the Community and third countries; the same holds true for the mechanism for cooperation between the Commission and the competition authorities of the Member States provided for in Regulation (EC) No 1/2003.

(3) Anti-competitive practices in air transport between the Community and third countries may affect trade between Member States. Since the mechanisms enshrined in Regulation (EC) No 1/2003, the function of which is to implement the rules on competition under Articles 81 and 82 of the Treaty, are equally appropriate for applying the competition rules to air transport between the Community and third countries, the scope of that regulation should be extended to cover such transport.

(4) When Articles 81 and 82 of the Treaty are applied in proceedings on the basis of Regulation (EC) No 1/2003 and in accordance with the case-law of the Court of Justice, air services agreements concluded between the Member States and/or the European Community on the one hand and third countries on the other hand should be duly considered, in particular for the purpose of assessing the degree of competition in the relevant air transport markets. This Regulation does, however, not affect the rights and obligations of the Member States under the Treaty with respect to the conclusion and application of such agreements.

(5) Article 2 of Regulation (EEC) No 3975/87 is of a purely declaratory nature and should therefore be deleted. With the exception of Article 6(3), which should continue to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of Regulation (EC) No 1/2003 until the date of expiry of those decisions, Regulation (EC) No 3975/87 will, following the deletion of most of its provisions by Regulation (EC) No 1/2003, cease to serve any further purpose; it should therefore be repealed.

(6) By the same token, an equivalent amendment should also be made to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (4). That regulation, which empowers the Commission to declare by way of regulation that the provisions of Article 81(1) do not apply to certain categories of agreements between undertakings, decisions by associations of undertakings and concerted practices, is at present explicitly limited to air transport between Community airports.

The Commission should be empowered to grant block exemptions in the air transport sector in respect of traffic between the Community and third countries as well as in respect of traffic within the Community. Accordingly, the scope of Regulation (EEC) No 3976/87 should be broadened by abolishing its limitation to air transport between Community airports.

Consequently, Regulation (EEC) No 3975/87 should be repealed, and Regulations (EEC) No 3976/87 and (EC) No 1/2003 should be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 3975/87 shall be repealed, with the exception of Article 6(3), which shall continue to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of Regulation (EC) No 1/2003 until the date of expiry of those decisions.

Article 2

In Article 1 of Regulation (EEC) No 3976/87, ‘between Community airports’ shall be deleted.

Article 3

In Article 32 of Regulation (EC) No 1/2003, point (c) shall be deleted.

Article 4

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 May 2004.

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

Done at Brussels, 26 February 2004.

For the Council

The President

N. DEMPSEY
ARTICLE 53

1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

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

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1 See also: - Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation* (94/1/ECSC, EC) (OJ L 1, 3.1.1994, p. 1)
- *The present agreement has not been ratified by the Swiss Confederation.
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

**Article 54**

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

**Article 55**

1. Without prejudice to the provisions giving effect to Articles 53 and 54 as contained in Protocol 21 and Annex XIV of this Agreement, the EC Commission and the EFTA Surveillance Authority provided for in Article 108(1) shall ensure the application of the principles laid down in Articles 53 and 54.

The competent surveillance authority, as provided for in Article 56, shall investigate cases of suspected infringement of these principles, on its own initiative, or on application by a State within the respective territory or by the other surveillance authority. The competent surveillance authority shall carry out these investigations in cooperation with the competent national authorities in the respective territory and in cooperation with the other surveillance authority, which shall give it its assistance in accordance with its internal rules.

If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the competent surveillance authority shall record such infringement of the principles in a reasoned decision.

The competent surveillance authority may publish its decision and authorize States within the respective territory to take the measures, the conditions and details of which
it shall determine, needed to remedy the situation. It may also request the other surveillance authority to authorize States within the respective territory to take such measures.

**Article 56**

1. Individual cases falling under Article 53 shall be decided upon by the surveillance authorities in accordance with the following provisions:

(a) individual cases where only trade between EFTA States is affected shall be decided upon by the EFTA Surveillance Authority;

(b) without prejudice to subparagraph (c), the EFTA Surveillance Authority decides, as provided for in the provisions set out in Article 58, Protocol 21 and the rules adopted for its implementation, Protocol 23 and Annex XIV, on cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33% or more of their turnover in the territory covered by this Agreement;

(c) the EC Commission decides on the other cases as well as on cases under (b) where trade between EC Member States is affected, taking into account the provisions set out in Article 58, Protocol 21, Protocol 23 and Annex XIV.

2. Individual cases falling under Article 54 shall be decided upon by the surveillance authority in the territory of which a dominant position is found to exist. The rules set out in paragraph 1(b) and (c) shall apply only if dominance exists within the territories of both surveillance authorities.

3. Individual cases falling under subparagraph (c) of paragraph 1, whose effects on trade between EC Member States or on competition within the Community are not appreciable, shall be decided upon by the EFTA Surveillance Authority.

4. The terms ‘undertaking’ and ‘turnover’ are, for the purposes of this Article, defined in Protocol 22.

**Article 57**

1. Concentrations the control of which is provided for in paragraph 2 and which create or strengthen a dominant position as a result of which effective competition would be significantly impeded within the territory covered by this Agreement or a substantial part of it, shall be declared incompatible with this Agreement.

2. The control of concentrations falling under paragraph 1 shall be carried out by:

(a) the EC Commission in cases falling under Regulation (EEC) No 4064/89 in accordance with that Regulation and in accordance with Protocols 21 and 24 and Annex XIV to this Agreement. The EC Commission shall, subject to the review of the EC Court of Justice, have sole competence to take decisions on these cases;

(b) the EFTA Surveillance Authority in cases not falling under subparagraph (a) where the relevant thresholds set out in Annex XIV are fulfilled in the territory of the EFTA
States in accordance with Protocols 21 and 24 and Annex XIV. This is without prejudice to the competence of EC Member States.

**Article 58**

With a view to developing and maintaining a uniform surveillance throughout the European Economic Area in the field of competition and to promoting a homogeneous implementation, application and interpretation of the provisions of this Agreement to this end, the competent authorities shall cooperate in accordance with the provisions set out in Protocols 23 and 24.

**Article 59**

1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

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

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measures to the States falling within their respective territory.

**Article 60**

Annex XIV contains specific provisions giving effect to the principles set out in Articles 53, 54, 57 and 59.

**CHAPTER 2
STATE AID**

**Article 61**

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.
2. The following shall be compatible with the functioning of this Agreement:
   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
   (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:
   (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
   (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;
   (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
   (d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

**Article 62**

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:
   (a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;
   (b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

**Article 63**

Annex XV contains specific provisions on State aid.
**Article 64**

1. If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f).

If a commonly agreed solution has not been found by the end of this two-week period, the competent authority of the affected Contracting Party may immediately adopt appropriate interim measures in order to remedy the resulting distortion of competition.

Consultations shall then be held in the EEA Joint Committee with a view to finding a commonly acceptable solution.

If within three months the EEA Joint Committee has not been able to find such a solution, and if the practice in question causes, or threatens to cause, distortion of competition affecting trade between the Contracting Parties, the interim measures may be replaced by definitive measures, strictly necessary to offset the effect of such distortion. Priority shall be given to such measures that will least disturb the functioning of the EEA.

2. The provisions of this Article will also apply to State monopolies, which are established after the date of signature of the Agreement.

**CHAPTER 3**

**OTHER COMMON RULES**

**Article 65**

1. Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.

2. Protocol 28 and Annex XVII contain specific provisions and arrangements concerning intellectual, industrial and commercial property, which, unless otherwise specified, shall apply to all products and services.

**Surveillance procedure**

**Article 108**

1. The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.
2. The EFTA States shall establish a court of justice (EFTA Court).

The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:

(a) actions concerning the surveillance procedure regarding the EFTA States;
(b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;
(c) the settlement of disputes between two or more EFTA States.

Article 109

1. The fulfilment of the obligations under this Agreement shall be monitored by, on the one hand, the EFTA Surveillance Authority and, on the other, the EC Commission acting in conformity with the Treaty establishing the European Economic Community.

2. In order to ensure a uniform surveillance throughout the EEA, the EFTA Surveillance Authority and the EC Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases.

3. The EC Commission and the EFTA Surveillance Authority shall receive any complaints concerning the application of this Agreement. They shall inform each other of complaints received.

4. Each of these bodies shall examine all complaints falling within its competence and shall pass to the other body any complaints which fall within the competence of that body.

5. In case of disagreement between these two bodies with regard to the action to be taken in relation to a complaint or with regard to the result of the examination, either of the bodies may refer the matter to the EEA Joint Committee which shall deal with it in accordance with Article 111.

Article 110

Decisions under this Agreement by the EFTA Surveillance Authority and the EC Commission which impose a pecuniary obligation on persons other than States, shall be enforceable. The same shall apply to such judgments under this Agreement by the Court of Justice of the European Communities, the Court of First Instance of the European Communities and the EFTA Court.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the authority which each Contracting Party shall designate for this purpose and shall make known to the other Contracting Parties, the EFTA Surveillance Authority,
the EC Commission, the Court of Justice of the European Communities, the Court of First Instance of the European Communities and the EFTA Court.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement, in accordance with the law of the State in the territory of which enforcement is to be carried out, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court of Justice of the European Communities, as far as decisions by the EC Commission, the Court of First Instance of the European Communities or the Court of Justice of the European Communities are concerned, or by a decision of the EFTA Court as far as decisions by the EFTA Surveillance Authority or the EFTA Court are concerned. However, the courts of the States concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

[…]

I - Cartels - 5
PROTOCOL 21
ON THE IMPLEMENTATION OF COMPETITION RULES APPLICABLE TO UNDERTAKINGS

Article 1
The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community, enabling the EFTA Surveillance Authority to give effect to the principles laid down in Articles 1(2)(e) and 53 to 60 of the Agreement, and in Protocol 25.

The Community shall, where necessary, adopt the provisions giving effect to the principles laid down in Articles 1(2)(e) and 53 to 60 of the Agreement, and in Protocol 25, in order to ensure that the EC Commission has equivalent powers and similar functions under this Agreement to those which it has, at the time of the signature of the Agreement, for the application of the competition rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.

Article 2
If, following the procedures set out in Part VII of the Agreement, new acts for the implementation of Articles 1(2)(e) and 53 to 60 and of Protocol 25, or on amendments of the acts listed in Article 3 of this Protocol are adopted, corresponding amendments shall be made in the agreement setting up the EFTA Surveillance Authority so as to ensure that the EFTA Surveillance Authority will be entrusted simultaneously with equivalent powers and similar functions to those of the EC Commission.

Article 3
1. In addition to the acts listed in Annex XIV, the following acts reflect the powers and functions of the EC Commission for the application of the competition rules of the Treaty establishing the European Economic Community:

Control of concentrations


4. Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33).

General procedural rules


Transport

5. [ ]

6. [ ]

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3 This point, introduced by Decision No 77/98 (OJ No L 172, 8.7.1999, p. 56 and EEA Supplement No 30, 8.7.1999, p. 153), e.i.f. 1.9.1998, replaces former point 2. See also Decision No 13/97 (OJ No L 182, 10.7.1997, p. 44 and EEA Supplement No 29, 10.7.1997, p. 59), e.i.f. 1.4.1997.


7 Indent added by Decision No 153/2006 (OJ No L [to be published]), e.i.f. 9.12.2006.


7. [ ]
8. [ ]
9. [ ]


11. [ ]

12. [ ]


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14 Indent and words as amended by above, added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.


18 Indent and words as amended by above, added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

2. In addition to the acts listed in Annex XIV, the following acts reflect the powers and functions of the EC Commission for the application of the competition rules of the Treaty establishing the European Coal and Steel Community (ECSC):

1. Article (ECSC) 65(2), subparagraphs 3 to 5, (3), (4), subparagraph 2, and (5).
2. Article (ECSC) 66(2), subparagraphs 2 to 4, and (4) to (6).
3. **354 D 7026**: High Authority Decision No 26/54 of 6 May 1954 laying down in implementation of Article 66(4) of the Treaty a regulation concerning information to be furnished (OJ of the European Coal and Steel Community No 9, 11.5.1954, p. 350/54).
5. **384 S 0379**: Commission Decision No 379/84/ECSC of 15 February 1984 defining the powers of officials and agents of the Commission instructed to carry out the checks provided for in the ECSC Treaty and decisions taken in application thereof (OJ No L 46, 16.2.1984, p. 23).

**Article 4**

**Article 5**

**Article 6**

**Article 7**
Article 8
Applications submitted to the EC Commission prior to the date of entry into force of the Agreement shall be deemed to comply with the provisions on application under the Agreement.

The competent surveillance authority pursuant to Article 56 of the Agreement and Article 10 of Protocol 23 may require a duly completed form as prescribed for the implementation of the Agreement to be submitted to it within such time as it shall appoint. In that event, applications shall be treated as properly made only if the forms are submitted within the prescribed period and in accordance with the provisions of the Agreement.

Article 9

Article 10
The Contracting Parties shall ensure that the measures affording the necessary assistance to officials of the EFTA Surveillance Authority and the EC Commission, in order to enable them to make their investigations as foreseen under the Agreement, are taken within six months of the entry into force of the Agreement.

Article 11
As regards agreements, decisions and concerted practices already in existence at the date of entry into force of the Agreement which fall under Article 53(1), the prohibition in Article 53(1) shall not apply where the agreements, decisions or practices are modified within six months from the date of entry into force of the Agreement so as to fulfil the conditions contained in the block exemptions provided for in Annex XIV.

Article 12
As regards agreements, decisions of associations of undertakings and concerted practices already in existence at the date of entry into force of the Agreement which fall under Article 53(1), the prohibition in Article 53(1) shall not apply, from the date of entry into force of the Agreement where the agreements, decisions or practices are modified within six months from the date of entry into force of the Agreement so as not to fall under the prohibition of Article 53(1) any more.

Article 13
Agreements, decisions of associations of undertakings and concerted practices which benefit from an individual exemption granted under Article 85(3) of the Treaty estab-
lishing the European Economic Community before the entry into force of the Agreement shall continue to be exempted as regards the provisions of the Agreement, until their date of expiry as provided for in the decisions granting these exemptions or until the EC Commission otherwise decides, whichever date is the earlier.

**Review clause**

By the end of 2005 and at the request of one of the Contracting Parties, the Parties shall review the mechanisms for the enforcement of Articles 53 and 54 of the Agreement as well as the co-operation mechanisms of Protocol 23 to the Agreement, with a view to ensuring the homogenous and effective application of those Articles. The Parties shall in particular review the decision of the EEA Joint Committee No 130/2004 of 24 September 2004 in light of the Parties’ experiences with the new system of enforcing the competition rules and explore the possibility of mirroring in the EEA the system established in the EU by Council Regulation (EC) No 1/2003 as regards the application of Articles 81 and 82 of the Treaty by national competition authorities, the horizontal co-operation between national competition authorities and the mechanism for ensuring uniform application of the competition rules by national authorities.

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PROTOCOL 23
CONCERNING THE COOPERATION BETWEEN THE SURVEILLANCE AUTHORITIES (ARTICLE 58)

GENERAL PRINCIPLES

Article 1

1. The EFTA Surveillance Authority and the EC Commission shall exchange information and consult each other on general policy issues at the request of either of the surveillance authorities.

2. The EFTA Surveillance Authority and the EC Commission, in accordance with their internal rules, respecting Article 56 of the Agreement and Protocol 22 and the autonomy of both sides in their decisions, shall cooperate in the handling of individual cases falling under Article 56(1)(b) and (c), (2), second sentence and (3), as provided for in the provisions below.

3. For the purposes of this Protocol, the term ‘territory of a surveillance authority’ shall mean for the EC Commission the territory of the EC Member States to which the Treaty establishing the European Community applies, upon the terms laid down in that Treaty, and for the EFTA Surveillance Authority the territories of the EFTA States to which the Agreement applies.

Article 1A

In the interests of homogeneous interpretation by the EFTA Surveillance Authority and the EC Commission of Articles 53 and 54 of the Agreement and of Articles 81 and 82 of the Treaty, the EFTA Surveillance Authority and the competent authorities of the EFTA States may also be allowed to participate in meetings of the network of public authorities referred to in recital 15 of Council Regulation (EC) No 1/2003 for the purposes of discussion of general policy issues only. The EFTA Surveillance Authority, the EC Commission and the competent authorities of the EFTA states and of the EC Member States shall have the power to make available all information necessary for the purpose of such general policy discussion in that network. Information made available in this context shall not be used for enforcement purposes. This participation shall be without prejudice to rights of participation of the EFTA States and the EFTA Surveillance Authority granted under the EEA Agreement.

32 Article inserted by Decision No 147/2007 (OJ No L 100, 10.4.2008, p. 99 and EEA Supplement No 19, 10.4.2008, p. 96), e.i.f. 27.10.2007.
THE INITIAL PHASE OF THE PROCEEDINGS

**Article 2**

1. In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other complaints to the extent that it is not apparent that these have been addressed to both surveillance authorities. They shall also inform each other when opening *ex officio* procedures.

2. The EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other information received from the national competition authorities within their respective territories concerning the commencement of the first formal investigative measure in cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement.

3. The surveillance authority which has received information as provided for in the first paragraph may present its comments thereon within 30 working days of its receipt.

**Article 3**

1. The competent surveillance authority shall, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, consult the other surveillance authority when:
   - addressing to the undertakings or associations of undertakings concerned its statement of objections,
   - publishing its intention to adopt a decision declaring Article 53 or 54 of the Agreement not applicable, or
   - publishing its intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.

2. The other surveillance authority may deliver its comments within the time limits set out in the abovementioned publication or statement of objections.

3. Observations received from the undertakings concerned or third parties shall be transmitted to the other surveillance authority.

**Article 4**

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall transmit to the other surveillance authority the administrative letters by which a file is closed or a complaint rejected.

**Article 5**

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall invite the other surveillance authority
to be represented at hearings of the undertakings concerned. The invitation shall also extend to the States falling within the competence of the other surveillance authority.

**ADVISORY COMMITTEES**

**Article 6**

1. In cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall, in due time, inform the other surveillance authority of the date of the meeting of the Advisory Committee and transmit the relevant documentation.

2. All documents forwarded for that purpose from the other surveillance authority shall be presented to the Advisory Committee of the surveillance authority which is competent to decide on a case in accordance with Article 56 together with the material sent out by that surveillance authority.

3. Each surveillance authority and the States falling within its competence shall be entitled to be present in the Advisory Committees of the other surveillance authority and to express their views therein; they shall not have, however, the right to vote.

4. Consultations may also take place by written procedure. However, if the surveillance authority which is not competent to decide on a case in accordance with Article 56 so requests, the competent surveillance authority shall convene a meeting.

**REQUEST FOR DOCUMENTS AND THE RIGHT TO MAKE OBSERVATIONS**

**Article 7**

The surveillance authority which is not competent to decide on a case in accordance with Article 56 of the Agreement may request from the other surveillance authority at all stages of the proceedings copies of the most important documents concerning cases falling under Article 56(1)(b) and (c), (2) second sentence and (3) of the Agreement, and may furthermore, before a final decision is taken, make any observations it considers appropriate.

**ADMINISTRATIVE ASSISTANCE**

**Article 8**

1. When the competent surveillance authority, as defined in Article 56 of the Agreement, by simple request or by decision requires an undertaking or association of undertakings located within the territory of the other surveillance authority to supply information, it shall at the same time forward a copy of the request or decision to the other surveillance authority.

2. At the request of the competent surveillance authority, as defined in Article 56 of the Agreement, the other surveillance authority shall, in accordance with its internal rules,
undertake inspections within its territory in cases where the competent surveillance authority so requesting considers it to be necessary.

3. The competent surveillance authority is entitled to be represented and take an active part in inspections carried out by the other surveillance authority in respect of paragraph 2.

4. All information obtained during such inspections on request shall be transmitted to the surveillance authority which requested the inspections immediately after their finalization.

5. Where the competent surveillance authority, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, carries out inspections within its territory, it shall inform the other surveillance authority of the fact that such inspections have taken place and, on request, transmit to that authority the relevant results of the inspections.

6. When the competent surveillance authority as defined in Article 56 of the Agreement interviews a consenting natural or legal person in the territory of the other surveillance authority, the latter shall be informed thereof. The surveillance authority which is not competent may be present during such an interview, as well as officials from the competition authority on whose territory the interviews are conducted.

EXCHANGE AND USE OF INFORMATION

Article 9

1. For the purpose of applying Articles 53 and 54 of the Agreement, the EFTA Surveillance Authority and the EC Commission shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information acquired or exchanged pursuant to this Protocol shall only be used in evidence for the purpose of procedures under Articles 53 and 54 of the Agreement and in respect of the subject matter for which it was collected.

3. Where the information referred to in Article 2 (1) and (2) concerns a case which has been initiated as a result of an application for leniency, that information cannot be used by the receiving surveillance authority as the basis for starting an inspection on its own behalf. This is without prejudice to any power of the surveillance authority to open an inspection on the basis of information received from other sources.

4. Save as provided under paragraph 5, information voluntarily submitted by a leniency applicant will only be transmitted to the other surveillance authority with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to the other surveillance authority if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. Once the leniency applicant has given consent to the transmission of information to the other surveillance authority, that consent may not be withdrawn.
This paragraph is without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.

5. Notwithstanding paragraph 4, the consent of the applicant for the transmission of information to the other surveillance authority is not required in any of the following circumstances:

a) no consent is required where the receiving surveillance authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting surveillance authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving surveillance authority;

b) no consent is required where the receiving surveillance authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting surveillance authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the leniency applicant or on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme or on any employee or former employee of the leniency applicant or of any of the aforementioned persons. A copy of the receiving authority’s written commitment will be provided to the applicant.

c) in the case of information collected by a surveillance authority under Article 8(2) at the request of the surveillance authority to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the surveillance authority to whom the application was made.

PROFESSIONAL SECRECY

Article 10

1. For the purpose of carrying out the tasks entrusted to it by this Protocol, the EC Commission and the EFTA Surveillance Authority can forward to the States falling within their respective territories all information acquired or exchanged by them pursuant to this Protocol.

2. The EC Commission, the EFTA Surveillance Authority, the competent authorities of the EC Member States and the EFTA States, their officials, servants and other persons working under the supervision of these authorities as well as officials and servants of other authorities of the States shall not disclose information acquired or exchanged by them as a result of the application of this Protocol and of the kind covered by the obligation of professional secrecy.

3. Rules on professional secrecy and restricted use of information provided for in the Agreement or in the legislation of the Contracting Parties shall not prevent exchange of information as set out in this Protocol.
ACCESS TO THE FILE

**Article 10A**

When a surveillance authority grants access to the file to the parties to whom it has addressed a statement of objections, the right of access to the file shall not extend to internal documents of the other surveillance authority or of the competition authorities of the EC Member States and the EFTA States. The right of access to the file shall also not extend to correspondence between the surveillance authorities, between a surveillance authority and the competition authorities of the EC Member States or EFTA States or between the competition authorities of the EC Member States or EFTA States where such correspondence is contained in the file of the competent surveillance authority.

COMPLAINTS AND TRANSFERRAL OF CASES

**Article 11**

1. Complaints may be addressed to either surveillance authority. Complaints addressed to the surveillance authority which, pursuant to Article 56, is not competent to decide on a given case shall be transferred without delay to the competent surveillance authority.

2. If, in the preparation or initiation of ex officio proceedings, it becomes apparent that the other surveillance authority is competent to decide on a case in accordance with Article 56 of the Agreement, this case shall be transferred to the competent surveillance authority.

3. Once a case is transferred to the other surveillance authority as provided for in paragraphs 1 and 2, the case may not be transferred back. A case may not be transferred after
   - the statement of objections has been sent to the undertakings or associations of undertakings concerned,
   - a letter has been sent to the complainant informing him that there are insufficient grounds for pursuing the complaint,
   - the publication of the intention to adopt a decision declaring Article 53 or 54 not applicable, or the publication of the intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.

LANGUAGES

**Article 12**

Any natural or legal person shall be entitled to address and be addressed by the EFTA Surveillance Authority and the EC Commission in an official language of an EFTA State or the European Community which they choose as regards complaints. This shall also cover all instances of a proceeding, whether it be opened following a complaint or ex officio by the competent surveillance authority.

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

(Text with EEA relevance)

(2011/C 308/06)

TABLE OF CONTENTS

1. SCOPE AND PURPOSE OF THE NOTICE ................................................................. 8
2. THE INVESTIGATIVE PHASE .............................................................................. 9
  2.1. Origin of cases ............................................................................................. 9
  2.2. Initial assessment and case allocation ......................................................... 10
  2.3. Opening of proceedings ........................................................................... 11
  2.4. Languages .................................................................................................... 12
  2.5. Information requests ................................................................................... 12
    2.5.1. Scope of request for information .......................................................... 13
    2.5.2. Self-incrimination ............................................................................... 13
    2.5.3. Time limits ........................................................................................... 13
    2.5.4. Confidentiality ..................................................................................... 14
    2.5.5. Meetings and other contacts with the parties and third parties ............ 14
    2.5.6. Power to take statements (interviews) .................................................. 15
  2.6. Inspections .................................................................................................... 15
  2.7. Legal professional privilege ....................................................................... 15
  2.8. Information exchange between competition authorities ........................ 17
  2.9. State of play meetings ............................................................................... 17
    2.9.1. Format of the state of play meetings ...................................................... 18
    2.9.2. Timing of the state of play meetings ...................................................... 18
  2.10. Triangular meetings .................................................................................. 19
  2.11. Meetings with the Commissioner or the Director-General ....................... 19
  2.12. Review of key submissions ....................................................................... 19
  2.13. Possible outcomes of the investigation phase .......................................... 20
3. PROCEDURES LEADING TO A PROHIBITION DECISION ................................. 20
3.1. Right to be heard ..................................................... 20
3.1.1. Statement of Objections ........................................ 21
3.1.1.1. Purpose and content of the Statement of Objections 21
3.1.1.2. Possible imposition of remedies and arguments of the parties 21
3.1.1.3. Possible imposition of fines and arguments of the parties 21
3.1.1.4. Transparency .................................................. 22
3.1.2. Access to file .................................................... 22
3.1.3. Procedures for facilitating the exchange of confidential information between parties to the proceedings ........................................ 23
3.1.4. Written reply to the Statement of Objections ............... 23
3.1.5. Rights of complainants and interested third persons ....... 24
3.1.6. Oral hearing ....................................................... 25
3.1.7. Supplementary Statement of Objections and letter of facts 25
3.2. Possible outcomes of this phase .................................. 26
4. COMMITMENT PROCEDURES ...................................... 26
4.1. Initiation of commitment discussions .............................. 27
4.2. Preliminary Assessment ............................................ 27
4.3. Submission of the commitments ................................... 27
4.4. The ‘market test’ and subsequent discussions with the parties 28
5. PROCEDURE FOR REJECTION OF COMPLAINTS .............. 28
5.1. Grounds for rejection .............................................. 29
5.2. Procedure .......................................................... 29
6. LIMITS ON THE USE OF INFORMATION ......................... 30
7. ADOPTION, NOTIFICATION AND PUBLICATION OF DECISIONS 30
8. FUTURE REVISION .................................................. 31
ANNEX 1 ............................................................... 32
1. SCOPE AND PURPOSE OF THE NOTICE

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

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

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

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


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


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

(9) Staff working paper on Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and merger cases, http://ec.europa.eu/competition/index_en.html
4. The investigation of cartels, as defined in the Leniency Notice (12), may also be subject to the specific procedures on applications for leniency and on settlements (13). These specific procedures are not covered by this notice. Moreover, the particular nature of cartel proceedings in some circumstances requires special provisions, in order not to interfere with possible leniency applications (14) or settlement discussions (15). These special provisions are indicated where applicable.

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

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

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

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

2. THE INVESTIGATIVE PHASE

2.1. Origin of cases

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

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


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

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

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

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

2.2. Initial assessment and case allocation

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

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

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

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

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(17) Or, when appropriate, the relevant national competition authority.
(18) Pursuant to Article 7(2) of Regulation (EC) No 1/2003. Under Articles 5 to 9 of the Implementing Regulation, formal complaints have to fulfil certain requirements. Information contained in submissions that do not respect these requirements may nevertheless be taken into account as market information.
(19) See Article 5(1) of the Implementing Regulation.
(20) The Court of Justice of the European Union has recognised that the Commission is entitled to give differing degrees of priority to the complaints that it receives. This is settled case law since Case T-24/90, Automec v Commission [hereinafter 'Automec II'] (1992) ECR II-2223, para 85.
(21) The Commission has made public a non-exhaustive list of criteria which it intends to use when examining whether or not complaints show a sufficient 'European Union interest'. The criteria were published in the Annual Report on Competition Policy 2005, adopted in June 2006. See as well paragraph 44 of the notice on handling of complaints.
(22) See paragraphs 5 to 15 of the Commission notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43).
confirmed to have taken place this might constitute an infringement of Articles 101 and/or 102 TFEU. After having received a request for information or being subject to an inspection, parties (24) may at any time inquire with the Directorate-General for Competition about the status of the investigation, including before the opening of proceedings. If such an undertaking considers that it has not been properly informed by the Directorate-General for Competition of its procedural status, it may refer the matter to the hearing officer for resolution, after having raised the matter with the Directorate-General for Competition (25). The hearing officer shall take a decision that the Directorate-General for Competition will inform the undertaking or association of undertakings that made the request of their procedural status. This decision shall be communicated to the undertaking or association of undertakings that made the request. If at any stage during the initial assessment phase, the Commission decides not to investigate the case further (and thus not to open proceedings), the Commission will, at its own initiative, inform the party subject to the preliminary investigation thereof.

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

2.3. Opening of proceedings

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

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

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

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

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

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

(24) In this notice, ‘parties’ are defined as the parties subject to the investigation. If not explicitly mentioned, ‘parties’ does not include complainants and admitted third persons (also referred to as ‘third parties’ in this notice).

(25) Article 4(2)(d) of the terms of reference of the hearing officer.

(26) Notice on the handling of complaints, paragraph 61.

(27) According to Article 2 of the Implementing Regulation, the Commission may decide to initiate proceedings with a view to adopting a decision (e.g. a decision finding an infringement or a commitment decision) at any point in time, but no later than the date on which it issues a statement of objections, a preliminary assessment (as referred to in Article 9(1) of Regulation (EC) No 1/2003) or a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, whichever is the earlier.

(28) The opening of proceedings relieves the national competition authorities of their competence to apply Articles 101 and 102 TFEU, see Article 11(6) of Regulation (EC) No 1/2003.
23. The opening of proceedings does not limit the right of the Commission to extend the scope and/or the addressees of the investigation at a later point in time. In case of such an extension of the scope of the investigation, the measures in paragraphs (20) to (21) apply.

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

2.4. Languages

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

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

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

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

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

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

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

2.5. Information requests

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

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

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

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

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

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

2.5.2. Self-incrimination

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

2.5.3. Time limits

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

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


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

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

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

(35) See footnote 33.
39. If they have difficulties responding within the time limit set, addressees may ask for it to be extended. A reasoned request should be made or confirmed in writing (letter or e-mail), sufficiently in advance of the expiry of the time limit. If the Commission considers the request to be justified, additional time (depending on the complexity of the information asked and other factors) will be granted. The Commission may also agree with the addressee of the request that certain parts of the requested information that are of particular importance or easily available for the addressee will be supplied within a shorter time limit, whereas additional time will be granted for supplying the remaining information.

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

2.5.4. Confidentiality

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

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

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

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

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

(36) Article 4(2)(c) of the terms of reference of the hearing officer.
(37) See paragraph 143 below.
(38) The provisions of this section also apply to State of Play meetings and triangular meetings (see Section 2.10 below).
45. The Commission may, after a meeting or other informal contact with the parties, complainants or third parties, request that they provide information in writing pursuant to Article 18 of Regulation (EC) No 1/2003 or invite them to make a statement pursuant to Article 19 of that Regulation.

2.5.6. Power to take statements (interviews)

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

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

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

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

2.6. Inspections

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

2.7. Legal professional privilege

51. According to the case law of the Court of Justice of the European Union (41), the main features of which are summarised below, certain communications between lawyer and client may, subject to strict conditions, be protected by legal professional privilege (also referred to as ‘LPP’) and thus (39) This power to take statements pursuant to Article 19 of Regulation (EC) No 1/2003 should be distinguished from the power of the Commission, during an inspection, to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003.
be confidential as regards the Commission, as an exception to the latter's powers of investigation and examination of documents (42). Communications between lawyer and client are protected by legal professional privilege provided that they are made for the purpose and interest of the exercise of the client's rights of defence in competition proceedings and that they emanate from independent lawyers (43).

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

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

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

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

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

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

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

(46) Akzo, paragraphs 81 and 82.
However, where, in the course of an inspection, the Commission officials consider that the material presented by the undertaking is not of such a nature as to prove that the document in question is protected by legal professional privilege as defined by the case law of the Court of Justice of the European Union, in particular where that undertaking refuses to give the Commission officials a cursory look at a document, but where it cannot be excluded that the document may be protected, the officials may place a copy of the contested document in a sealed envelope and bring it to the Commission's premises, with a view to a subsequent resolution of the dispute.

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

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

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

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

2.8. Information exchange between competition authorities

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

2.9. State of Play meetings

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

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

I - Cartels - 8
61. In this respect the Commission will offer State of Play meetings at certain stages of the procedure. State of Play meetings, which are completely voluntary in nature for the parties, can contribute to the quality and efficiency of the decision making process and to ensure transparency and communication between the Directorate-General for Competition and the parties, notably to inform them of the status of the proceedings at key points in the procedure. State of Play meetings will only be offered to the parties being investigated and not to the complainant (except where the Commission has opened proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and intends to inform the complainant that it will reject its complaint by formal letter under Article 7(1) of the Implementing Regulation) nor to third parties. Where several parties are investigated, State of Play meetings will be offered to each party separately. In cartel proceedings, a State of Play meeting will be offered as provided for in paragraph (65).

2.9.1. Format of the State of Play meetings

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

2.9.2. Timing of the State of Play meetings

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

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

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

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

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

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

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

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

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

2.11. Meetings with the Commissioner or the Director-General

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

2.12. Review of key submissions

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

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

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

(51) A non-confidential version of the reply of the party subject to the investigation to the complaint may thereafter be provided to the complainant.
74. The review of key submissions will not be offered in the context of cartel proceedings (see paragraph (4) above).

2.13. Possible outcomes of the investigation phase

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

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

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

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

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

3. PROCEDURES LEADING TO A PROHIBITION DECISION

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

3.1. Right to be heard

78. The right of the parties to the proceedings to be heard before a final decision adversely affecting their interests is taken is a fundamental principle of EU law. The Commission is committed to ensuring that the effective exercise of the right to be heard is respected in its proceedings (\(^5\)).

79. The hearing officers have the function of safeguarding the effective exercise of procedural rights, in particular the right to be heard, in competition proceedings (\(^5\)). The hearing officers carry out their tasks in full independence from the Directorate-General for Competition, and disputes arising between the latter and any party subject to the proceedings can be brought before the relevant hearing officer for resolution.

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

(\(^5\)) Article 27 of Regulation (EC) No 1/2003, mentioned above.

(\(^6\)) Article 1 of terms of reference of the hearing officer.
3.1.1. Statement of Objections

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

3.1.1.1. Purpose and content of the Statement of Objections

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

3.1.1.2. Possible imposition of remedies and arguments of the parties

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

3.1.1.3. Possible imposition of fines and arguments of the parties

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

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

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

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

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

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

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

3.1.1.4. Transparency

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

3.1.2. Access to file

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

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

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

(56) See footnote 55.
(58) See paragraph 107 below.
(59) Notice on the rules for access to the Commission file, mentioned above.
(60) Commission Notice on Immunity from fines and reduction of fines in cartel cases (mentioned above), paragraphs 31 to 35 and Commission Notice on the conduct of settlement procedures (mentioned above), paragraphs 35 to 40.
(61) See Article 16(4) of the Implementing Regulation.
3.1.3. Procedures for facilitating the exchange of confidential information between parties to the proceedings

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

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

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

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

3.1.4. Written reply to the Statement of Objections

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

100. The time limit for the reply to the Statement of Objections will take into account both the time required for the preparation of the submission and the urgency of the case (\textsuperscript{[2]}). The addressees of the Statement of Objections have the right to a minimum period of four weeks to

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

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

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

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

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

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

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

3.1.5. Rights of complainants and interested third persons

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

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

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

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


(67) Article 9(2) of the terms of reference of the hearing officer.
105. Upon application, the Commission shall also hear other natural or legal persons which can demonstrate a sufficient interest in the outcome of the procedure in accordance with Article 13 of the Implementing Regulation. The hearing officer takes the decision on whether such third persons are admitted to the proceedings. Persons who have been admitted shall be informed in writing of the nature and subject matter of the procedure and a time limit shall be set by the Commission in which they may make their views known in writing. A request for an extension of this time limit may be made by way of a reasoned request to the Directorate-General for Competition in due time before the expiry of the original time limit. If such a request is not granted or the Directorate-General for Competition and the third person admitted to the proceedings disagree about a requested extension the third person may refer the matter to the hearing officer, by means of a reasoned request (68).

3.1.6. Oral hearing

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

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

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

3.1.7. Supplementary Statement of Objections and letter of facts

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

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

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

(68) See footnote 67.
(69) See further the document ‘Key actors and checks and balances’, available on the Directorate-General for Competition’s website.
(70) For example a supplementary Statement of Objections would be issued if the new evidence allows the Commission to extend the duration of the infringement, the geographic scope or the nature or scope of the infringement.
(71) When the Commission merely communicates to a party a non-confidential version (or specific excerpts thereof) of the other parties’ written replies to the Statement of Objections and gives it the opportunity to submit its comments (see paragraph 103 above), this does not constitute a letter of facts.
time limit. A request for an extension of this time limit may be made by way of a reasoned request to the Commission. If the Directorate-General for Competition and the addressee disagree about a requested extension, the addressee may refer the matter to the hearing officer, by means of a reasoned request.

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

3.2. Possible outcomes of this phase

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

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

4. COMMITMENT PROCEDURES

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

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

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

(72) Case C-441/07 P Commission v Alrosa, judgment of 29 June 2010, paragraph 120.
4.1. Initiation of commitment discussions

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

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

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

4.2. Preliminary Assessment

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

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

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

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

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

4.3. Submission of the commitments

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

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

(74) Article 15(1) of the terms of reference of the hearing officer.
(75) See Section 3 of this notice.
128. Commitments must be unambiguous and self-executing (76). If need be, a trustee can be appointed to assist the Commission in their implementation (monitoring and/or divestiture trustee). Furthermore, when commitments cannot be implemented without the agreement of third parties (e.g. where a third party that would not be a suitable buyer under the commitments holds a pre-emption right), the undertaking should submit evidence of the third party’s agreement.

4.4. The ‘market test’ and subsequent discussions with the parties

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

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

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

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

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

5. PROCEDURE FOR REJECTION OF COMPLAINTS

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

(76) That is, their implementation must not be dependant on the will of a third party which is not bound by the commitments.
(78) Non-confidential version.
(79) Without translation.
(80) See also Commission notice on the handling of complaints (mentioned above).
5.1. Grounds for rejection

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

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

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

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

5.2. Procedure

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

(82) The Commission notice on the handling of complaints lists in paragraph 44 certain criteria that can be used in isolation or combination for rejections on the grounds of lack of ‘European Union interest’. Moreover, the Commission identified in its Report on Competition Policy 2005 some criteria that it could use to decide whether or not there is ‘European Union interest’. See also Case T-427/08, Confédération européenne des associations d’horlogers-réparateurs (CEAHR) v Commission, not yet reported.
(83) The notion of same case essentially implies: infringement of the same nature, same product market, same geographic market, at least one of the same undertakings, same period of time.
(84) Paragraph 25 of the Commission’s notice on the handling of complaints.
(86) Article 7(1) of the Implementing Regulation; paragraph 68 of the Commission’s notice on the handling of complaints.
(87) Article 8 of Regulation of the Implementing Regulation; paragraph 69 of the Commission’s notice on the handling of complaints.
(88) Article 17(2) of the Implementing Regulation.
(89) Article 17(4) of the Implementing Regulation.
(90) See footnote 67.
140. If the complainant does not react to the above mentioned letter of the Commission within the time limit, the complaint shall be deemed to have been withdrawn pursuant to Article 7(3) of the Implementing Regulation. The complainant will be informed accordingly about the administrative closure of the case.

141. If the submissions of the complainant in response to the above mentioned letter of the Commission, does not lead the Commission to a different assessment of the complaint, it will reject the complaint by formal decision pursuant to Article 7(2) of the Implementing Regulation. If the submissions of the complainant lead to a different assessment of the complaint, the Commission will continue its investigation.

6. LIMITS ON THE USE OF INFORMATION

142. Information exchanged in the course of these procedures, in particular in the context of access to file and review of key submissions, shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU (91).

143. At all stages of the proceedings, the Commission will respect genuine and justified requests from complainants or from information providers regarding the confidential nature of their submissions or contacts with the Commission, including, where appropriate, their identity, in order to protect their legitimate interests (in particular in case of possible retaliation) and to avoid discouraging them from coming forward to the Commission (92).

144. Commission officials and the members of the Advisory Committee are bound by the obligation of professional secrecy set out in Article 28 of Regulation (EC) No 1/2003. They are therefore prohibited from disclosing any information of the kind covered by this obligation which they have acquired or exchanged in the context of the investigation and the preparation of, and the deliberations in, the Advisory Committee. As regards the Advisory Committee, its members also must not reveal the opinion of the Advisory Committee prior to its publication, if any, or any information concerning the deliberations which led to the formulation of the opinion.

7. ADOPTION, NOTIFICATION AND PUBLICATION OF DECISIONS

145. All decisions pursuant to Articles 7, 9, 23 and 24 of Regulation (EC) No 1/2003 are adopted by the Commission, on a proposal of the Commissioner responsible for competition policy.

146. Immediately after the decision has been adopted, the addressees will be informed of the decision. The Directorate-General for Competition endeavours to send a courtesy copy to the parties. A certified copy of the full text of the decision as well as a copy of the final report of the hearing officer will then be notified to the addressees by express courier service.

147. A press release will be published after the adoption of the decision by the Commission. The press release describes the scope of the case and the nature of the infringement. It also indicates (where appropriate) the amount of fines for each undertaking concerned and/or the remedies imposed or, in decisions pursuant to Article 9 of Regulation (EC) No 1/2003, the commitments rendered binding.

148. The summary of the decision, the hearing officer’s final report as well as the Opinion of the Advisory Committee will be published shortly after the adoption of the decision in the Official Journal of the European Union in all official languages (93).

(91) Cf. Article 15(4) of the Implementing Regulation.
(92) See Article 16(1) of Regulation (EC) No 1/2003.
(93) With the exception of Irish (see Article 2 of Council Regulation (EC) No 920/2005 of 13 June 2005).
149. In addition to the requirements set out in Article 30(1) of Regulation (EC) No 1/2003, the Directorate-General for Competition will endeavour to publish as soon as possible on its website a non-confidential version of the decision in the authentic languages as well as in additional languages, if such versions are available. A non-confidential version of the decision will also be sent to the complainant. The addressees of the decision will normally be asked to provide the Commission within two weeks with a non-confidential version of the decision and to approve the summary. Should disputes arise regarding the deletion of business secrets, a provisional version of the decision excluding all information for which confidentiality has been requested will be made available on the website of the Directorate-General for Competition in any of the official languages in anticipation of a final version after resolution of the disputed parts.

150. In the interest of transparency, the Commission intends to make public on its website its decisions rejecting complaints (pursuant to Article 7 of the Implementing Regulation) or a summary thereof. If required for the protection of legitimate interests of the complainant, the published version of the decision will not identify the complainant. Decisions adopted pursuant to Article 7 of Regulation (EC) No 1/2003 or modifying commitments that have been made binding under Article 9 of that Regulation will also be made public on the website. Other types of decisions may also be published in appropriate cases.

8. FUTURE REVISION

151. This notice may be revised to reflect changes in the applicable legislation, significant developments in the case law of the Court of Justice of the European Union, or further experience gained in applying the competition rules. The Commission intends to engage in regular dialogue with the business and legal community and other interested parties on the experience gained through the application of this notice, of Regulation (EC) No 1/2003, the Implementing Regulation and its various notices and guidelines.
ANNEX 1

The enforcement of Articles 101 and 102 TFEU in prohibition and commitment decisions: a roadmap

Origin of the case
↓
Complaints Ex officio (including leniency applications)

Initial assessment:
- investigative instruments may be used
- case may be allocated to another ECN member and vice versa
- cases discarded which do not merit further action
- complainant informed of proposed course of action

Opening of proceedings (*)

State of Play meeting
- shortly after opening

Investigation
- including State of Play meeting at a sufficiently advanced stage

Statement of Objections (SO)
↓
Access to file

Reply by parties to SO

Oral hearing

State of Play meeting
- offered either after parties have replied to the SO or after the hearing

Case closed

Advisory Committee

Prohibition decision (Article 7 Regulation (EC) No 1/2003)

Commitment decision (Article 9 Regulation (EC) No 1/2003)

if parties show willingness to discuss commitments

Case closed for some/all parties

State of Play meeting

Preliminary Assessment (**)

Submission of commitments

Market test

State of Play meeting

Advisory Committee

Complainants informed about Commission’s intention to reject the complaint

If no reply, complaint is deemed to be withdrawn

If reply by complainant, rejection decision is taken

(*) With the exception of cartel proceedings, where the opening of proceedings normally takes place simultaneously with the adoption of the Statement of Objections.
(**) If an SO has already been issued, a Preliminary Assessment is not required.
Commission Notice on Immunity from fines and reduction of fines in cartel cases
(Text with EEA relevance)

(2006/C 298/11)

I. INTRODUCTION

(1) This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC (1).

(2) By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. They ultimately result in artificial prices and reduced choice for the consumer. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.

(3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission’s investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the intrinsic value. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission’s possession.

(4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.

(5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking’s actual contribution, in terms of quality and timing, to the Commission’s establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission’s possession.

(6) In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.

(7) The supervisory task conferred on the Commission by the Treaty in competition matters does not only include the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy. The protection of corporate statements in the public interest is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Commission, to the extent that it is technically possible to combine both interests by rendering corporate statements accessible only at the Commission premises and normally on a single occasion following the formal notification of the objections. Moreover, the Commission will process personal data in the context of this notice in conformity with its obligations under Regulation (EC) No 45/2001. (2)

II. IMMUNITY FROM FINES

A. Requirements to qualify for immunity from fines

(8) The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel...
affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel (1); or

(b) find an infringement of Article 81 EC in connection with the alleged cartel.

(9) For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardize the inspections:

(a) A corporate statement (2) which includes, in so far as it is known to the applicant at the time of the submission:

— A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.

— The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participated in the alleged cartel;

— The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;

— Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and

(b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

(10) Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.

(11) Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC.

(12) In addition to the conditions set out in points (8)(a), (9) and (10) or in points (8)(b) and 11, all the following conditions must be met in any case to qualify for any immunity from a fine:

(a) The undertaking cooperates genuinely (3), fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This includes:

— providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;

— remaining at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts;

— making current (and, if possible, former) employees and directors available for interviews with the Commission;

— not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and

— not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed;

(1) The assessment of the threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.

(2) Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally.

(3) This requires in particular that the applicant provides accurate, not misleading, and complete information. Cfr judgement of the European Court of Justice of 29 June 2006 in case C-189/02 P, Commission v SGL Carbon AG a.o., at paragraphs 68-70, and judgement of the European Court of Justice of 28 June 2005 in cases C-189/02 P, C-202/02 P, C-203/02 P, C-208/02 P and C-213/02 P, Dansk Rørindustri A/S a.o. v. Commission, at paragraphs 395-399.
(b) The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission’s view, be reasonably necessary to preserve the integrity of the inspections;

(c) When contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

(13) An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor.

B. Procedure

(14) An undertaking wishing to apply for immunity from fines should contact the Commission’s Directorate General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines in order to meet the conditions in points (8)(a) or (8)(b), as appropriate. The Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued.

(15) The Commission services may grant a marker protecting an immunity applicant’s place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. Undertakings which have been granted a marker cannot perfect it by making a formal application in hypothetical terms. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

(16) An undertaking making a formal immunity application to the Commission must:

(a) provide the Commission with all information and evidence relating to the alleged cartel available to it, as specified in points (8) and (9), including corporate statements; or

(b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of the applying undertaking and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.

(17) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking’s application for immunity from fines, confirming the date and, where appropriate, time of the application.

(18) Once the Commission has received the information and evidence submitted by the undertaking under point (16)(a) and has verified that it meets the conditions set out in points (8)(a) or (8)(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

(19) If the undertaking has presented information and evidence in hypothetical terms, the Commission will verify that the nature and content of the evidence described in the detailed list referred to in point (16)(b) will meet the conditions set out in points (8)(a) or (8)(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

(20) If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the Commission will inform the undertaking in writing. In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section III of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.
The Commission will determine in any final decision
the concept of ‘added value’ refers to the extent to which
in order to qualify, an undertaking must provide the
undertakings disclosing their participation in an alleged
cartel, irrespective of whether the immunity application
is presented formally or by requesting a marker.

If at the end of the administrative procedure, the under-
taking has met the conditions set out in point (12), the
Commission will grant it immunity from fines in the rele-
vant decision. If at the end of the administrative proce-
dure, the undertaking has not met the conditions set out
in point (12), the undertaking will not benefit from any
favorable treatment under this Notice. If the Commission,
after having granted conditional immunity ultimately
finds that the immunity applicant has acted as a coercer,
it will withhold immunity.

III. REDUCTION OF A FINE

A. Requirements to qualify for reduction of a fine

Undertakings disclosing their participation in an alleged
cartel affecting the Community that do not meet the
conditions under section II above may be eligible to
benefit from a reduction of any fine that would otherwise
have been imposed.

In order to qualify, an undertaking must provide the
Commission with evidence of the alleged infringement
which represents significant added value with respect to
the evidence already in the Commission’s possession and
must meet the cumulative conditions set out in points
(12)(a) to (12)(c) above.

The concept of ‘added value’ refers to the extent to which
the evidence provided strengthens, by its very nature and/or
its level of detail, the Commission’s ability to prove the
alleged cartel. In this assessment, the Commission will
generally consider written evidence originating from the
period of time to which the facts pertain to have a greater
value than evidence subsequently established. Incrimi-
nating evidence directly relevant to the facts in question
will generally be considered to have a greater value than
that with only indirect relevance. Similarly, the degree of
corroboration from other sources required for the
evidence submitted to be relied upon against other under-
takings involved in the case will have an impact on the
value of that evidence, so that compelling evidence will be
attributed a greater value than evidence such as statements
which require corroboration if contested.

The Commission will determine in any final decision
adopted at the end of the administrative procedure the
level of reduction an undertaking will benefit from, relative
to the fine which would otherwise be imposed. For the:

— first undertaking to provide significant added value: a
  reduction of 30-50 %,
— subsequent undertakings that provide significant
  added value: a reduction of up to 20 %.

In order to determine the level of reduction within each
of these bands, the Commission will take into account the
time at which the evidence fulfilling the condition in
point (24) was submitted and the extent to which it repre-
sents added value.

If the applicant for a reduction of a fine is the first to
submit compelling evidence in the sense of point (25)
which the Commission uses to establish additional facts
increasing the gravity or the duration of the infringement,
the Commission will not take such additional facts into
account when setting any fine to be imposed on the
undertaking which provided this evidence.

B. Procedure

An undertaking wishing to benefit from a reduction of a
fine must make a formal application to the Commission
and it must present it with sufficient evidence of the
alleged cartel to qualify for a reduction of a fine in accord-
ance with point (24) of this Notice. Any voluntary
submission of evidence to the Commission which the
undertaking that submits it wishes to be considered for
the beneficial treatment of section III of this Notice must
be clearly identified at the time of its submission as being
part of a formal application for a reduction of a fine.

If requested, the Directorate General for Competition will
provide an acknowledgement of receipt of the underta-
kings application for a reduction of a fine and of any
subsequent submissions of evidence, confirming the date
and, where appropriate, time of each submission. The
Commission will not take any position on an application
for a reduction of a fine before it has taken a position on
any existing applications for conditional immunity from
fines in relation to the same alleged cartel.

The Commission will come to the preliminary conclusion
that the evidence submitted by the undertaking constitutes
significant added value within the meaning of points (24)
and (25), and that the undertaking has met the conditions
of points (12) and (27), it will inform the undertaking in
writing, no later than the date on which a statement of
objections is notified, of its intention to apply a reduction
of a fine within a specified band as provided in point (26).
The Commission will also, within the same time frame,
inform the undertaking in writing if it comes to the preli-
minary conclusion that the undertaking does not qualify
for a reduction of a fine. The Commission may disregard
any application for a reduction of fines on the grounds
that it has been submitted after the statement of objec-
tions has been issued.
(30) The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted. The Commission will determine in any such final decision:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission’s possession at that same time;

(b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;

(c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).

If the Commission finds that the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favourable treatment under this Notice.

IV. CORPORATE STATEMENTS MADE TO QUALIFY UNDER THIS NOTICE

(31) A corporate statement is a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking’s knowledge of a cartel and its role therein prepared specially to be submitted under this Notice. Any statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission’s file and can thus be used in evidence.

(32) Upon the applicant’s request, the Commission may accept that corporate statements be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Commission’s premises. In accordance with Article 19 of Council Regulation (EC) No 773/2004 (2), undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission’s premises and to correct the substance of their oral statements within a given time limit. Undertakings may waive these rights within the said time-limit, in which case the recording will from that moment on be deemed to have been approved. Following the explicit or implicit approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Commission’s premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under this Notice.

(33) Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf — not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements. The Commission considers that this specific protection of a corporate statement is not justified as from the moment when the applicant discloses to third parties the content thereof.

(34) In accordance with the Commission Notice on rules for access to the Commission file (3), access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points (12) and (27) of this Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceeding, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

(35) Corporate statements made under the present Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation No 1/2003, provided that the conditions set out in the Network Notice (4) are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

V. GENERAL CONSIDERATIONS

(36) The Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose.

From the date of its publication in the Official Journal, this notice replaces the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. However, points (31) to (35) of the current notice will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.

The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.

In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.

The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 (1), even after the decision has been taken.

INTRODUCTION

1. This notice concerns secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports. Such practices are among the most serious restrictions of competition encountered by the Commission and ultimately result in increased prices and reduced choice for the consumer. They also harm European industry.

2. By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.

3. The Commission is aware that certain undertakings involved in this type of illegal agreements are willing to put an end to their participation and inform it of the existence of such agreements, but are dissuaded from doing so by the high fines to which they are potentially exposed. In order to clarify its position in this type of situation, the Commission adopted a notice on the non-imposition or reduction of fines in cartel cases (1), hereafter ‘the 1996 notice’.

4. The Commission considered that it is in the Community interest to grant favourable treatment to undertakings which cooperate with it. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.

5. In the 1996 notice, the Commission announced that it would examine whether it was necessary to modify the notice once it had acquired sufficient experience in applying it. After five years of implementation, the Commission has the experience necessary to modify its policy in this matter. Whilst the validity of the principles governing the notice has been confirmed, experience has shown that its effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted. A closer alignment between the level of reduction of fines and the value of a company's contribution to establishing the infringement could also increase this effectiveness. This notice addresses these issues.

6. The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.

7. Moreover, cooperation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission’s establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission’s possession.

A. IMMUNITY FROM FINES

8. The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if:

(a) the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 (2) in connection with an alleged cartel affecting the Community; or

(b) the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC (3) in connection with an alleged cartel affecting the Community.

9. Immunity pursuant to point 8(a) will only be granted on the condition that the Commission did not have, at the time of the submission, sufficient evidence to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with the alleged cartel.

10. Immunity pursuant to point 8(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point 8(a) in connection with the alleged cartel.

11. In addition to the conditions set out in points 8(a) and 9 or in points 8(b) and 10, as appropriate, the following cumulative conditions must be met in any case to qualify for any immunity from a fine:

(a) the undertaking cooperates fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it remains at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned;

(b) the undertaking ends its involvement in the suspected infringement no later than the time at which it submits evidence under points 8(a) or 8(b), as appropriate;

(c) the undertaking did not take steps to coerce other undertakings to participate in the infringement.

PROCEDURE

12. An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate-General for Competition. Should it become apparent that the requirements set out in points 8 to 10, as appropriate, are not met, the undertaking will immediately be informed that immunity from fines is not available for the suspected infringement.

13. If immunity from fines is available for a suspected infringement, the undertaking may, in order to meet conditions 8(a) or 8(b), as appropriate:

(a) immediately provide the Commission with all the evidence relating to the suspected infringement available to it at the time of the submission; or

(b) initially present this evidence in hypothetical terms, in which case the undertaking must present a descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Expurgated copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence.

14. The Directorate-General for Competition will provide a written acknowledgement of the undertaking's application for immunity from fines, confirming the date on which the undertaking either submitted evidence under 13(a) or presented to the Commission the descriptive list referred to in 13(b).

15. Once the Commission has received the evidence submitted by the undertaking under point 13(a) and has verified that it meets the conditions set out in points 8(a) or 8(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

16. Alternatively, the Commission will verify that the nature and content of the evidence described in the list referred to in point 13(b) will meet the conditions set out in points 8(a) or 8(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

17. An undertaking which fails to meet the conditions set out in points 8(a) or 8(b), as appropriate, may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section B of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

18. The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same suspected infringement.

19. If at the end of the administrative procedure, the undertaking has met the conditions set out in point 11, the Commission will grant it immunity from fines in the relevant decision.

B. REDUCTION OF A FINE

20. Undertakings that do not meet the conditions under section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

21. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

22. The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.
23. The Commission will determine in any final decision adopted at the end of the administrative procedure:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, as follows. For the:

— first undertaking to meet point 21: a reduction of 30-50 %,

— second undertaking to meet point 21: a reduction of 20-30 %,

— subsequent undertakings that meet point 21: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.

PROCEDURE

24. An undertaking wishing to benefit from a reduction of a fine should provide the Commission with evidence of the cartel in question.

25. The undertaking will receive an acknowledgement of receipt from the Directorate-General for Competition recording the date on which the relevant evidence was submitted. The Commission will not consider any submissions of evidence by an applicant for a reduction of a fine before it has taken a position on any existing application for a conditional immunity from fines in relation to the same suspected infringement.

26. If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes added value within the meaning of point 22, it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point 23(b).

27. The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted.

GENERAL CONSIDERATIONS

28. From 14 February 2002, this notice replaces the 1996 notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. The Commission will examine whether it is necessary to modify this notice once it has acquired sufficient experience in applying it.

29. The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.

30. Failure to meet any of the requirements set out in sections A or B, as the case may be, at any stage of the administrative procedure may result in the loss of any favourable treatment set out therein.

31. In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.

32. The Commission considers that normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council.

33. Any written statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file. It may not be disclosed or used for any other purpose than the enforcement of Article 81 EC.
COMMISSION NOTICE

on the non-imposition or reduction of fines in cartel cases

(96/C 207/04)

A. INTRODUCTION

1. Secret cartels between enterprises aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports are among the most serious restrictions of competition encountered by the Commission.

Such practices ultimately result in increased prices and reduced choice for the consumer. Furthermore, they not only prejudice the interests of Community consumers, but they also harm European industry. By artificially limiting the competition that would normally prevail between them, Community enterprises avoid exactly those pressures that lead them to innovate, both in terms of product development and with regard to the introduction of more efficient production processes. Such practices also lead to more expensive raw materials and components for the Community enterprises that buy from such producers. In the long term, they lead to a loss of competitiveness and, in an increasingly global market-place, reduced employment opportunities.

For all those reasons, the Commission considers that combating cartels is an important aspect of its endeavours to achieve the objectives set out in its 1993 White Paper on Growth, Competitiveness and Employment. This explains why it has increased its efforts to detect cartels in recent years.

2. The Commission is aware that certain enterprises participating in such agreements might wish to terminate their involvement and inform the Commission of the existence of the cartel, but are deterred from doing so by the risk of incurring large fines.

3. In order to take account of this fact, the Commission has decided to adopt the present notice, which sets out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fines which would otherwise have been imposed upon them. The Commission will examine whether it is necessary to modify this notice as soon as it has acquired sufficient experience in applying it.

4. The Commission considers that it is in the Community interest in granting favourable treatment to enterprises which cooperate with it in the circumstances set out below. The interests of consumers and citizens in ensuring that such practices are detected and prohibited outweigh the interest in fining those enterprises which cooperate with the Commission, thereby enabling or helping it to detect and prohibit a cartel.

5. Cooperation by an enterprise is only one of several factors which the Commission takes into account when fixing the amount of a fine. This notice does not prejudice the Commission's right to reduce a fine for other reasons.

B. NON-IMPOSITION OF A FINE OR A VERY SUBSTANTIAL REDUCTION IN ITS AMOUNT

An enterprise which:

(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;
(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity,

will benefit from a reduction of at least 75 % of the fine or even from total exemption from the fine that would have been imposed if they had not cooperated.

C. SUBSTANTIAL REDUCTION IN A FINE

Enterprises which both satisfy the conditions set out in Section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50 % to 75 % of the fine.

D. SIGNIFICANT REDUCTION IN A FINE

1. Where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10 % to 50 % of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

E. PROCEDURE

1. Where an enterprise wishes to take advantage of the favourable treatment set out in this notice, it should contact the Commission's Directorate-General for Competition. Only persons empowered to represent the enterprise for that purpose may take such a step. This notice does not therefore cover requests from individual employees of enterprises.

2. Only on its adoption of a decision will the Commission determine whether or not the conditions set out in Sections B, C and D are met, and thus whether or not to grant any reduction in the fine, or even waive its imposition altogether. It would not be appropriate to grant such a reduction or waiver before the end of the administrative procedure, as those conditions apply throughout such period.

3. Nonetheless, provided that all the conditions are met, non-imposition or reductions will be granted. The Commission is aware that this notice will create legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission. Failure to meet any of the conditions set out in Sections B or C at any stage of the administrative procedure will, however, result in the loss of the favourable treatment set out therein. In such circumstances an enterprise may, however, still enjoy a reduction in the fine, as set out in Section D above.
4. The fact that leniency in respect of fines is granted cannot, however, protect an enterprise from the civil law consequences of its participation in an illegal agreement. In this respect, if the information provided by the enterprise leads the Commission to take a decision pursuant to Article 85 (1) of the EC Treaty, the enterprise benefiting from the leniency in respect of the fine will also be named in that decision as having infringed the Treaty and will have the part it played described in full therein. The fact that the enterprise cooperated with the Commission will also be indicated in the decision, so as to explain the reason for the non-imposition or reduction of the fine.

Should an enterprise which has benefited from a reduction in a fine for not substantially contesting the facts then contest them for the first time in proceedings for annulment before the Court of First Instance, the Commission will normally ask that court to increase the fine imposed on that enterprise.
I. INTRODUCTION

1. In a system of parallel competences between the European Commission (hereinafter the Commission) and National Competition Authorities (hereinafter NCAs), an application for leniency to one authority is not to be considered as an application for leniency to another authority. It is therefore in the interest of the applicant to apply for leniency to all Competition Authorities (hereinafter CAs) which have competence to apply Article 101 of the Treaty on the Functioning of the European Union (hereinafter TFEU) in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question.

2. The purpose of the ECN Model Leniency Programme (hereinafter the ECN Model Programme) is to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Programme therefore sets out the treatment which an applicant can anticipate in any ECN jurisdiction once alignment of all programmes has taken place. In addition, the ECN Model Programme aims to alleviate the burden associated with multiple filings in cases for which the Commission is particularly well placed by introducing a model for a uniform summary application system.

3. The ECN Model Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope. The ECN members commit to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Programme. The ECN Model Programme does not prevent a CA from adopting a more favourable approach towards applicants within its programme.

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1 The term “leniency” refers to immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel, in exchange for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case (see paragraph 37 of the Commission Notice on cooperation within the Network of Competition Authorities (hereinafter the Network Notice)).

2 See paragraph 38 of the Network Notice.
II. SCOPE OF THE PROGRAMME

4. The ECN Model Programme concerns secret cartels, in particular agreements and/or concerted practices between two or more competitors aimed at restricting competition through, for example, the fixing of purchase or selling prices, the allocation of production or sales quotas or the sharing of markets including bid-rigging.

III. IMMUNITY FROM FINES

Type 1A

5. The CA will grant an undertaking immunity from any fine which would otherwise have been imposed provided:

a) The undertaking is the first to submit evidence which in the CA’s view, at the time it evaluates the application, will enable the CA to carry out targeted inspections in connection with an alleged cartel;

b) The CA did not, at the time of the application, already have sufficient evidence to adopt an inspection decision/seek a court warrant for an inspection or had not already carried out an inspection in connection with the alleged cartel arrangement; and

c) The conditions attached to leniency are met.

6. With a view to enabling the CA to carry out targeted inspections, the undertaking should be in a position to provide the CA with the following:

- The name and address of the legal entity submitting the immunity application;
- The other parties to the alleged cartel;
- A detailed description of the alleged cartel, including:
  - The affected products;
  - The affected territory (-ies);
  - The duration; and
  - The nature of the alleged cartel conduct;
- Evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence);
- Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.
Type 1B

7. In cases where no undertaking had been granted conditional immunity from fines before the CA carried out an inspection or before it had sufficient evidence to adopt an inspection decision/seek a court warrant for an inspection, the CA will grant an undertaking immunity from any fine which would otherwise have been imposed if:

   a) The undertaking is the first to submit evidence which in the CA’s view, enables the finding of an infringement of Article 101 TFEU in respect of an alleged cartel;

   b) At the time of the submission, the CA did not have sufficient evidence to find an infringement of Article 101 TFEU in connection with the alleged cartel; and

   c) The conditions attached to leniency are met.

Excluded immunity applicants

8. An undertaking which took steps to coerce another undertaking to participate in the cartel will not be eligible for immunity from fines under the programme.

IV. REDUCTION OF FINES: TYPE 2

9. Undertakings that do not qualify for immunity may benefit from a reduction of any fine that would otherwise have been imposed.

10. In order to qualify for a reduction of fines, an undertaking must provide the CA with evidence of the alleged cartel which, in the CA’s view, represents significant added value relative to the evidence already in the CA’s possession at the time of the application. The concept of ‘significant added value’ refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the CA’s ability to prove the alleged cartel.

11. In order to determine the appropriate level of reduction of the fine, the CA will take into account the time at which the evidence was submitted (including whether the applicant was the first, second or third, etc. undertaking to apply) and the CA’s assessment of the overall value added to its case by that evidence. Reductions granted to an applicant following a Type 2 application shall not exceed 50% of the fine which would otherwise have been imposed.

12. If a Type 2 applicant submits compelling evidence which the CA uses to establish additional facts which have a direct bearing on the amount of the

\[\text{footnote 3} \quad \text{For national programmes, the equivalent national legal basis should be added.}\]

\[\text{footnote 4} \quad \text{Germany and Greece note that the sole ringleader is not eligible for immunity from fines under their respective programmes.}\]
fine, this will be taken into account when setting any fine to be imposed on the undertaking which provided this evidence.

V. CONDITIONS ATTACHED TO LENIENCY

13. In order to qualify for leniency under this programme, the applicant must satisfy the following cumulative conditions:

(1) It ends its involvement in the alleged cartel immediately following its application save to the extent that its continued involvement would, in the CA’s view, be reasonably necessary to preserve the integrity of the CA’s inspections;

(2) It cooperates genuinely, fully and on a continuous basis from the time of its application with the CA until the conclusion of the case; this includes in particular:
   (a) providing the CA promptly with all relevant information and evidence that comes into the applicant’s possession or under its control;
   (b) remaining at the disposal of the CA to reply promptly to any requests that, in the CA’s view, may contribute to the establishment of relevant facts;
   (c) making current and, to the extent possible, former employees and directors available for interviews with the CA;
   (d) not destroying, falsifying or concealing relevant information or evidence; and
   (e) unless and to the extent otherwise explicitly authorised by the CA, not disclosing the fact or any of the content of the leniency application at least before the CA has notified its objections to the parties.

(3) When contemplating making an application to the CA but prior to doing so, it must not have:
   (a) destroyed evidence which falls within the scope of the application; or

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5 ‘Application’ in this paragraph 13 refers to an application for a marker, a summary application or a full leniency application (as the case may be).

6 Due to the variety of procedures and investigative measures applied in the various jurisdictions, the ECN Model Programme has been drafted in a manner that takes into account both administrative and judicial proceedings. The terms “objections” and “statement of objections” should be read as covering all equivalent steps under the relevant procedures where the investigative stage has been completed and the parties are formally notified of the CA’s objections.
(b) disclosed, directly or indirectly, the fact or any of the content of the application it is contemplating except to other CAs or any competition authority outside the EU.

VI. PROCEDURE

Approaching the CA

14. An undertaking wishing to benefit from leniency must apply to the CA and provide it with the information specified above. Before making a formal application, the applicant may on an anonymous basis approach the CA in order to seek informal guidance on the application of the leniency programme.

15. Once a formal application has been made, the CA will, upon request, provide an acknowledgement of receipt confirming the date and time of the application. The CA will assess applications in relation to the same alleged cartel in the order of receipt.

Procedure for immunity applications

Marker for immunity applicants

16. An undertaking wishing to make an application for immunity may initially apply for a ‘marker’. A marker protects an applicant’s place in the queue for a given period of time and allows it to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity.

17. The CA has discretion as to whether or not it grants a marker. Where a marker is granted, the CA determines the period within which the applicant has to ‘perfect’ the marker by submitting the information required to meet the relevant evidential threshold for immunity. If the applicant perfects the marker within the set period, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

18. To be eligible to secure a marker, the applicant must provide the CA with its name and address as well as information concerning:

- The basis for the concern which led to the leniency approach;
- The parties to the alleged cartel;
- The affected product(s);
- The affected territory (-ies);
- The duration of the alleged cartel;
- The nature of the alleged cartel conduct; and
- Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.
**Granting immunity**

19. Once the CA has verified that the evidence submitted is sufficient to meet the relevant evidential threshold for immunity, it will grant the undertaking conditional immunity from fines in writing.

20. If the relevant evidential threshold is not met, the CA will inform the undertaking in writing that its application for immunity is rejected. The undertaking may in that case request the CA to consider its application for a reduction of the fine.

21. The CA will take its final position on the grant of immunity at the end of the procedure. If the CA, having granted conditional immunity, ultimately finds that the immunity applicant acted as a coercer or that the applicant has not fulfilled all of the conditions attached to leniency, the CA will inform the applicant of this promptly. If immunity is withheld because the CA finds at the end of the procedure that the conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any other favourable treatment under this programme in respect of the same proceedings.

**Procedure for reductions of fines applications**

22. If the CA comes to the preliminary conclusion that the evidence submitted by an undertaking constitutes ‘significant added value’ within the meaning of the programme, it will inform the undertaking in writing of its intention to apply a reduction of fines. This confirmation will be given as early as possible and no later than the date the statement of objections is notified to the parties. The final amount of reduction will be determined at the latest by the end of the procedure.

23. If the CA finds that one or more of the conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any favourable treatment under this programme in respect of the same proceedings.

**Summary applications**

24. In cases where the Commission is ‘particularly well placed’ to deal with a case in accordance with paragraph 14 of the Network Notice, the applicant that has or is in the process of filing a leniency application, either for immunity or for reduction of a fine, with the Commission may file summary applications with any NCAs which the applicant considers might be ‘well placed’ to act under the Network Notice. Summary applications should each have an identical substantive scope to the respective application with the Commission and should include a short description of the following:

- The name and address of the applicant;
- The other parties to the alleged cartel;
- The affected product(s);
- The affected territory(-ies);
- The duration;
– The nature of the alleged cartel conduct;
– The Member State(s) where the evidence is likely to be located; and
– Information on its other past or possible future leniency applications in relation to the alleged cartel.

25. Having received a summary application, the NCA will acknowledge receipt and grant the applicant a summary application marker based on the date and time when the information was provided to the NCA concerned. In addition, if the summary applicant is the first applicant in respect of the alleged cartel at the NCA concerned, the NCA will inform the summary applicant accordingly.

26. Should an NCA having received a summary application decide to request specific further information, the applicant should provide such information promptly. Should an NCA decide to act upon the case, it will determine a period of time within which the applicant must make a full submission of all relevant evidence and information required to meet the applicable threshold. If a Type 1A or Type 1B summary applicant submits such information within the set period to the NCA, the information provided will be deemed to have been submitted on the date when the summary application marker was granted. Type 2 summary applications will be assessed in the order created by summary application markers, subject to the threshold and other requirements applicable under the respective leniency programme. If an NCA requests the applicant to make a full submission, the applicant must submit to the NCA all information and evidence relating to the alleged cartel, subject to the requirements under the relevant leniency programme.

27. Summary applications are deemed to be applications within the meaning of paragraph 41(1) of the Network Notice.

_Statements under the leniency programme and oral procedure_

28. Upon the applicant’s request, the CA may allow oral applications. In such cases the statements’ may be provided orally and recorded in any form deemed appropriate by the CA. The applicant will still need to provide the CA with copies of all pre-existing documentary evidence of the cartel.

29. No access to any records of the statements (whether oral or written) will be granted before the CA has issued its statement of objections to the parties.

30. Statements (both oral and written) made under the present programme will only be exchanged between CAs pursuant to Article 12 of Regulation No 1/2003 if the conditions set out in the Network Notice are met and provided that the protection against disclosure granted by the receiving CA is equivalent to the one conferred by the transmitting CA.

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7 The term ‘statement’ refers both to corporate statements given by legal representatives on behalf of undertakings and witness statements made by employees and directors of the undertakings.
VII. REVIEW OF THE ECN MODEL PROGRAMME

31. The ECN Model Programme may be reviewed on the basis of the experience gathered by the ECN members. In any event, no later than at the end of the second year after the publication of the ECN Model Programme, the state of convergence of the leniency programmes of ECN members will be assessed.
I. INTRODUCTION

Importance of leniency programmes in the fight against cartels

1. Cartel activities are very serious violations of competition law. They injure consumers by raising prices and restricting supply. In the long term, they lead to a loss of competitiveness and reduced employment opportunities. Undertakings involved in these types of illegal activities that are willing to put an end to their participation and inform the European Commission and the National Competition Authorities (i.e. CAs) of the existence of such activities should not be dissuaded from doing so by the high fines to which they are potentially exposed. The CAs consider that it is in the public interest to grant favourable treatment to undertakings which co-operate with them.

2. The purpose of leniency programmes is to assist CAs in their efforts to detect and terminate cartels and to punish cartel participants. The CAs consider that the voluntary assistance with the above objectives has an intrinsic value for the economic well-being of individual Member States as well as the Common Market which may justify immunity in certain cases (Type 1A and 1B) and a reduction of any fine in others (Type 2).

Safeguards for leniency information within the ECN

3. In order to prevent the mechanisms for cooperation between CAs established by Regulation No 1/2003\(^8\) discouraging applicants from voluntarily reporting cartel activities, the Network Notice sets out special safeguards for leniency related information\(^9\). These safeguards enable the CAs to exchange and use in evidence leniency related information without jeopardising the effectiveness of their respective programmes.

4. According to paragraph 39 of the Network Notice, leniency related information submitted pursuant to Article 11 of Regulation 1/2003 cannot be used by other CAs to start an investigation.

5. According to paragraph 41, information submitted by a leniency applicant or collected on that basis, may only be exchanged between two CAs in the following circumstances:

   – The applicant consents to the exchange; or
   – The applicant has applied for leniency with both CAs in the same case; or

\(^8\) OJ L 1, 4.1.2003, page 1.

\(^9\) See paragraphs 39-42 of the Network Notice. Leniency related information covers not only information contained in the leniency application itself, but all information that has been collected following any fact-finding measures that could not have been carried out but for the leniency application.
The receiving CA provides a written commitment not to use the information transmitted or any information it may obtain after the date of the transmission to impose sanctions on the applicant, its subsidiaries or its employees. A copy of the written commitment is sent to the applicant.

**Purpose of the ECN Model Programme**

6. Making multiple parallel applications across the ECN is a complex exercise given the existing discrepancies between the different leniency regimes. Certain discrepancies may have adverse effects on the effectiveness of individual programmes. In addition, for cases involving a significant number of jurisdictions and for which the Commission is particularly well placed to act within the meaning of the Network Notice, the multiple filing of complete applications to all other possibly well placed CAs can be a cumbersome process which could discourage certain applicants from applying for leniency under any programme.

7. The purpose of the ECN Model Programme is to address the issue of multiple parallel applications and to provide a greater degree of predictability for potential applicants. The ECN Model Programme is based on the common experience of the CAs having operated a leniency programme for a number of years and has two principal objectives. Firstly, the ECN Model Programme is meant to trigger soft harmonisation of the existing leniency programmes and to facilitate the adoption of such programmes by the few CAs who do not currently operate one. Secondly, it sets out the features of a uniform type of short form applications (so-called summary applications) designed to alleviate the burden on both undertakings and CAs associated with multiple filing in large, cross-border cartel cases.

8. While it is highly desirable to ensure that all CAs operate a leniency programme, the variety of legislative frameworks, procedures and sanctions across the EU makes it difficult to adopt one uniform system. The ECN Model Programme therefore sets out the principal elements which, after the soft harmonisation process has occurred, should be common to all leniency programmes across the ECN. This would be without prejudice to the possibility for a CA to add further detailed provisions which suit its own enforcement system or to provide for a more favourable treatment of its applicants if it considers it to be necessary in order to ensure effective enforcement.

9. The Commission and the NCAs are committed to seeking the alignment of the programmes in their jurisdictions within the framework specified by the ECN Model Programme. It is recognised that some ECN members do not have the power to implement changes in their national leniency programmes as this power is held by other bodies. However, the existence of the ECN Model Programme should assist all relevant bodies (ECN members as well as other decision-making bodies) in implementing an efficient policy and making sure that cooperation within the ECN works as efficiently and effectively as possible.
II. THE ECN MODEL PROGRAMME

10. The ECN Model Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope. The ECN Model Programme does not give rise to any legal or other legitimate expectations on the part of any undertaking.

A. Scope of the programme

11. The ECN Model Programme concerns secret cartels. Secrecy does not imply that all aspects of the conduct should be secret, while in particular such elements that make the full extent of the conduct and the fact that it constitutes a cartel more difficult to detect are not known to the public or the customers/suppliers.

12. Cartels constitute very serious violations of competition rules which are often extremely difficult to detect and investigate without the cooperation of at least one of the participants. The interests of consumers and citizens in ensuring that such cartels are detected, terminated and punished outweighs the interest in fining those undertakings that enable a CA to detect, terminate and punish such illegal practices.

13. For the purpose of the ECN Model Programme cartels are agreements and/or concerted practices between competitors aimed at restricting competition by co-ordinating their competitive behaviour or influencing the relevant parameters of competition within the EEA. Cartel participants would typically collude to fix their purchase or selling prices, and/or to allocate production or sales quotas and/or to share markets. These cartel practices include arrangements which either directly or indirectly affect prices, volumes, market shares and other relevant parameters of competition. By way of example, collusive practices such as restrictions on imports or exports, bid-rigging or joint boycotts fall within the scope of the ECN Model Programme.

14. Other types of restriction such as vertical agreements and horizontal restrictions other than cartels are normally less difficult to detect and/or investigate and therefore do not justify being dealt with under a leniency programme. In addition, including agreements other than cartels within the scope of a leniency programme may risk re-introducing a kind of de facto notification system which would be undesirable. It is not excluded, however, that a cartel which includes vertical elements may be covered by the leniency programme.

15. The ECN Model Programme only concerns corporate leniency. It does not cover sanctions on natural persons which are not undertakings. In order to ensure that corporate leniency programmes work efficiently, it is however important to protect to the greatest extent possible employees and directors of the undertakings applying for immunity. It may also be appropriate to offer

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10 This is a non-exhaustive list of examples. See also paragraph 59 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 011, 14/01/2011, p. 1 - 72.
protection from individual sanctions to employees and directors of applicants for a reduction of any fine. A number of CAs have leniency programmes that allow both individuals and undertakings involved in a cartel to individually apply for leniency. This is not in any way impeded by the ECN Model Programme’s alignment of the corporate leniency programmes.

B. Immunity from fines: Type 1A and 1B

Evidential thresholds for immunity

16. The ECN Model Programme contains two different evidential thresholds for granting immunity:

- one for the first undertaking that provides the CA with sufficient evidence to enable it to carry out targeted inspections in connection with an alleged cartel (Type 1A); and

- one for the first undertaking that submits evidence which in the CA’s view may enable the finding of an infringement of Article 101 TFEU in connection with an alleged cartel (Type 1B).

17. Immunity is no longer available under Type 1B if it has already been granted under Type 1A.

18. Immunity is available under a lower threshold in Type 1A compared to Type 1B in order to create an incentive for cartel participants to leave the cartel and to report infringements which are not yet known to the CAs.

19. The threshold in a Type 1A situation is that the applicant must provide the CA with sufficient information to allow it to carry out targeted inspections. The assessment of the threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant. The list contained in the ECN Model Programme and described in more detail below should serve as guidance for the applicant to anticipate what is usually required by a CA.

20. In order to meet the evidential threshold in Type 1A cases, undertakings should generally be in a position to provide the CA with the following information and evidence:

- The name and address of the legal entity submitting the immunity application, as well as the names of individuals who are or have been involved in the alleged cartel on its behalf;

- The identity of all the other undertakings which participate(d) in the alleged cartel as well as of the individuals who, to the applicant’s knowledge, are or have been involved in the alleged cartel;

- A detailed description of the alleged cartel conduct, including for instance its aims, activities and functioning; the product(s) or service(s) concerned, the geographic coverage, the duration and the estimated
market volumes affected by the alleged cartel; the dates, locations, content and participants of alleged cartel contacts; all relevant explanations in connection with evidence provided in support of the application;

– Evidence relating to the alleged cartel in the possession of the applicant or available to it at the time of the submission, in particular contemporaneous evidence; and

– Information on which other CAs, inside or outside the EU, have been approached or are intended to be approached by the applicant in relation to the alleged cartel.

21. If a CA has carried out an inspection or already has in its possession sufficient evidence to carry out an inspection, immunity under Type 1A will no longer be available.

**Excluded applicants**

22. An undertaking which has taken steps to coerce one or more undertakings to join or remain in the cartel should, as a matter of principle, be excluded from the benefit of immunity. Considerations of natural justice prevent an undertaking that has played such a role from escaping sanction altogether. The scope of the exclusion is narrow, however, so as to avoid creating uncertainty for potential applicants.

**C. Reduction of fines: Type 2**

23. It is in the interest of CAs to obtain the cooperation in the proceedings of those undertakings which do not qualify for immunity, either because they failed to meet the relevant evidential threshold or because of the role they played in the cartel. Such cooperation ensures that cartel activities are more efficiently investigated and penalised.

24. The value of the cooperation depends on the timing (including whether the applicant was the first, second or third, etc. to apply) and the quality and nature of the evidence submitted. There are various ways of combining these parameters to reward the contribution of the applicant. However, all systems should ensure that there is a significant difference between immunity from fines and reductions of fines in order to make applications for immunity significantly more attractive. Significant added value for type 2 applications should therefore not be rewarded with a reduction of any fine of more than 50%.

25. Applicants are required to adduce evidence which constitutes in the CA’s view significant added value with respect to the evidence already in its possession at the time the application was submitted. The CA will generally consider written evidence originating from the period to which the facts pertain to have a greater value than evidence subsequently created, and incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required to rely on the evidence submitted will have an impact on the value of that evidence.
26. The ECN Model Programme contains a provision to counter any potentially adverse consequences for Type 2 applicants when they submit compelling evidence relating to additional facts which have a direct bearing on the amount of the fines.

D. Conditions attached to leniency

27. Qualifying for conditional immunity or bringing significant added value to an investigation will entitle an applicant to immunity or a reduction of fines provided that three cumulative conditions are met.

28. The final assessment of full compliance with the conditions attached to leniency is made at the end of the procedure.

29. The first condition relates to the termination of the alleged cartel conduct. Undertakings should terminate all cartel activities as soon as possible. However, experience shows that immediate termination, e.g. sudden unexplained absences from regular cartel meetings, after the application and before the CA has undertaken inspections can seriously undermine the effectiveness of subsequent inspections by alerting other cartel participants and allowing them to conceal or destroy evidence. It is therefore in the public interest to delay the complete termination of all cartel activities until the point in time necessary to safeguard the integrity of the inspection. This derogation to the general rule should be agreed to only when it is necessary and should strike the appropriate balance between bringing an end to the illegal activities of the applicant as soon as possible and protecting the effectiveness of the CA’s investigation. This is also necessary to allow coordination between the various CAs in the event of parallel proceedings and to avoid applicants from being exposed to conflicting demands. The need to continue with certain cartel conduct should be discussed between the applicant and the CA at a very early stage.

30. The second condition is the obligation to cooperate with the CA throughout the procedure. This obligation is an essential feature of the leniency programme. It starts from the date of application to the CA and lasts throughout the procedure. In this respect, there is no reason to distinguish between applicants for immunity and those for a reduction of fines. In all cases, the cooperation has to be genuine, i.e., the assistance of the applicant, in addition to being comprehensive and immediate, should reveal a sincere spirit of cooperation. It has various facets and therefore the list of duties that can be drawn is necessarily non-exhaustive. It involves among others:

- providing without delay any pre-existing evidence and information which is available to the applicant or comes into its possession or under its control during the investigation;

11 See, for example, the judgment of the Court of Justice of 29 June 2006 in Case C-301/04 P, Commission v. SGL Carbon AG, a.o., at paragraphs 66 to 80; the judgment of the Court of Justice of 28 June 2005 in Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213 /02 P, Dansk Rørindustri A/S a.o. v. Commission, at paragraphs 395 and 399; and the judgment of the General Court of 9 September 2011 in Case T-12/06, Deltafina SpA v Commission, at paragraphs 124 to 134.
– answering without delay any question from the CA and making current and, where possible former, individual employees and directors available for interviews with the CA. This encompasses, inter alia, gathering all relevant information and material relevant to substantiate the leniency application that may be in possession of an employee or a director prior to their dismissal\(^{12}\) or their voluntary departure;

– not destroying, falsifying or concealing evidence which falls within the scope of the application after having applied for leniency;

– not revealing (directly or indirectly) the fact or any of the content of its leniency application before the CA has notified its objections to the parties.

31. The obligation of non-disclosure of the application shall not be considered breached if the applicant informs another competition authority of the existence or the content of the leniency application, in the context of multiple applications by the same leniency applicant. Similarly, the obligation of non-disclosure shall not be considered breached if the applicant involves external counsel for the purpose of obtaining legal advice, provided the applicant ensures that the external counsel does not disclose any such information to any third party. Leniency applicants are encouraged to take necessary internal measures that would allow them to show to the CA, upon request, who has been informed by the applicant, at what date and time, about the fact or any of the content of the (contemplated or submitted) leniency application.

32. Unless otherwise explicitly authorised by the CA, an applicant’s obligation of non-disclosure lasts at least until the CA has notified its objections to the parties. CAs may apply the obligation for a longer period, beyond the notification of objections to the parties, for example throughout their entire procedure. Leniency applicants who have submitted multiple applications with several CAs are encouraged to carefully verify throughout the duration of the procedures at the different CAs until when the obligation of non-disclosure is applicable to them under each leniency regime, in order to comply with all of them.

33. The third condition requires that the applicant should not, when contemplating making a leniency application to the CA but before doing so, have:

   a) destroyed evidence which falls within the scope of the application; or

   b) disclosed, directly or indirectly, the fact or any of the content of its contemplated application except to other CAs.

34. Failure to comply fully with any of these conditions will disqualify the applicant from the leniency programme in the relevant proceedings.

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\(^{12}\) The applicant is encouraged to inform the CA beforehand of any contemplated dismissal of an employee or director who may be in possession of information and material relevant to the leniency application.
E. Procedure

Approaching the CA

35. All CAs accept anonymous approaches by potential applicants wishing to obtain guidance on their respective programmes. Some CAs have more formalised systems for such approaches, such as hypothetical applications.

Marker for immunity applicants

36. A marker protects an applicant’s place in the queue for a given period of time. It allows the applicant to complete its internal investigation to gather the required information and evidence in order to meet the threshold.

37. In the ECN Model Programme, markers are available at the discretion of the CA. Some CAs may choose only to grant markers when it is clear that immunity is available or in certain type of situations, whereas certain others may grant markers in every case. Taking account of the specificities of each individual case the CA may decide the duration of the marker. In the event of parallel action by a number of CAs, the CAs will endeavour to use their discretion in a manner that allows their respective investigations to be coordinated smoothly.

38. The ECN Model Programme specifies the information required to secure a marker within the meaning of this programme. It is broadly equivalent to what is required to file a summary application. Some CAs however may decide to protect the applicant’s place in the queue on the basis of more limited information, depending on the case at hand. In any event, an applicant would as a minimum have to provide its name and address and to satisfy a CA that it has a concrete basis for a reasonable concern that it has participated in cartel conduct.

Procedure for immunity and reduction of fines applications

39. CAs should deal with an application in a manner which ensures a high degree of legal certainty for the applicant. This implies that the applicant is informed as early as possible of the status of its application and that it will receive an acknowledgement of receipt of its submission(s).

40. If a CA has granted conditional immunity, no fines will be imposed on the applicant in relation to the cartel which is the subject of the application, provided that the conditions attached to leniency are fulfilled during the procedure and that it is not found that the applicant has acted as a coercer. Similarly, any position taken on an application for reduction of fines is subject to the conditions set out in the programme.

Summary applications

41. Experience has shown that applicants often choose to apply to several CAs simultaneously in cases for which the Commission is particularly well placed to act under paragraph 14 of the Network Notice. Such precautionary multiple applications are time-consuming both for the NCAs and the applicants. They are however useful to allow network members to have an informed view on
whether or not they want to act on a case and to protect the position of the applicant in the event of a case being reallocated, given that an application to one CA does not count as an application to all CAs.

42. In order to alleviate the burden associated with multiple parallel applications on both undertakings and NCAs, the ECN Model Programme contains a model for a uniform system of summary applications. By filing a summary application, the applicant protects its position under the leniency programme of the NCA concerned for the alleged cartel on which it has submitted, or is in the process of submitting, a leniency application to the Commission. Summary applications will be possible irrespective of the applicant’s position(s) in the leniency queue at the Commission and the NCA, i.e. in Type 1A, Type 1B and Type 2 applications.

43. If the applicant files a summary application before ‘well placed’ NCAs, in accordance with paragraph 24 of the ECN Model Programme, each NCA concerned will grant the applicant a summary application marker. The summary application marker aims at protecting the applicant’s position under the leniency programme before the concerned NCAs, in particular during the phase of case allocation. As concerns Type 1A or Type 1B summary applicants, the summary application marker will mean that, if it is perfected at a later point in time, in particular after a reallocation of the case to the NCAs concerned, all information then provided to the NCAs concerned will be deemed to have been submitted by the applicant to the respective NCAs at the time of the summary application marker. Type 2 summary applications will be assessed in the order created by summary application markers, insofar as relevant under the applicable leniency programme.

44. A summary application is an application for leniency and CAs having received such an application are entitled to exchange information without the consent of the applicant, in accordance with paragraph 41(1) of the Network Notice.

45. The NCAs will not process summary applications, i.e. they will not grant or deny conditional immunity or leniency. They will only (a) acknowledge receipt to the applicant, (b) grant the applicant a summary application marker and (c) confirm that the applicant would have a given period of time in which to complete the application, should the NCA at any point later request the applicant to make a full application. In addition, if the summary applicant is the first applicant in respect of the alleged cartel at the NCA concerned (i.e. in Type 1A or Type 1B cases), the NCA will inform the summary applicant accordingly.

46. As long as the CA has not decided to take action in the case, the applicant’s duty to provide further information and generally assist with the investigation only exists towards the Commission. However, since the scope of a summary application marker is essentially determined by the content of the leniency application, applicants should consider the following. From a substantive point of view, a summary application should be a proper summary of the leniency application submitted at the Commission. Therefore, if a leniency applicant has received a summary application marker from an NCA, and it subsequently provides information and evidence to the Commission which indicates that the alleged cartel is significantly different in scope than reported
to the NCAs in its summary applications (for example, it covers an additional product), the applicant should consider updating the NCAs where it has filed summary applications in order to keep the scope of its protection at the NCAs identical to the scope of protection at the Commission. The duties specified under paragraphs 13(2)(d) (no destruction, falsification or concealment) and 13(2)(e) (no disclosure of contents or existence of the application) of the ECN Model Programme will also be owed to the NCA which has received the summary application.

47. In addition, the applicant must comply with any specific additional information requests of an NCA which has received a summary application in particular for the NCA to reach an informed view on the issue of case allocation. Failure to comply with such requests by an NCA fully and expeditiously would result in loss of the summary application marker. If the applicant is requested by an NCA to perfect the summary application into a full application, the applicant must submit to the NCA all information and evidence that relates to the alleged cartel. Normally, this would require the applicant to provide NCAs with all information and evidence that it has also supplied to the Commission. In this context, applicants are encouraged to verify the requirements applicable under the relevant leniency programmes with the NCAs concerned. Moreover, the applicant shall provide the NCA with any additional information that may be required under the relevant leniency programme.

48. The timing of the termination by the applicant of its participation in the cartel in summary application cases is for the Commission to determine.

49. The ECN Model Programme lists the information which must be contained in a summary application. Firstly, the information and the level of detail must be sufficient to enable the CA to decide whether it wants to act in the case. Secondly, it must allow the CA to determine whether the applicant should be granted a summary application marker. NCAs agree to show flexibility (to the extent legally permissible) as to the language(s) in which summary applications can be made. Annex 1 to the explanatory notes contains a template in English that applicants may use when preparing a summary application. Applicants should duly consider the applicable language requirements when submitting a summary application.

**Statements under the leniency programme and oral procedure**

50. The ECN members are strong proponents of effective civil proceedings for damages against cartel participants. However, they consider it inappropriate that undertakings which cooperate with them in revealing cartels should be placed in a worse position in respect of civil damage claims than cartel members that refuse to cooperate. The discovery in civil damage proceedings of statements which have been made specifically to a CA in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the CAs’ leniency programmes, could undermine the effectiveness of the CAs’ fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions. The risk that an applicant becomes subject to a discovery order depends to some extent on the affected territories and the nature of the cartel in which it has participated. Experience has so far shown that it is more likely that discovery orders will be
made in cases which the Commission is particularly well placed to deal with than in cartels that are limited to a certain region or a certain Member State.

51. In order to limit any such negative consequences for the CAs’ leniency programmes, the ECN Model Programme allows for oral applications (summary, marker or full applications) in all cases where this would appear to be justified and proportionate. Oral applications are always justified and proportionate in cases where the Commission is particularly well placed to act under paragraph 14 of the Network Notice. Some CAs will accept oral applications without requiring the applicant to demonstrate that its request is justified and proportionate.

52. The ECN Model Programme also stipulates that no access will be granted to any records of any statements (oral and written) before the statement of objections has been issued. In addition, given the differences in the rules concerning access to the file and/or public access to documents in the various jurisdictions, the ECN Model Programme stipulates that the exchange of records of statements (oral or written) between CAs is limited to cases where the protections afforded to such records by the receiving CA are equivalent to those afforded by the transmitting CA.

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Leniency contact information

In order to benefit from the Notice, companies can approach the Commission directly or through a legal adviser. To apply for leniency please contact the Commission only through the following dedicated fax number:

Leniency fax: +32 2 299.45.85

The use of this fax ensures that the precise time and date of the contact is duly recorded and that the information is treated with the utmost confidentiality within the Commission. Before sending the actual submission by fax, however, it is advisable to seek assistance from one of the Commission officials involved in leniency by calling the following dedicated telephone numbers:

Telephone numbers: +32 2 298.41.90 or +32 2 298.41.91

Because of the need for confidentiality of leniency applications, companies are requested not to send any application to the Commission by any other channel than the leniency fax.

Please note that these telephone numbers are only to be used for leniency applications. Given the importance of keeping these lines clear so that companies can make their applications promptly, no other queries will be answered.

The telephones are monitored from 09.00 to 17.00 on weekdays. Outside of these times, please use the leniency fax.

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1 See [http://ec.europa.eu/competition/cartels/leniency/leniency.html](http://ec.europa.eu/competition/cartels/leniency/leniency.html) (last accessed on 13 September 2012)
INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases

(Text with EEA relevance)

(2008/C 167/01)

1. INTRODUCTION

1. This Notice sets out the framework for rewarding cooperation in the conduct of proceedings commenced in view of the application of Article 81 of the EC Treaty (1) to cartel cases (2). The settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence. The cooperation covered by this Notice is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is covered by the Commission Notice on Immunity from fines and reduction of fines in cartel cases (3) (the Leniency Notice). Provided that the cooperation offered by an undertaking qualifies under both Commission Notices, it can be cumulatively rewarded accordingly (4).

2. When parties to the proceedings are prepared to acknowledge their participation in a cartel violating Article 81 of the Treaty and their liability therefore, they may also contribute to expediting the proceedings leading to the adoption of the corresponding decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (5) in the way and with the safeguards specified in this Notice. Whilst the Commission, as the investigative authority and the guardian of the Treaty empowered to adopt enforcement decisions subject to judicial control by the Community Courts, does not negotiate the question of the existence of an infringement of Community law and the appropriate sanction, it can reward the cooperation described in this Notice.

3. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (6) lays down the core practical rules concerning the conduct of proceedings in antitrust cases including those applicable in the variant for settlement. In this regard, Regulation (EC) No 773/2004 bestows on the Commission the discretion whether to explore the settlement procedure or not in cartel cases, while ensuring that the choice of the settlement procedure cannot be imposed on the parties.

4. Effective enforcement of Community competition law is compatible with full respect of the parties' rights of defence, which constitutes a fundamental principle of Community law to be respected in all circumstances, and in particular in antitrust procedures which may give rise to

(1) References in this text to Article 81 also cover Article 53 EEA when applied by the Commission in accordance with the rules laid down in Article 56 of the EEA Agreement.

(2) Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC.


(4) See point 33.
penalties. It follows that the rules established to conduct the Commission proceedings to enforce Article 81 of the Treaty should ensure that the undertakings and associations of undertakings concerned are afforded the opportunity effectively to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (1), throughout the administrative procedure.

2. PROCEDURE

5. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties’ interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including the scale of burden involved in providing access to non-confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent might apply. The Commission may also decide to discontinue settlement discussions if the parties to the proceedings coordinate to distort or destroy any evidence relevant to the establishment of the infringement or any part thereof or to the calculation of the applicable fine. Distortion or destruction of evidence relevant to the establishment of the infringement or any part thereof may also constitute an aggravating circumstance within the meaning of point 28 of the Commission Guidelines on fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (2) (the Guidelines on fines), and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. The Commission may only engage in settlement discussions upon the written request of the parties concerned.

6. While parties to the proceedings do not have a right to settle, should the Commission consider that a case may, in principle, be suitable for settlement, it will explore the interest in settlement of all parties to the same proceedings.

7. The parties to the proceedings may not disclose to any third party in any jurisdiction the contents of the discussions or of the documents which they have had access to in view of settlement, unless they have a prior explicit authorization by the Commission. Any breach in this regard may lead the Commission to disregard the undertaking’s request to follow the settlement procedure. Such disclosure may also constitute an aggravating circumstance, within the meaning of point 28 of the Guidelines on fines and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice.

8. Where the Commission contemplates the adoption of a decision pursuant to Article 7 and/or Article 23 of Regulation (EC) No 1/2003, it is required in advance to identify and recognize as parties to the proceedings the legal persons on whom a penalty may be imposed for an infringement of Article 81 of the Treaty.

9. To this end, the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 in view of adopting such a decision can take place at any point in time, but no later than the date on which the Commission issues a statement of objections against the parties concerned. Article 2(1) of Regulation (EC) No 773/2004 further specifies that, should the Commission consider it suitable to explore the parties’ interest in engaging in settlement discussions, it will initiate proceedings no later than the date on which it either issues a statement of objections or requests the parties to express in writing their interest to engage in settlement discussions, whichever is the earlier.

10. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission becomes the only competition authority competent to apply Article 81 of the Treaty to the case in point.

11. Should the Commission consider it suitable to explore the parties’ interest to engage in settlement discussions, it will set a time-limit of no less than two weeks pursuant to Articles 10a(1) and 17(3) of Regulation (EC) No 773/2004 within which parties to the same proceedings should declare in writing whether they envisage engaging in settlement discussions in view of possibly introducing settlement submissions at a later stage. This written declaration does not imply an admission by the parties of having participated in an infringement or of being liable for it.

12. Whenever the Commission initiates proceedings against two or more parties within the same undertaking, the Commission will inform each of them of the other legal entities which it identifies within the same undertaking and which are also concerned by the proceedings. In such a case, should the concerned parties wish to engage in settlement discussions, they must appoint joint representatives duly empowered to act on their behalf by the end of the time-limit referred to in point 11. The appointment of joint representatives aims solely to facilitate the settlement discussions and it does not prejudice in any way the attribution of liability for the infringement amongst the different parties.

(2) OJ C 210, 1.9.2006, p. 2.
13. The Commission may disregard any application for immunity from fines or reduction of fines on the ground that it has been submitted after the expiry of the time-limit referred to in point 11.

14. Should some of the parties to the proceedings request settlement discussions and comply with the requirements referred to in points 11 and 12, the Commission may decide to pursue the settlement procedure by means of bilateral contacts between the Commission Directorate-General for Competition and the settlement candidates.

15. The Commission retains discretion to determine the appropriateness and the pace of the bilateral settlement discussions with each undertaking. In line with Article 10a(2) of Regulation (EC) No 773/2004, this includes determining, in view of the progress made overall in the settlement procedure, the order and sequence of the bilateral settlement discussions as well as the timing of the disclosure of information, including the evidence in the Commission file used to establish the envisaged objections and the potential fine (1). Information will be disclosed in a timely manner as settlement discussions progress.

16. Such an early disclosure in the context of settlement discussions pursuant to Article 10a(2) and Article 15(1a) of Regulation (EC) No 773/2004 will allow the parties to be informed of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections. This will enable the parties effectively to assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle. Upon request by a party, the Commission services will also grant it access to non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as this is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other aspect of the cartel (2).

17. When the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Commission, and the Commission takes the preliminary view that procedural efficiencies are likely to be achieved in view of the progress made overall, the Commission may grant a final time-limit of at least 15 working days for an undertaking to introduce a final settlement submission pursuant to Articles 10a(2) and 17(3) of Regulation (EC) No 773/2004. The time-limit can be extended following a reasoned request. Before granting such time-limit, the parties will be entitled to have the information specified in point 16 disclosed to them upon request.

18. The parties may call upon the Hearing Officer at any time during the settlement procedure in relation to issues that might arise relating to due process. The Hearing Officer's duty is to ensure that the effective exercise of the rights of defence is respected.

19. Should the parties concerned fail to introduce a settlement submission, the procedure leading to the final decision in their regard will follow the general provisions, in particular Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004, instead of those regulating the settlement procedure.

2.3. Settlement submissions

20. Parties opting for a settlement procedure must introduce a formal request to settle in the form of a settlement submission. The settlement submission provided for in Article 10a(2) of Regulation (EC) No 773/2004 should contain:

(a) an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;

(b) an indication (1) of the maximum amount of the fine the parties foresee to be imposed by the Commission and which the parties would accept in the framework of a settlement procedure;

(c) the parties' confirmation that, they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission;

(1) Reference to the 'potential fine' in Article 10a(2) of Regulation (EC) No 773/2004 affords the Commission services the possibility to inform the parties concerned by settlement discussions of an estimate of their potential fine in view of the guidance contained in the Guidelines on fines, the provisions of this Notice and the Leniency Notice, where applicable.

(2) For that purpose, the parties will be provided with a list of all accessible documents in the case file at that point in time.

(1') This would result from the discussions as set out in points 16 and 17.
(d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision:

(e) the parties' agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in an agreed official language of the European Community.

21. The acknowledgments and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the expeditious handling of the case following the settlement procedure. However, those acknowledgments and confirmations are conditional upon the Commission meeting their settlement request, including the anticipated maximum amount of the fine.

22. Settlement requests cannot be revoked unilaterally by the parties which have provided them unless the Commission does not meet the settlement requests by reflecting the settlement submissions first in a statement of objections and ultimately, in a final decision (see in this regard points 27 and 29). The statement of objections would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in point 20(a). Additionally, for a final decision to be deemed to have reflected the settlement submissions, it should also impose a fine which does not exceed the maximum amount indicated therein.

2.4. Statement of objections and reply

23. Pursuant to Article 10(1) of Regulation (EC) No 773/2004, the notification of a written statement of objections to each of the parties against whom objections are raised is a mandatory preparatory step before adopting any final decision. Therefore, the Commission will issue a statement of objections also in a settlement procedure.\(^1\)

24. For the parties' rights of defence to be exercised effectively, the Commission should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate.\(^2\) The Commission must be able not only to accept or reject the parties' relevant arguments expressed during the administrative procedure, but also to make its own analysis of the matters put forward by them in order to either abandon such objections because they have been shown to be unfounded or to supplement and reassess its arguments both in fact and in law, in support of the objections which it maintains.

25. By introducing a formal settlement request in the form of a settlement submission prior to the notification of the statement of objections, the parties concerned enable the Commission to effectively take their views into account already when drafting the statement of objections, rather than only before the consultation of the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter the 'Advisory Committee') or before the adoption of the final decision.\(^3\)

26. Should the statement of objections reflect the parties' settlement submissions, the parties concerned should within a time-limit of at least two weeks set by the Commission in accordance with Articles 10a(3) and 17(3) of Regulation (EC) No 773/2004, reply to it by simply confirming (in unequivocal terms) that the statement of objections corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure. In the absence of such a reply, the Commission will take note of the party's breach of its commitment and may also disregard the party's request to follow the settlement procedure.

27. The Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submission. If so, the general provisions in Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004 will apply. The acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used in evidence against any of the parties to the proceedings. Hence, the parties concerned would no longer be bound by their settlement submissions and would be granted a time-limit allowing them, upon request, to present their defence anew, including the possibility to access the file and to request an oral hearing.

2.5. Commission decision and settlement reward

28. Upon the parties' replies to the statement of objections confirming their commitment to settle, Regulation (EC) No 773/2004 allows the Commission to proceed, without any other procedural step, to the adoption of the

\(^1\) In this regard, recital 2 of Regulation (EC) No 622/2008 states: '...Such early disclosure should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability.'

\(^2\) As required by Article 11(1) of Regulation (EC) No 773/2004 and Article 27(1) of Regulation (EC) No 1/2003, respectively.
Settlement Notice

2.7.2008 Official Journal of the European Union C 167/5

subsequent final decision pursuant to Articles 7 and/or 23 of Regulation (EC) No 1/2003, after consultation of the Advisory Committee pursuant to Article 14 of Regulation (EC) No 1/2003. In particular, this implies that no oral hearing or access to the file may be requested by those parties once their settlement submissions have been reflected by the statement of objections, in line with Articles 12(2) and 15(1a) of Regulation (EC) No 773/2004.

29. The Commission retains the right to adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' settlement submissions, either in view of the opinion provided by the Advisory Committee or for other appropriate considerations in view of the ultimate decisional autonomy of the Commission to this effect. However, should the Commission opt to follow that course, it will inform the parties and notify to them a new statement of objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure. It follows that the parties would then be entitled to have access to the file, to request an oral hearing and to reply to the statement of objections. The acknowledgments provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.

30. The final amount of the fine in a particular case is determined in the decision finding an infringement pursuant to Article 7 and imposing a fine pursuant to Article 23 of Regulation (EC) No 1/2003.

31. In line with the Commission's practice, the fact that an undertaking cooperated with the Commission under this Notice during the administrative procedure will be indicated in the final decision, so as to explain the reason for the level of the fine.

32. Should the Commission decide to reward a party for settlement in the framework of this Notice, it will reduce by 10 % the amount of the fine to be imposed after the 10 % cap has been applied having regard to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (1). Any specific increase for deterrence (2) used in their regard will not exceed a multiplication by two.

33. When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward.

34. This Notice applies to any case pending before the Commission at the time of or after its publication in the Official Journal of the European Union.

35. Access to settlement submissions is only granted to those addressees of a statement of objections who have not requested settlement, provided that they commit — together with the legal counsels getting access on their behalf — not to make any copy by mechanical or electronic means of any information in the settlement submissions to which access is being granted and to ensure that the information to be obtained from the settlement submission will solely be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related proceedings. Other parties such as complainants will not be granted access to settlement submissions.

36. The use of such information for a different purpose during the proceedings may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceedings, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

37. Settlement submissions made under this Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation (EC) No 1/2003, provided that the conditions set out in the Network Notice (3) are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

38. Upon the applicant's request, the Commission may accept that settlement submissions be provided orally. Oral settlement submissions will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Regulation (EC) No 1/2003 and Articles 3(3) and 17(3) of Regulation (EC) No 773/2004 undertakings making oral settlement submissions will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral settlement submissions and the accuracy of the transcript without delay.

39. The Commission will not transmit settlement submissions to national courts without the consent of the relevant applicants, in line with the provisions in the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (4).

40. The Commission considers that normally public disclosure of documents and written or recorded statements (including settlement submissions) received in the context of this Notice would undermine certain public or private

(2) Point 30 of the Guidelines on fines.

interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (1), even after the decision has been taken.

41. Final decisions taken by the Commission under Regulation (EC) No 1/2003 are subject to judicial review in accordance with Article 230 of the Treaty. Moreover, as provided in Article 229 of the Treaty and Article 31 of Regulation (EC) No 1/2003, the Court of Justice has unlimited jurisdiction to review decisions on fines adopted pursuant to Article 23 of Regulation (EC) No 1/2003.

Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003

I. Investigation as usual
   — Parties may express their interest in a hypothetical settlement.

II. Exploratory steps regarding settlement
    — Letter to all companies (and MS) informing of the decision to initiate proceedings in view of settlement (Article 11(6)) and requesting them to express their interest in settlement.

III. Bilateral rounds of settlement discussions
    — Disclosure and exchange of arguments on potential objections, liability, fines range.
    — Disclosure of evidence used to establish potential objections, liability, fines.
    — Disclosure of other non-confidential versions of documents in the file, when justified.

IV. Settlement
    — Conditional settlement submissions by the companies, jointly represented where applicable.
    — DG COMP sends acknowledgement of receipt.

V. ‘Settled’ statement of objections
    — Notification of streamlined SO endorsing company's settlement submissions, where appropriate.
    — Company's reply to SO confirming clearly that it reflects its settlement submission.

VI. ‘Settlement’ Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003
    — Advisory Committee on a draft streamlined final decision.
    If College of Commissioners agrees:
    — Adoption of streamlined final decision.

COMMISSION REGULATION (EC) No 622/2008
of 30 June 2008
amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases
(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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

Having published a draft of this Regulation (2),

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

Whereas:

(1) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (3) lays down rules concerning the participation of the parties concerned in such proceedings.

(2) Parties to the proceedings may be prepared to acknowledge their participation in a cartel violating Article 81 of the Treaty and their liability in respect of such participation, if they can reasonably anticipate the Commission's envisaged findings as regards their participation in the infringement and the level of potential fines and agree with those findings. It should be possible for the Commission to disclose to those parties, where appropriate, the objections which it intends to raise against them on the basis of the evidence in the file and the fines that they are likely to incur. Such early disclosure should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability.

(3) When the Commission reflects the parties’ settlement submissions in the statement of objections and the parties' replies confirm that the statement of objections corresponds to the contents of their settlement submissions, the Commission should be able to proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation (EC) No 1/2003.

(4) A settlement procedure should therefore be established in order to enable the Commission to handle faster and more efficiently cartel cases. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. Therefore, the Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including any unreasonable delays, such as delays associated with the resources required to provide access to non-confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent may also be considered.

(5) Complainants will be closely associated with settlement proceedings and be duly informed of the nature and subject matter of the procedure in writing to enable them to provide their views thereon and thereby cooperate with the Commission investigation. However, in the particular context of settlement proceedings, providing systematically a non-confidential version of the statement of objections to complainants would not always serve the purpose of enabling complainants to cooperate with the Commission's investigation and may occasionally discourage the parties to the proceedings from cooperating with the Commission. To this end, the Commission should not be obliged to provide a non-confidential version of the statement of objections to complainants.
(6) Regulation (EC) No 773/2004 should therefore be amended accordingly,

[...]

INTRODUCTION

1. Pursuant to Article 23(2)(a) of Regulation No 1/2003 (1), the Commission may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 or 82 of the Treaty.

2. In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion (2) within the limits set by Regulation No 1/2003. First, the Commission must have regard both to the gravity and to the duration of the infringement. Second, the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003.

3. In order to ensure the transparency and impartiality of its decisions, the Commission published on 14 January 1998 guidelines on the method of setting fines (3). After more than eight years of implementation, the Commission has acquired sufficient experience to develop further and refine its policy on fines.

4. The Commission’s power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article 81 or 82 of the Treaty is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles (4). For this purpose, the Commission must ensure that its action has the necessary deterrent effect (5).

5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. It necessarily has an impact on the potential consequences of the infringement on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.

6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.

7. It is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices.

8. The sections below set out the principles which will guide the Commission when it sets fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

METHOD FOR THE SETTING OF FINES

9. Without prejudice to point 37 below, the Commission will use the following two-step methodology when setting the fine to be imposed on undertakings or associations of undertakings.

10. First, the Commission will determine a basic amount for each undertaking or association of undertakings (see Section 1 below).

11. Second, it may adjust that basic amount upwards or downwards (see Section 2 below).

1. Basic amount of the fine

12. The basic amount will be set by reference to the value of sales and applying the following methodology.


(2) See, for example, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri A/S and others v Commission [2005] ECR I-5425, paragraph 172.

(3) Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).

(4) See, for example, Dansk Rørindustri A/S and others v Commission, cited above, paragraph 170.

2006 Guidelines on Fines

A. Calculation of the value of sales

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly (1) relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter ‘value of sales’).

14. Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members.

15. In determining the value of sales by an undertaking, the Commission will take that undertaking’s best available figures.

16. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.

17. The value of sales will be determined before VAT and other taxes directly related to the sales.

18. Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

B. Determination of the basic amount of the fine

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales.

22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

23. Horizontal price-fixing, market-sharing and output-limitation agreements (2), which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.

24. In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above) will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.

25. In addition, irrespective of the duration of the undertaking’s participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.

26. Where the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set for each of them an identical basic amount. Moreover, in determining the basic amount of the fine, the Commission will use rounded figures.

2. Adjustments to the basic amount

27. In setting the fine, the Commission may take into account circumstances that result in an increase or decrease in the basic amount as determined in Section A above. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.

(1) Such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.

(2) This includes agreements, concerted practices and decisions by associations of undertakings within the meaning of Article 81 of the Treaty.
A. Aggravating circumstances

28. The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

— where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100% for each such infringement established;

— refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

— role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

B. Mitigating circumstances

29. The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

— where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened; this will not apply to secret agreements or practices (in particular, cartels);

— where the undertaking provides evidence that the infringement has been committed as a result of negligence;

— where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market; the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

— where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

— where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation. (*)

(*) This is without prejudice to any action that may be taken against the Member State concerned.

C. Specific increase for deterrence

30. The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.

31. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.

D. Legal maximum

32. The final amount of the fine shall not, in any event, exceed 10% of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003.

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

E. Leniency Notice

34. The Commission will apply the leniency rules in line with the conditions set out in the applicable notice.

F. Ability to pay

35. In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

FINAL CONSIDERATIONS

36. The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.
37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.

38. These Guidelines will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 23(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62 (1).

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

(98/C 9/03)

(Text with EEA relevance)

The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalizing infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.

1. Basic amount

The basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15 (2) of Regulation No 17.

A. Gravity

In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.

— minor infringements:

These might be trade restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market.

Likely fines: ECU 1000 to ECU 1 million.

— serious infringements:

These will more often than not be horizontal or vertical restrictions of the same type as above, but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market. There might also be abuse of a dominant position (refusals to supply, discrimination, exclusion, loyalty discounts made by dominant firms in order to shut competitors out of the market, etc.).

Likely fines: ECU 1 million to ECU 20 million.

— very serious infringements:

These will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardize the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly (see Decisions 91/297/EEC, 91/298/EEC, 91/299/EEC, 91/300/EEC and 91/301/EEC — Soda Ash, 94/815/EC — Cement, 94/601/EC — Cartonboard, 92/163/EC — Tetra Pak, and 94/215/ECSC — Steel beams).

Likely fines: above ECU 20 million

Within each of these categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed.

It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

Generally speaking, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognize that their

(1) OJ L 152, 15.6.1991, p. 34.

IV - Fines - 17
conduct constitutes an infringement and be aware of the consequences stemming from it under competition law.

Where an infringement involves several undertakings (e.g. cartels), it might be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.

Thus, the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetic calculation.

B. Duration

A distinction should be made between the following:

- infringements of short duration (in general, less than one year): no increase in amount,
- infringements of medium duration (in general, one to five years): increase of up to 50% in the amount determined for gravity,
- infringements of long duration (in general, more than five years): increase of up to 10% per year in the amount determined for gravity.

This approach will therefore point to a possible increase in the amount of the fine.

Generally speaking, the increase in the fine for long-term infringements represents a considerable strengthening of the previous practice with a view to imposing effective sanctions on restrictions which have had a harmful impact on consumers over a long period. Moreover, this new approach is consistent with the expected effect of the notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (\(^\text{(*)}\)). The risk of having to pay a much larger fine, proportionate to the duration of the infringement, will necessarily increase the incentive to denounce it or to cooperate with the Commission.

The basic amount will result from the addition of the two amounts established in accordance with the above:

\[ x \text{ gravity} + y \text{ duration} = \text{basic amount} \]

2. Aggravating circumstances

The basic amount will be increased where there are aggravating circumstances such as:

- repeated infringement of the same type by the same undertaking(s),
- refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations,
- role of leader in, or instigator of the infringement,
- retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement,
- need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount,
- other.

3. Attenuating circumstances

The basic amount will be reduced where there are attenuating circumstances such as:

- an exclusively passive or ‘follow-my-leader’ role in the infringement,
- non-implementation in practice of the offending agreements or practices,
- termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks),
- existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement,
- infringements committed as a result of negligence or unintentionally,
- effective cooperation by the undertaking in the proceedings, outside the scope of the Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases,
- other.

4. Application of the Notice of 18 July 1996 on the non-imposition or reduction of fines (\(^\text{(*)}\))

\(^{(*)}\) See footnote 6.
5. General comments

(a) It goes without saying that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15 (2) of Regulation No 17. In the case of agreements which are illegal under the ECSC Treaty, the limit laid down by Article 65 (5) is twice the turnover on the products in question, increased in certain cases to a maximum of 10% of the undertaking’s turnover on ECSC products.

The accounting year on the basis of which the worldwide turnover is determined must, as far as possible, be the one preceding the year in which the decision is taken or, if figures are not available for that accounting year, the one immediately preceding it.

(b) Depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders (see Twenty-first report on competition policy, point 139), the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and the fines should be adjusted accordingly.

(c) In cases involving associations of undertakings, decisions should as far as possible be addressed to and fines imposed on the individual undertakings belonging to the association. If this is not possible (e.g. where there are several thousands of affiliated undertakings), and except for cases falling within the ECSC Treaty, an overall fine should be imposed on the association, calculated according to the principles outlined above but equivalent to the total of individual fines which might have been imposed on each of the members of the association.

(d) The Commission will also reserve the right, in certain cases, to impose a ‘symbolic’ fine of ECU 1,000, which would not involve any calculation based on the duration of the infringement or any aggravating or attenuating circumstances. The justification for imposing such a fine should be given in the text of the decision.

Initiation of proceedings

(Case No IV/M.970 — TKS/ITW Signode/Titan)

(98/C 9/04)

(Text with EEA relevance)

On 22 December 1997, the Commission decided to initiate proceedings in the above-mentioned case after finding that the notified concentration raises serious doubts as to its compatibility with the common market. The initiation of proceedings opens a second phase investigation with regard to the notified concentration. The decision is based on Article 6(1)(c) of Council Regulation (EEC) No 4064/89.

The Commission invites interested third parties to submit their observations on the proposed concentration.

In order to be fully taken into account in the procedure, observations should reach the Commission not later than 15 days following the date of this publication. Observations can be sent by fax (32-2) 296 43 01/296 72 44) or by post, under reference IV/M.970 — TKS/ITW Signode/Titan, to:

European Commission,
Directorate-General for Competition (DG IV),
Directorate B — Merger Task Force,
Avenue de Cortenberg/Kortenberglaan 150,
B-1040 Brussels.
COMMISSION EUROPÉENNE

Secrétariat général

SEC(2010) 737/2  Bruxelles, le 12 juin 2010

OJ 1922


Note d'information de M. ALMUNIA et de M. LEWANDOWSKI

Cette question est inscrite à l'ordre du jour de la 1922ème réunion de la Commission, le mardi 15 juin 2010

Destinataires : Membres de la Commission
Directeurs Généraux et Chefs de service

IV - Fines - 18
INFORMATION NOTE

BY MR JOAQUÍN ALMUNIA
VICE-PRESIDENT OF THE COMMISSION
AND BY MR JANUSZ LEWANDOWSKI
MEMBER OF THE COMMISSION

Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines

1. INTRODUCTION

1. The Commission's methodology of setting fines for antitrust cases is set out in detail in its 2006 Fining Guidelines. The first step consists of calculating the so-called "basic amount", based on the companies' EEA sales related to the infringement in the relevant market and the duration of the infringement. This amount includes an "entry fee", based on a percentage of the value of sales, in order to generally deter the undertakings from entering into the anticompetitive practice. In a second step, aggravating circumstances as well as mitigating circumstances are considered. The basic amount may also be increased through a "multiplier" in order to ensure sufficient deterrence for particularly large companies. Finally, fines are capped to a maximum of 10% of the total turnover in the year previous to the adoption of the Decision and then possible reductions under the Leniency and Settlements Notices are applied. Once the fine is set, the Commission may, upon request of the companies concerned, assess a company's alleged inability to pay the fine (hereinafter "ITP").

2. The number of companies invoking ITP and requesting a reduction of the fine pre-decision in view of their alleged critical financial situation has risen significantly in recent years. Similarly, companies are also more frequently requesting, post-decision, different types of financial relief such as the exemption from the obligation to provide a security pending the appeal before the Court, the full or partial release of a security already provided or even a full or partial waiver of the fine imposed by the Commission.

3. The basic principles under which the Commission may take into account a company's inability to pay when setting fines prior to the adoption of a decision are set forth in paragraph 35 of the 2006 Fining Guidelines.1

4. As a general matter, any type of reductions in the fine, either in the nominal amount or through favourable payment conditions, in view of a company's alleged critical financial situation has to be treated with great caution. Granting such favourable treatment to one company may give rise to concerns of equal treatment with regard to those companies that do not obtain such treatment. In addition, taking into

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1 Paragraph 35 reads as follows: "In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value."
account the distressed financial situation of a company can carry the inherent risk of favouring those companies that are inefficient, badly managed or over-leveraged at the expense of well managed and financially prudent companies. It may also encourage strategic behaviour (moral hazard), in particular financial engineering or corporate restructuring, aimed at avoiding the payment of the fine. It should also be considered that the more the Commission takes into account the financial situation of companies when setting fines or granting payment conditions, the more the Commission may be drawn into discretionary and potentially conflicting situations in its fining policy, which would put into question its credibility as an objective enforcement institution. A generous treatment of such ITP requests may also diminish the deterrent effect of the Commission’s fines. Conversely, the Commission should avoid imposing fines that would drive competitive companies and productive assets out of the market, especially of SMEs and/or mono-product companies.

5. Within this context, this information note provides a brief overview regarding four specific issues that have arisen. The first point concerns the clarification of the interpretation of the ITP conditions under paragraph 35 of the 2006 Fining Guidelines and the general principles to be applied in this field. The second point addresses the question of how to adjust the fine for successful ITP applicants under paragraph 35. The third point deals with the issue of how to address requests by companies which have appealed the fine and/or asked for interim relief to provide a bank guarantee as security instead of provisionally paying the fine. The fourth point concerns the question if and to what extent companies may be granted financial relief post-decision by way of a College decision, in view of their financial situation that deteriorated following the adoption of a Commission fining decision.

II. THE INTERPRETATION OF PARAGRAPH 35 AND ITS COMMUNICATION TO THE PUBLIC

6. Background. Whereas there is no legal requirement for the Commission to consider the financial situation of a company when setting fines, paragraph 35 of its 2006 Fining Guidelines foresees that the Commission may take into account requests by companies based on their inability to pay. The purpose of this provision has been to avoid that the Commission's fines drive financially distressed but competitive companies out of the market and cause adverse social and economic consequences. In order to ensure that companies are systematically made aware of the possibility to invoke ITP, it is proposed to include an explicit reference to paragraph 35 in every Statement of Objections in antitrust cases where fines are likely to be imposed or in the requests for information that are sent out closer to the adoption date of the decision in order to collect the parties' latest turnover figures, which serve as a basis for the calculation of the fine.

7. The interpretation of paragraph 35 by the Commission. In 2009, the Commission deepened and intensified its review of ITP requests in order to be able to deal better with the rising number of such requests. The focus of last year's effort was to enhance the assessment of whether a fine imposed by the Commission will "irretrievably jeopardise the economic viability of the undertaking", which is the most important but also most complex and difficult part of the ITP test laid down in paragraph 35. The latest refined methodology now assesses the financial situation of

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2 A similar provision also existed in point 5(b) of the pre-existing Guidelines on fines of 1998.
a company on the basis of a number of indicators of profitability, capitalisation, solvency and liquidity (derived from recognised bankruptcy prediction models, including the so-called Altman Z-score test). The ITP methodology has been refined, compared to previous practice, in particular in three respects: (i) the Commission gives more emphasis to solvency and liquidity relative to capitalisation and profitability of the company, (ii) it assesses whether and how the fine would cause the above financial indicators to deteriorate, and (iii) it relies not only on historical data but also uses projections, in particular regarding cash flows (for the current year and two future years) in its assessment. Thus, if there is sufficiently clear evidence that a company is in immediate danger of bankruptcy, the Commission will try to assess whether it is likely that bankruptcy would indeed be caused by the fine.

8. The remaining conditions of paragraph 35 of the 2006 Fining Guidelines, namely (i) the economic context, (ii) the social context, and (iii) asset loss are being interpreted rather broadly by the Commission. In particular, these conditions will be fulfilled relatively easily, e.g. during a sectoral or general economic crisis. The specific economic context can be argued if the sector concerned by the decision is going through a cyclical crisis (e.g., suffering from overcapacity or falling prices), but it may also be considered in this context whether companies have difficulties in obtaining access to capital or credit as a result of the prevailing economic conditions. The specific social context is also likely to be present in the context of high and/or mounting unemployment at a regional or wider level.

9. With respect to the condition that the company's assets have to lose "all their value", it has become apparent that a literal interpretation of this wording would rather lead to a systematic rejection of all ITP claims since individual assets practically never lose completely their value, even if the company that participated in the anticompetitive practice goes bankrupt (because the assets normally will retain a certain operational and resale value). The Commission therefore interprets this condition as requesting that the fine would not only be likely to lead to the bankruptcy of an undertaking as such, but also that it would cause its productive assets to lose "significantly" their value. This would be the case if the bankruptcy would lead to the disappearance of the undertaking as a going concern (because of dismantling and/or closure), its jobs being lost and the assets (property, buildings, machinery etc.) being sold separately at substantially discounted prices. Conversely, there would be no significant asset loss if there are clear indications that the undertaking will be acquired and its business will be continued as a going concern (i.e. without job losses, etc.) by another company, even if the infringing undertaking as a legal entity would declare bankruptcy. The condition of the asset losing "all their value" is more likely to be fulfilled when the sector concerned or the whole economy at the local or wider scale is going through a serious crisis.

10. **Further action.** The Commission has already adjusted and improved its assessment of ITP claims in order to take account of the increasing number of requests and has been applying the refined assessment in the most recent and upcoming cases. It is nevertheless important to clarify the interpretation of paragraph 35 and in particular of the condition of the assets losing "all their value". The above mentioned principles for the application of paragraph 35 of the Fining Guidelines, as applied recently and as clarified herewith, will be made public through case practice (e.g., in upcoming Statements of Objections or decisions) and, possibly, through more general public statements in an appropriate manner. As noted before, the companies
will in the meantime be made systematically aware of the possibility to invoke ITP, by explicitly referring to paragraph 35 in each Statement of Objections or the requests for information to obtain turnover data which are sent to all undertakings prior to the adoption of the decision.

III. THE CONSEQUENCES OF SUCCESSFUL ITP APPLICATIONS

11. Background. In case a company can demonstrate that it is unable to partially or fully pay the fine imposed by the Commission and meets the criteria for ITP under paragraph 35 of the 2006 Fining Guidelines, there are two principal options to address this situation. The first option would be to reduce the amount of the fine to a level that the company is currently able to pay or, if necessary, to zero (no fine at all). The second option would be not to reduce the amount of the fine but to grant deferred payment by instalments, unsecured by a bank guarantee for the amount that the company is currently unable to pay (this amount would then be paid in yearly instalments over a certain time period, normally not exceeding 3 to 5 years). A combination of these two options would only be possible in exceptional cases.

12. On the one hand, by keeping the nominal amount of the fine the Commission would arguably increase deterrence and the Commission would keep a claim on profits, if the financial situation of the company improves. On the other hand, a clear-cut fine reduction is considerably more beneficial for companies in a distressed financial situation than deferred payments and, hence, it will better achieve the objective of ITP, namely to prevent bankruptcies of competitive undertakings. In particular, fine reductions definitely remove the claim from the company's balance sheet, clarify the liability and allow for more effective financial planning. In addition, the calibration of instalments pre-decision can be practically very difficult without engaging in a discussion with the companies concerned (which do not know yet the precise amount of the expected fine) and may risk leading to unequal treatment.

13. Further action. Fines of applicants meeting the ITP conditions will, as a matter of principle, be reduced in upcoming cases to a level that the company will be considered to be able to pay at the time of the decision without seriously jeopardising its economic viability. Only in exceptional circumstances, should the possibility of granting deferred and unsecured payments by instalments, specified with corresponding deferred due dates in the fine decision be considered as an alternative to fine reductions. The exceptional circumstances will be explained in the basic decision imposing the fines in order to prevent any criticism from an equal treatment perspective by the other undertakings that participated in the anti-competitive conduct. A combination of the above two options would only be possible in exceptional cases.
IV. THE RIGHT OF COMPANIES TO PROVIDE A VALID BANK GUARANTEE

14. **Background.** The companies against which a fine has been imposed but which appeal the fine must either pay the fine provisionally or provide a bank guarantee covering the full fine amount, in accordance with Article 85a of the implementing rules for the Financial Regulation. Provisional payments and bank guarantees have the purpose of securing the fine amount for the Commission until the fine is confirmed or annulled by the Community Courts. The question has arisen recently in a number of cases whether companies, which have sufficient liquidity to provisionally pay the fine, have the right to provide a bank guarantee as security or whether the companies may only provide a bank guarantee if they can demonstrate to the Accounting Officer that they have insufficient liquidity. It should be noted that bank guarantees involve a higher financial risk (corresponding to the standing of the issuing bank). In addition, the management of fines guarantees and their safekeeping impose an administrative burden on the Commission that does not exist in the case of provisional payments.

15. The current wording of the implementing rules for the Financial Regulation is not very clear as to whether the undertakings have a right to provide a bank guarantee or whether the Accounting Officer should first attempt to obtain provisional payment as the "safest" security. As the choice of the option can have financial consequences for the companies concerned, it is necessary to amend the implementing rules for the Financial Regulation in order to clarify that, in such situations, the undertakings concerned have the right to choose between providing valid bank guarantees (i.e. fulfilling the relevant criteria which will be established and, for transparency reasons, made public by the Accounting Officer) or of making a provisional payment, because in either case the payment of the fine will be secured.

16. **Further action.** The relevant Article 85a of the implementing rules for the Financial Regulation will however be changed so as to reflect better that undertakings have the right to provide either a valid bank guarantee or make a provisional payment. From now on, the body of the decision and its operative part imposing the fines should specify that, pending an appeal, the undertaking has the option of covering the fine by the due date either by providing a valid bank guarantee or by making a provisional payment of the fine.

V. FINANCIAL RELIEF POST DECISION

17. **Background.** For all requests for payment relief post-decision an ITP analysis should be carried out, similar to those performed in case such a request is made before the decision is taken, in order to assess the company's financial situation. If it

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3 Article 85a reads as follows: "Where an action is brought before a Community court against a Commission decision imposing a fine, periodic penalty payment or other penalty under the EC Treaty or Euratom Treaty and until such time as all legal remedies have been exhausted, the accounting officer shall provisionally collect the amounts concerned from the debtor or request him to provide a financial guarantee."

4 While the precise criteria will need to be determined in detail such guarantee must be acceptable to the Accounting Officer and, to that purpose, issued, along the model adopted by the College in its internal rules on the implementation of the General budget, by a European bank (i.e. with its seat within the Union), with at least a AA long term rating. These criteria will also be communicated in the reminders sent by the Accounting Officer before the fine falls due.
is decided to intervene in favour of the company, which in principle should only be done exceptionally, the appropriate solution will obviously depend on the individual financial situation of the company in question (i.e. the results of its ITP analysis). Indeed, financial relief should only be granted if the criteria for the assessment of ITP claims under paragraph 35 of the 2006 Guidelines are fulfilled, in particular when it can be demonstrated with a sufficient degree of probability that it is the Commission's fine (covered by a security) that is likely to cause the company's bankruptcy.

18. In practice, such situations are expected to be rare in the future when an ITP request will have been made, in view of the refined ITP methodology that would be applied before adopting the basic decision setting the fine amounts. However, such situations cannot be excluded with absolute certainty. In particular, in the course of appeal proceedings⁵, which normally last several years, it cannot be excluded that a company's financial situation may worsen significantly. Any form of financial relief should however be operated with great caution and can only be granted when a proper ITP assessment demonstrates that the conditions are fulfilled. Three situations must be distinguished:

a) The financial distress occurs during the period immediately after the adoption of the fine until the due date (three months after the notification of the decision)

Notwithstanding the refined ITP assessment method, it cannot be totally excluded in pending or upcoming cases that a situation may still arise where the company will claim ITP immediately after the adoption of that decision and claim that it is unable to provide a security to the Accounting Officer. In order to address this type of situation, it is proposed to amend the implementing rules of the Financial Regulation to the effect that the companies can make a well-documented request to the Accounting Officer for an exemption from the obligation to provide a security in combination with a deferred payment plan (which will carry late payment interest). Financial relief can only be envisaged after an ITP analysis evidencing a distressed situation of the company, unless such an analysis has been performed recently. The request for such financial relief is examined by the Accounting Officer in collaboration with DG Competition.

Pending the revision of the current implementing rules of the Financial Regulation, the College should empower on a case-by-case basis the Accounting Officer to allow a deferred coverage of the fine without guarantee, if he decides in collaboration with DG Competition and the Legal Service that this solution is justified by an ITP analysis, there are prospects to recover the fine and that the financial interest of the Union and the principle of equal treatment are taken into account. Under this new ad-hoc competence of the Accounting Officer it is expected that the number of applications for interim measures introduced by companies before the President of the General Court in order to obtain financial relief would be further reduced. In exceptional circumstances, where deferred security coverage does not prevent the company's bankruptcy (for which

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⁵ Around 85% of the decisions imposing a fine are appealed to the General Court and about 20% of its judgments are further appealed to the Court of Justice.
an ITP analysis will be required), the fine amount might have to be partially or totally waived by the College. A combination of the two options (partial waiver of the fine and deferred coverage of the balance without guarantee) would also be possible in appropriate cases. When the request to review the company's financial situation is accepted in the above scenarios, the ITP is performed by DG Competition.

b) The financial distress occurs during the period after the due date of the fine and pending appeal proceedings:

Financial relief may not be granted by way of release of securities (payments of guarantees) already provided. Upon request of the company and after examination by the Accounting Officer in collaboration with DG Competition and the Legal Service, a new ITP analysis should be performed. The College could then in exceptional circumstances, fully or partially waive the fine, and the amount of any security provided would be correspondingly adjusted.

c) The financial distress occurs after the fine becomes definitive (no appeal or all legal remedies exhausted).

In case the fine becomes due, Article 85 of the implementing rules of the Financial Regulation currently provides for the possibility, upon a company's reasoned request, of a deferred payment plan covered by a valid bank guarantee for the open balance and interest. It will be proposed to amend the implementing rules of the Financial Regulation to the effect that, in exceptional circumstances, the Accounting Officer in collaboration with DG Competition may also accept a deferred payment plan without bank guarantee in the exceptional cases where such a guarantee has not been already provided.

19. The formal act for partially or fully waiving the fine would in each case be a College decision. The legal basis for waiving the fine would either be Article 87(1)(c) of the implementing rules for the Financial Regulation – if the conditions are fulfilled - or otherwise an ad hoc College decision or an amendment of the basic decision that imposed the fines. The legal basis for granting a deferred payment plan with interest but without guarantee will be the revised implementing rules for the Financial Regulation and, pending this revision, an empowerment of the Accounting Officer by the College on an ad hoc basis.

20. Further action. The implementing rules for the Financial Regulation should be amended in order to enable the Accounting Officer, in collaboration with DG Competition, to exempt a company that meets the ITP test from the obligation to provide a security for an appealed fine in combination with a deferred payment plan after the adoption of the decision. With respect to financial difficulties of a

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6 In accordance with existing Commission procedures.

7 Pending the revision of the implementing rules of the Financial Regulation, the College should empower on a case-by-case basis the Accounting Officer, to allow a deferred coverage of the fine without guarantee, if he decides in collaboration with DG Competition, that this solution is justified by an ITP analysis, there are prospects to recover the fine and that the financial interest of the Union and the principle of equal treatment are taken into account.
company, in connection with non definite fines under appeal the Commission may exceptionally intervene by way of a partial or full waiver of the fine. However, financial relief will in both cases (deferred payment or fine waiver) only be granted following a proper ITP analysis by DG Competition. Regarding financial difficulties in case of due fines, the implementing rules of the Financial Regulation should be amended so as to include the possibility to provide for a deferred payment plan without bank guarantee in exceptional circumstances.

21. The proposals aimed at individual decisions in the domain covered by this note will be submitted to the College along the principles as set out above.

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8 In accordance with existing Commission procedures.
Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (2005/C 325/07)

(Text with EEA relevance)

I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Access to the Commission file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. Access to the file is provided for in Article 27(1) and (2) of Council Regulation (EC) No 1/2003 (1), Article 15(1) of Commission Regulation (EC) No 773/2004 (the Implementing Regulation) (2), Article 18(1) and (3) of the Council Regulation (EC) No 139/2004 (Merger Regulation) (3) and Article 17(1) of Commission Regulation (EC) No 802/2004 (the Merger Implementing Regulation) (4). In accordance with these provisions, before taking decisions on the basis of Articles 7, 8, 23 and 24(2) of Regulation (EC) No 1/2003 and Articles 6(3), 7(3), 8(2) to (6), 14 and 15 of the Merger Regulation, the Commission shall give the persons, undertakings or associations of undertakings, as the case may be, an opportunity of making known their views on the objections against them and they shall be entitled to have access to the Commission’s file in order to fully respect their rights of defence in the proceedings. The present notice provides the framework for the exercise of the right set out in these provisions. It does not cover the possibility of the provision of documents in the context of other proceedings. This notice is without prejudice to the interpretation of such provisions by the Community Courts. The principles set out in this Notice apply also when the Commission enforces Articles 53, 54 and 57 of the EEA Agreement (5).

2. This specific right outlined above is distinct from the general right to access to documents under Regulation (EC) No 1049/2001 (6), which is subject to different criteria and exceptions and pursues a different purpose.

3. The term access to the file is used in this notice exclusively to mean the access granted to the persons, undertakings or association of undertakings to whom the Commission has addressed a statement of objections. This notice clarifies who has access to the file for this purpose.

4. The same term, or the term access to documents, is also used in the above-mentioned regulations in respect of complainants or other involved parties. These situations are, however, distinct from that of the addressees of a statement of objections and therefore do not fall under the definition of access to the file for the purposes of this notice. These related situations are dealt with in a separate section of the notice.

5. This notice also explains to which information access is granted, when access takes place and what are the procedures for implementing access to the file.

(5) References in this Notice to Articles 81 and 82 therefore apply also to Articles 53 and 54 of the EEA Agreement.

V - Right to be Heard - 19
6. As from its publication, this notice replaces the 1997 Commission notice on access to the file (1). The new rules take account of the legislation applicable as of 1 May 2004, namely the above referred Regulation (EC) No 1/2003, Merger Regulation, Implementing Regulation and Merger Implementing Regulation, as well as the Commission Decision of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings (2). It also takes into account the recent case law of the Court of Justice and the Court of First Instance of the European Communities (3) and the practice developed by the Commission since the adoption of the 1997 notice.

II. SCOPE OF ACCESS TO THE FILE

A. Who is entitled to access to the file?

7. Access to the file pursuant to the provisions mentioned in paragraph 1 is intended to enable the effective exercise of the rights of defence against the objections brought forward by the Commission. For this purpose, both in cases under Articles 81 and 82 EC and in cases under the Merger Regulation, access is granted, upon request, to the persons, undertakings or associations of undertakings (4), as the case may be, to which the Commission addresses its objections (5) (hereinafter, 'the parties').

B. To which documents is access granted?

1. The content of the Commission file

8. The 'Commission file' in a competition investigation (hereinafter also referred to as 'the file') consists of all documents (6), which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation.

9. In the course of investigation under Articles 20, 21 and 22(2) of Regulation (EC) No 1/2003 and Articles 12 and 13 of the Merger Regulation, the Commission may collect a number of documents, some of which may, following a more detailed examination, prove to be unrelated to the subject matter of the case in question. Such documents may be returned to the undertaking from which those have been obtained. Upon return, these documents will no longer constitute part of the file.

10. The parties must be able to acquaint themselves with the information in the Commission's file, so that, on the basis of this information, they can effectively express their views on the preliminary conclusions reached by the Commission in its objections. For this purpose they will be granted access to all documents making up the Commission file, as defined in paragraph 8, with the exception of internal documents, business secrets of other undertakings, or other confidential information (7).


(3) In particular Joint Cases T-25/95 et al., Cimenteries CBR SA et al. v Commission, [2000] ECR II-0491.

(4) In the remainder of this Notice, the term 'undertaking' includes both undertakings and associations of undertakings. The term 'person' encompasses natural and legal persons. Many entities are legal persons and undertakings at the same time; in this case, they are covered by both terms. The same applies where a natural person is an undertaking within the meaning of Articles 81 and 82. In Merger proceedings, account must also be taken of persons referred to in Article 3(1)(b) of the Merger Regulation, even when they are natural persons. Where entities without legal personality which are also not undertakings become involved in Commission competition proceedings, the Commission applies, where appropriate, the principles set out in this Notice mutatis mutandis.

(5) Cf. Article 15(1) of the Implementing Regulation, Article 18(3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation.

(6) In this notice the term 'document' is used for all forms of information support, irrespective of the storage medium. This covers also any electronic data storage device as may be or become available.

11. Results of a study commissioned in connection with proceedings are accessible together with the terms of reference and the methodology of the study. Precautions may however be necessary in order to protect intellectual property rights.

3. Non-accessible documents

3.1. Internal documents

3.1.1 General principles

12. Internal documents can be neither incriminating nor exculpatory (1). They do not constitute part of the evidence on which the Commission can rely in its assessment of a case. Thus, the parties will not be granted access to internal documents in the Commission file (2). Given their lack of evidential value, this restriction on access to internal documents does not prejudice the proper exercise of the parties’ right of defence (3).

13. There is no obligation on the Commission departments to draft any minutes of meetings (4) with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission’s own interpretation of what was said at the meetings, for which reason they are classified as internal documents. Where, however, the person or undertaking in question has agreed the minutes, such minutes will be made accessible after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the evidence on which the Commission can rely in its assessment of a case (5).

14. In the case of a study commissioned in connection with proceedings, correspondence between the Commission and its contractor containing evaluation of the contractor’s work or relating to financial aspects of the study, are considered internal documents and will thus not be accessible.

3.1.2 Correspondence with other public authorities

15. A particular case of internal documents is the Commission’s correspondence with other public authorities and the internal documents received from such authorities (whether from EC Member States (‘the Member States’) or non-member countries). Examples of such non-accessible documents include:

— correspondence between the Commission and the competition authorities of the Member States, or between the latter (6);

— correspondence between the Commission and other public authorities of the Member States (7);

— correspondence between the Commission, the EFTA Surveillance Authority and public authorities of EFTA States (8);

— correspondence between the Commission and public authorities of non-member countries, including their competition authorities, in particular where the Community and a third country have concluded an agreement governing the confidentiality of the information exchanged (9).

(1) Examples of internal documents are drafts, opinions, memos or notes from the Commission departments or other public authorities concerned.

(2) Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, and Article 17(3) of the Merger Implementing Regulation.

(3) Cf. paragraph 1 above.

(4) Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, Article 17(3) of the Merger Implementing Regulation.


(6) Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, Article 17(3) of the Merger Implementing Regulation.


(8) In this notice the term ‘EFTA States’ includes the EFTA States that are parties to the EEA Agreement.

(9) For example, Article VIII.2 of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ No L 95, 27.4.1995, p. 47) stipulates that information provided to it in confidence under the Agreement must be protected ‘to the fullest extent possible’. That Article creates an international-law obligation binding the Commission.
16. In certain exceptional circumstances, access is granted to documents originating from Member States, the EFTA Surveillance Authority or EFTA States, after deletion of any business secrets or other confidential information. The Commission will consult the entity submitting the document prior to granting access to identify business secrets or other confidential information.

This is the case where the documents originating from Member States contain allegations brought against the parties, which the Commission must examine, or form part of the evidence in the investigative process, in a way similar to documents obtained from private parties. These considerations apply, in particular, as regards:

— documents and information exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, and information provided to the Commission pursuant to Article 18(6) of Regulation (EC) No 1/2003;

— complaints lodged by a Member State under Article 7(2) of Regulation (EC) No 1/2003.

Access will also be granted to documents originating from Member States or the EFTA Surveillance Authority in so far as they are relevant to the parties' defence with regard to the exercise of competence by the Commission (1).

3.2. Confidential information

17. The Commission file may also include documents containing two categories of information, namely business secrets and other confidential information, to which access may be partially or totally restricted (2). Access will be granted, where possible, to non-confidential versions of the original information. Where confidentiality can only be assured by summarising the relevant information, access will be granted to a summary. All other documents are accessible in their original form.

3.2.1 Business secrets

18. In so far as disclosure of information about an undertaking's business activity could result in a serious harm to the same undertaking, such information constitutes business secrets (3). Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

3.2.2 Other confidential information

19. The category 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. The Court of First Instance and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures (4). Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.

(1) In the merger control area, this may apply in particular to submissions by a Member State under Article 9(2) of the Merger Regulation with regard to a case referral.


20. The category of other confidential information also includes military secrets.

3.2.3 Criteria for the acceptance of requests for confidential treatment.

21. Information will be classified as confidential where the person or undertaking in question has made a claim to this effect and such claim has been accepted by the Commission (1).

22. Claims for confidentiality must relate to information which is within the scope of the above descriptions of business secrets or other confidential information. The reasons for which information is claimed to be a business secret or other confidential information must be substantiated (2). Confidentiality claims can normally only pertain to information obtained by the Commission from the same person or undertaking and not to information from any other source.

23. Information relating to an undertaking but which is already known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential (3). Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential. As a general rule, the Commission presumes that information pertaining to the parties’ turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential (4).

24. In proceedings under Articles 81 and 82 of the Treaty, the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement (‘inculpatory document’) or could be necessary to exonerate a party (‘exculpatory document’). In this case, the need to safeguard the rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties (5). It is for the Commission to assess whether those circumstances apply to any specific situation. This calls for an assessment of all relevant elements, including:

— the relevance of the information in determining whether or not an infringement has been committed, and its probative value;

— whether the information is indispensable;

— the degree of sensitivity involved (to what extent would disclosure of the information harm the interests of the person or undertaking in question)

— the preliminary view of the seriousness of the alleged infringement.

Similar considerations apply to proceedings under the Merger Regulation when the disclosure of information is considered necessary by the Commission for the purpose of the procedure (6).

25. Where the Commission intends to disclose information, the person or undertaking in question shall be granted the possibility to provide a non-confidential version of the documents where that information is contained, with the same evidential value as the original documents (7).

C. When is access to the file granted?

26. Prior to the notification of the Commission’s statement of objections pursuant to the provisions mentioned in paragraph 1, the parties have no right of access to the file.

(1) See paragraph 40 below.
(2) See paragraph 35 below.
(3) However, business secrets or other confidential information which are given to a trade or professional association by its members do not lose their confidential nature with regard to third parties and may therefore not be passed on to complainants. Cf. Joined Cases 209 to 215 and 218/78, Fedetab, [1980] ECR 3125, paragraph 46.
(4)See paragraphs 33-38 below on asking undertakings to identify confidential information.
(6) Article 18(1) of the Merger Implementing Regulation.
(7) Cf. paragraph 42 below.
1. In antitrust proceedings under Articles 81 and 82 of the Treaty

27. Access to the file will be granted upon request and, normally, on a single occasion, following the notification of the Commission's objections to the parties, in order to ensure the principle of equality of arms and to protect their rights of defence. As a general rule, therefore, no access will be granted to other parties' replies to the Commission's objections.

A party will, however, be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence — whether of an incriminating or of an exculpatory nature — pertaining to the allegations concerning that party in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence.

2. In proceedings under the Merger Regulation

28. In accordance with Article 18(1) and (3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation, the notifying parties will be given access to the Commission's file upon request at every stage of the procedure following the notification of the Commission's objections up to the consultation of the Advisory Committee. In contrast, this notice does not address the possibility of the provision of documents before the Commission states its objections to undertakings under the Merger Regulation (1).

III. PARTICULAR QUESTIONS REGARDING COMPLAINANTS AND OTHER INVOLVED PARTIES

29. The present section relates to situations where the Commission may or has to provide access to certain documents contained in its file to the complainants in antitrust proceedings and other involved parties in merger proceedings. Irrespective of the wording used in the antitrust and merger implementing regulations (2), these two situations are distinct — in terms of scope, timing, and rights — from access to the file, as defined in the preceding section of this notice.

A. Provision of documents to complainants in antitrust proceedings

30. The Court of First Instance has ruled (3) that complainants do not have the same rights and guarantees as the parties under investigation. Therefore complainants cannot claim a right of access to the file as established for parties.

31. However, a complainant who, pursuant to Article 7(1) of the Implementing Regulation, has been informed of the Commission's intention to reject its complaint (4), may request access to the documents on which the Commission has based its provisional assessment (5). The complainant will be provided access to such documents on a single occasion, following the issuance of the letter informing the complainant of the Commission's intention to reject its complaint.

32. Complainants do not have a right of access to business secrets or other confidential information which the Commission has obtained in the course of its investigation (6).


(2) Cf. Article 8(1) of the Implementing Regulation, which speaks about ‘access to documents’ to complainants and Article 17(2) of Merger Implementing Regulation which speaks about ‘access to file’ to other involved parties ‘in so far as this is necessary for the purposes of preparing their comments’.

(3) See Case T-17/93 Matra-Hachette SA v Commission, [1994] ECR II-595, paragraph 34. The Court ruled that the rights of third parties, as laid down by Article 19 of the Council Regulation No 17 of 6.2.1962 (now replaced by Article 27 of Regulation (EC) No 1/2003), were limited to the right to participate in the administrative procedure.

(4) By means of a letter issued in accordance with Article 7(1) of the Implementing Regulation.

(5) Cf. Article 8(1) of the Implementing Regulation.

(6) Cf. Article 8(1) of the Implementing Regulation.
B. Provision of documents to other involved parties in merger proceedings

33. In accordance with Article 17(2) of the Merger Implementing Regulation, access to the file in merger proceedings shall also be given, upon request, to other involved parties who have been informed of the objections in so far as this is necessary for the purposes of preparing their comments.

34. Such other involved parties are parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration (1).

IV. PROCEDURE FOR IMPLEMENTING ACCESS TO THE FILE

A. Preparatory procedure

35. Any person which submits information or comments in one of the situations listed hereunder, or subsequently submits further information to the Commission in the course of the same procedures, has an obligation to clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known (2):

a) In antitrust proceedings

— an addressee of a Commission's statement of objections making known its views on the objections (3);

— a complainant making known its views on a Commission statement of objections (4);

— any other natural or legal person, which applies to be heard and shows a sufficient interest, or which is invited by the Commission to express its views, making known its views in writing or at an oral hearing (5);

— a complainant making known his views on a Commission letter informing him on the Commission's intention to reject the complaint (6).

b) In merger proceedings

— notifying parties or other involved parties making known their views on Commission objections adopted with a view to take a decision with regard to a request for a derogation from suspension of a concentration and which adversely affects one or more of those parties, or on a provisional decision adopted in the matter (7);

— notifying parties to whom the Commission has addressed a statement of objections, other involved parties who have been informed of those objections or parties to whom the Commission has addressed objections with a view to inflict a fine or a periodic penalty payment, submitting their comments on the objections (8);

— third persons who apply to be heard, or any other natural or legal person invited by the Commission to express their views, making known their views in writing or at an oral hearing (9);

— any person which supplies information pursuant to Article 11 of the Merger Regulation.

(1) Cf. Article 11(b) of the Merger Implementing Regulation.
(2) Cf. Article 16(2) of the Implementing Regulation and Article 18(2) of the Merger Implementing Regulation.
(3) pursuant to Article 10(2) of the Implementing Regulation.
(4) pursuant to Article 6(1) of the Implementing Regulation.
(5) pursuant to Article 13(1) and (3) of the Implementing Regulation.
(6) pursuant to Article 7(1) of the Implementing Regulation.
(7) Article 12 of the Merger Implementing Regulation.
(8) Article 13 of the Merger Implementing Regulation.
(9) pursuant to Article 16 of the Merger Implementing Regulation.
Moreover, the Commission may require undertakings (1), in all cases where they produce or have produced documents, to identify the documents or parts of documents, which they consider to contain business secrets or other confidential information belonging to them, and to identify the undertakings with regard to which such documents are to be considered confidential (2).

For the purposes of quickly dealing with confidentiality claims referred to in paragraph 36 above, the Commission may set a time-limit within which the undertakings shall: (i) substantiate their claim for confidentiality with regard to each individual document or part of document; (ii) provide the Commission with a non-confidential version of the documents, in which the confidential passages are deleted (3). In antitrust proceedings the undertakings in question shall also provide within the said time-limit a concise description of each piece of deleted information (4).

The non-confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed to be confidential.

B. Treatment of confidential information

In antitrust proceedings, if undertakings fail to comply with the provisions set out in paragraphs 35 to 37 above, the Commission may assume that the documents or statements concerned do not contain confidential information (5). The Commission may consequently assume that the undertaking has no objections to the disclosure of the documents or statements concerned in their entirety.

In both antitrust proceedings and in proceedings under the Merger Regulation, should the person or undertaking in question meet the conditions set out in paragraphs 35 to 37 above, to the extent they are applicable, the Commission will either:

— provisionally accept the claims which seem justified; or

— inform the person or undertaking in question that it does not agree with the confidentiality claim in whole or in part, where it is apparent that the claim is unjustified.

The Commission may reverse its provisional acceptance of the confidentiality claim in whole or in part at a later stage.

Where the Directorate General for Competition does not agree with the confidentiality claim from the outset or where it takes the view that the provisional acceptance of the confidentiality claim should be reversed, and thus intends to disclose information, it will grant the person or undertaking in question an opportunity to express its views. In such cases, the Directorate General for Competition will inform the person or undertaking in writing of its intention to disclose information, give its reasons and set a time-limit within which such person or undertaking may inform it in writing of its views. If, following submission of those views, a disagreement on the confidentiality claim persists, the matter will be dealt with by the Hearing Officer according to the applicable Commission terms of reference of Hearing Officers (6).

(1) In merger proceedings the principles set out in the present and subsequent paragraphs also apply to the persons referred to in Article 3(1)(b) of Merger Regulation.

(2) Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation. This also applies to documents gathered by the Commission in an inspection pursuant to Article 13 of the Merger Regulation and Articles 20 and 21 of Regulation (EC) No 1/2003.

(3) Cf. Article 16(3) of the Implementing Regulation.

(4) Cf. Article 16 of the Implementing Regulation.

43. Where there is a risk that an undertaking which is able to place very considerable economic or commercial pressure on its competitors or on its trading partners, customers or suppliers will adopt retaliatory measures against those, as a consequence of their collaboration in the investigation carried out by the Commission (1), the Commission will protect the anonymity of the authors by providing access to a non-confidential version or summary of the responses in question (2). Requests for anonymity in such circumstances, as well as requests for anonymity according to point 81 of the Commission Notice on the handling of complaints (3) will be dealt with according to paragraphs 40 to 42 above.

C. Provision of access to file

44. The Commission may determine that access to the file shall be granted in one of the following ways, taking due account of the technical capabilities of the parties:
— by means of a CD-ROM(s) or any other electronic data storage device as may become available in future;
— through copies of the accessible file in paper form sent to them by mail;
— by inviting them to examine the accessible file on the Commission’s premises.

The Commission may choose any combination of these methods.

45. In order to facilitate access to the file, the parties will receive an enumerative list of documents setting out the content of the Commission file, as defined in paragraph 8 above.

46. Access is granted to evidence as contained in the Commission file, in its original form: the Commission is under no obligation to provide a translation of documents in the file (4).

47. If a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. If the services of the Directorate General for Competition are not in a position to accept the request and if the party disagrees with that view, the matter will be resolved by the Hearing Officer, in accordance with the applicable terms of reference of Hearing Officers (5).

48. Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings (6). Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

49. With the exception of paragraphs 45 and 47, this section C applies equally to the grant of access to documents to complainants (in antitrust proceedings) and to other involved parties (in merger proceedings).

(1) Cf. paragraph 19 above.
(6) Cf. Articles 15(4) and 8(2) of the Implementing Regulation, respectively, and Article 17(4) of the Merger Implementing Regulation.

V - Right to be Heard - 19
DECISION OF THE PRESIDENT OF THE EUROPEAN COMMISSION
of 13 October 2011
on the function and terms of reference of the hearing officer in certain competition proceedings
(Text with EEA relevance)
(2011/695/EU)

THE PRESIDENT OF THE EUROPEAN COMMISSION,

Having regard to the Treaty on European Union,

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

Having regard to the Agreement on the European Economic Area,

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

Whereas:

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

(2) The Commission has to conduct its competition proceedings fairly, impartially and objectively and must ensure respect of the procedural rights of the parties concerned as set out in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2), Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (3), Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (4), and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (5), as well as in the relevant case-law of the Court of Justice. In particular, the right of the parties concerned to be heard before the adoption of any individual decision adversely affecting them is a fundamental right of European Union law recognised by the Charter of Fundamental Rights, and in particular Article 41 thereof (6).

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

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

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

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

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

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

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

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

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

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

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

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

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

(15) In order to safeguard the effective exercise of the rights of defence of parties to whom a statement of objections has been addressed, the hearing officer should be responsible for ensuring that disputes about access to the file or about the protection of business secrets and other confidential information between those parties and the Commission's Directorate-General for Competition are resolved. In exceptional circumstances, the hearing officer may suspend the running of the time period in which an addressee of a statement of objections should reply to that statement until a dispute about access to file has been resolved, if the addressee would not be in a position to reply within the deadline granted and an extension would not be an adequate solution at that point in time.
In order to safeguard the effective exercise of procedural rights while respecting the legitimate interests of confidentiality, the hearing officer should, where appropriate, be able to order specific measures for access to the Commission’s file. In particular, the hearing officer should have the power to decide that parts of the file are made accessible to the party requesting access in a restricted manner, for example by limiting the number or category of persons having access, and the use of the information being accessed.

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

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

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

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

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

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

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

Decision 2001/462/EC, ECSC should be repealed.

HAS DECIDED AS FOLLOWS:

CHAPTER 1

ROLE, APPOINTMENT AND DUTIES OF THE HEARING OFFICER

Article 1

The Hearing Officer

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

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

Article 2

Appointment, Termination of Appointment and Deputising

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

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

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

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

Article 3

Method of Operation

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

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

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

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

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

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

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

CHAPTER 2

INVESTIGATION

Article 4

Procedural rights in the investigation phase

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

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

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

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

V - Right to be Heard - 20

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

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

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

Article 6

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

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

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

CHAPTER 4

ACCESS TO FILE, CONFIDENTIALITY AND BUSINESS SECRETS

Article 7

Access to File and Access to Documents and Information

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

2. Subject to Article 3(7), other involved parties, complainants and interested third persons within the meaning of Article 5 may make a reasoned request to the hearing officer in the circumstances listed hereafter:
(a) Other involved parties who have reason to believe that they have not been informed of the objections addressed to the notifying parties in accordance with Article 13(2) of Regulation (EC) No 802/2004.

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

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

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

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

Article 8

Business secrets and other confidential information

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

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

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

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

CHAPTER 5

EXTENSION OF TIME LIMITS

Article 9

Requests for extension of time limits

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

(a) the size and complexity of the file;

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

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

For the purposes of assessing point (a) of the first subparagraph, the number of infringements, the alleged duration of the infringement(s), the size and number of documents and the size and complexity of expert studies may be taken into consideration.
2. If other involved parties, a complainant or an interested third person within the meaning of Article 5 considers that the time limit to make its views known is too short, it may seek an extension of that time limit by means of a reasoned request addressed to the director responsible in due time before the expiry of the original time limit. If such a request is not granted or the other involved party, complainant or interested third person disagrees with this decision, it may refer the matter to the hearing officer for review. After hearing the director responsible, the hearing officer shall decide on whether an extension of the time limit should be granted.

CHAPTER 6
THE ORAL HEARING

Article 10
Organisation and function
1. The hearing officer shall organise and conduct the hearings provided for in the provisions implementing Articles 101 and 102 of the Treaty and Regulation (EC) No 139/2004.

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

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

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

Article 11
Preparation of the oral hearing
1. The hearing officer shall be responsible for the preparation of the oral hearing and shall take all appropriate measures in that regard. In order to ensure the proper preparation of the oral hearing, the hearing officer may, after consulting the director responsible, supply in advance to the persons invited to the hearing a list of questions on which they are invited to make known their views. The hearing officer may also indicate to the persons invited to the hearing the focal areas for debate, having regard, in particular, to the facts and issues that the addressees of a statement of objections who have requested an oral hearing want to raise.

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

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

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

Article 12
Timing and conduct
1. After consulting the director responsible, the hearing officer shall determine the date, the duration and the place of the hearing. Where a postponement is requested, the hearing officer shall decide whether or not to allow it.

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

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

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

Article 13
Protection of business secrets and confidentiality at the oral hearing
Each person shall normally be heard in the presence of all other persons invited to attend the oral hearing. The hearing officer may also decide to hear persons separately in a closed session, having regard to their legitimate interest in the protection of their business secrets and other confidential information.
CHAPTER 7
INTERIM REPORT AND RIGHT TO MAKE OBSERVATIONS

Article 14
Interim report and observations

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

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

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

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

(d) the proper conduct of the oral hearing.

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

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

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

CHAPTER 8
COMMITMENTS AND SETTLEMENTS

Article 15
Commitments and settlements

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

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

CHAPTER 9
FINAL REPORT

Article 16
Content and transmission prior to the adoption of a decision

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

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

Article 17
Submission to the Commission and publication

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

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

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

CHAPTER 10
FINAL PROVISIONS

Article 18
Repeal and transitional provision

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

2. Procedural steps already taken under Decision 2001/462/EC, ECSC shall continue to have effect. In relation to investigatory measures that were taken before the entry into force of this Decision, the hearing officer may decline to exercise his or her powers pursuant to Article 4.
In cases where the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 or the initiation of proceedings pursuant to Article 6(1)(c) of Regulation (EC) No 139/2004 took place before the entry into force of the present Decision, the interim report pursuant to Article 14 of the present Decision and the final report pursuant to Article 16 shall not cover the investigation phase, unless the hearing officer decides otherwise.

Article 19

Entry into force

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

Done at Brussels, 13 October 2011.

For the Commission
The President
José Manuel BARROSO
Commission Notice on cooperation within the Network of Competition Authorities

(2004/C 101/03)

(Text with EEA relevance)

1. INTRODUCTION

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (1) (hereafter the 'Council Regulation') creates a system of parallel competences in which the Commission and the Member States' competition authorities (hereafter the 'NCAs') (2) can apply Article 81 and Article 82 of the EC Treaty (hereafter the 'Treaty'). Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe. The network is called 'European Competition Network' (ECN).

2. The structure of the NCAs varies between Member States. In some Member States, one body investigates cases and takes all types of decisions. In other Member States, the functions are divided between two bodies, one which is in charge of the investigation of the case and another, often a college, which is responsible for deciding the case. Finally, in certain Member States, prohibition decisions and/or decisions imposing a fine can only be taken by a court: another competition authority acts as a prosecutor bringing the case before that court. Subject to the general principle of effectiveness, Article 35 of the Council Regulation allows Member States to choose the body or bodies which will be designated as national competition authorities and to allocate functions between them. Under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law (3). The enforcement systems of the Member States differ but they have recognised the standards of each other's systems as a basis for cooperation (4).

3. The network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules. The Council Regulation together with the joint statement of the Council and the Commission on the functioning of the European Competition Network sets out the main principles of the functioning of the network. This notice presents the details of the system.

4. Consultations and exchanges within the network are matters between public enforcers and do not alter any rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring due process in the cases it deals with.

2. DIVISION OF WORK

2.1. Principles of allocation

5. The Council Regulation is based on a system of parallel competences in which all competition authorities have the power to apply Articles 81 or 82 of the Treaty and are responsible for an efficient division of work with respect to those cases where an investigation is deemed to be necessary. At the same time each network member retains full discretion in deciding whether or not to investigate a case. Under this system of parallel competences, cases will be dealt with by:

— a single NCA, possibly with the assistance of NCAs of other Member States; or

— several NCAs acting in parallel; or

— the Commission.

6. In most instances the authority that receives a complaint or starts an ex-officio procedure (5) will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure (see paragraph 18 below) where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act (see paragraphs 8 to 15 below).

7. Where re-allocation is found to be necessary for an effective protection of competition and of the Community interest, network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible (6). In any event, re-allocation should be a quick and efficient process and not hold up ongoing investigations.
8. An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:

1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;

2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;

3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

9. The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State’s competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is better placed to act (see below paragraphs 14 and 15).

10. It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory.

Example 1: Undertakings situated in Member State A are involved in a price fixing cartel on products that are mainly sold in Member State A. The NCA in A is well placed to deal with the case.

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.

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.

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 3: Two undertakings agree on a market sharing agreement, restricting the activity of the company located in Member State A to Member State A and the activity of the company located in Member State B to Member State B. The NCAs in A and B are well placed to deal with the case in parallel, each one for its respective territory.

13. The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

14. The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).

Example 4: Two undertakings agree to share markets or fix prices for the whole territory of the Community. The Commission is well placed to deal with the case.

Example 5: An undertaking, dominant in four different national markets, abuses its position by imposing fidelity rebates on its distributors in all these markets. The Commission is well placed to deal with the case. It could also deal with one national market so as to create a ‘leading’ case and other national markets could be dealt with by NCAs, particularly if each national market requires a separate assessment.
15. Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.

16. In order to detect multiple procedures and to ensure that cases are dealt with by a well placed competition authority, the members of the network have to be informed at an early stage of the cases pending before the various competition authorities (7). If a case is to be re-allocated, it is indeed in the best interest both of the network and of the undertakings concerned that the re-allocation takes place quickly.

17. The Council Regulation creates a mechanism for the competition authorities to inform each other in order to ensure an efficient and quick re-allocation of cases. Article 11(3) of the Council Regulation lays down an obligation for NCAs to inform the Commission when acting under Article 81 or 82 of the Treaty before or without delay after commencing the first formal investigative measure. It also states that the information may be made available to other NCAs (8). The rationale of Article 11(3) of the Council Regulation is to allow the network to detect multiple procedures and address possible case re-allocation issues as soon as an authority starts investigating a case. Information should therefore be provided to NCAs and the Commission before or just after any step similar to the measures of investigation that can be undertaken by the Commission under Articles 18 to 21 of the Council Regulation. The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. Network members will inform each other of pending cases by means of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case. They will also provide each other with updates when a relevant change occurs.

18. Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months, starting from the date of the first information sent to the network pursuant to Article 11 of the Council Regulation. During this period, competition authorities will endeavour to reach an agreement on a possible re-allocation and, where relevant, on the modalities for parallel action.

19. In general, the competition authority or authorities that is/are dealing with a case at the end of the re-allocation period should continue to deal with the case until the completion of the proceedings. Re-allocation of a case after the initial allocation period of two months should only occur where the facts known about the case change materially during the course of the proceedings.

20. If the same agreement or practice is brought before several competition authorities, be it because they have received a complaint or have opened a procedure on their own initiative, Article 13 of the Council Regulation provides a legal basis for suspending proceedings or rejecting a complaint on the grounds that another authority is dealing with the case or has dealt with the case. In Article 13 of the Council Regulation, ‘dealing with the case’ does not merely mean that a complaint has been lodged with another authority. It means that the other authority is investigating or has investigated the case on its own behalf.

21. Article 13 of the Council Regulation applies when another authority has dealt or is dealing with the competition issue raised by the complainant, even if the authority in question has acted or acts on the basis of a complaint lodged by a different complainant or as a result of an ex-officio procedure. This implies that Article 13 of the Council Regulation can be invoked when the agreement or practice involves the same infringement(s) on the same relevant geographic and product markets.

22. An NCA may suspend or close its proceedings but it has no obligation to do so. Article 13 of the Council Regulation leaves scope for appreciation of the peculiarities of each individual case. This flexibility is important: if a complaint was rejected by an authority following an investigation of the substance of the case, another authority may not want to re-examine the case. On the other hand, if a complaint was rejected for other reasons (e.g. the authority was unable to collect the evidence necessary
to prove the infringement), another authority may wish to carry out its own investigation and deal with the case. This flexibility is also reflected, for pending cases, in the choice open to each NCA as to whether it closes or suspends its proceedings. An authority may be unwilling to close a case before the outcome of another authority's proceedings is clear. The ability to suspend its proceedings allows the authority to retain its ability to decide at a later point whether or not to terminate its proceedings. Such flexibility also facilitates consistent application of the rules.

23. Where an authority closes or suspends proceedings because another authority is dealing with the case, it may transfer — in accordance with Article 12 of the Council Regulation — the information provided by the complainant to the authority which is to deal with the case.

24. Article 13 of the Council Regulation can also be applied to part of a complaint or to part of the proceedings in a case. It may be that only part of a complaint or of an ex-officio procedure overlaps with a case already dealt or being dealt with by another competition authority. In that case, the competition authority to which the complaint is brought is entitled to reject part of the complaint on the basis of Article 13 of the Council Regulation and to deal with the rest of the complaint in an appropriate manner. The same principle applies to the termination of proceedings.

25. Article 13 of the Council Regulation is not the only legal basis for suspending or closing ex-officio proceedings or rejecting complaints. NCAs may also be able to do so according to their national procedural law. The Commission may also reject a complaint for lack of Community interest or other reasons pertaining to the nature of the complaint (9).

26. A key element of the functioning of the network is the power of all the competition authorities to exchange and use information (including documents, statements and digital information) which has been collected by them for the purpose of applying Article 81 or Article 82 of the Treaty. This power is a precondition for efficient and effective allocation and handling of cases.

27. Article 12 of the Council Regulation states that for the purpose of applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. This means that exchanges of information may not only take place between an NCA and the Commission but also between and amongst NCAs. Article 12 of the Council Regulation takes precedence over any contrary law of a Member State. The question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. When transmitting information the transmitting authority may inform the receiving authority whether the gathering of the information was contested or could still be contested.

28. The exchange and use of information contains in particular the following safeguards for undertakings and individuals.

(a) First, Article 28 of the Council Regulation states that 'the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities (...) shall not disclose information acquired or exchanged by them pursuant to the Council Regulation which is of the kind covered by the obligation of professional secrecy'. However, the legitimate interest of undertakings in the protection of their business secrets may not prejudice the disclosure of information necessary to prove an infringement of Articles 81 and 82 of the Treaty. The term 'professional secrecy' used in Article 28 of the Council Regulation is a Community law concept and includes in particular business secrets and other confidential information. This will create a common minimum level of protection throughout the Community.

(b) The second safeguard given to undertakings relates to the use of information which has been exchanged within the network. Under Article 12(2) of the Council Regulation, information so exchanged can only be used in evidence for the application of Articles 81 and 82 of the Treaty and for the subject matter for which it was collected (10). According to Article 12(2) of the Council Regulation, the information exchanged may also be used for the purpose of applying national competition law in parallel in the same case. This is, however, only possible if the application of national law does not lead to an outcome as regards the finding of an infringement different from that under Articles 81 and 82 of the Treaty.

(c) The third safeguard given by the Council Regulation relates to suspending or terminating proceedings on the basis of information exchanged pursuant to Article 12(1). The Council Regulation only provides for sanctions on undertakings for violations of Articles 81 and 82 of
the Treaty. Some national laws also provide for sanctions on individuals in connection with violations of Articles 81 and 82 of the Treaty. Individuals normally enjoy more extensive rights of defence (e.g. a right to remain silent compared to undertakings which may only refuse to answer questions which would lead them to admit that they have committed an infringement (1)). Article 12(3) of the Council Regulation ensures that information collected from undertakings cannot be used in a way which would circumvent the higher protection of individuals. This provision precludes sanctions being imposed on individuals on the basis of information exchanged pursuant to the Council Regulation if the laws of the transmitting and the receiving authorities do not provide for sanctions of a similar kind in respect of individuals, unless the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the receiving authority. The qualification of the sanctions by national law (‘administrative’ or ‘criminal’) is not relevant for the purpose of applying Article 12(3) of the Council Regulation. The Council Regulation intends to create a distinction between sanctions which result in custody and other types of sanctions such as fines on individuals and other personal sanctions. If both the legal system of the transmitting and that of the receiving authority provide for sanctions of a similar kind (e.g. in both Member States, fines can be imposed on a member of the staff of an undertaking who has been involved in the violation of Article 81 or 82 of the Treaty), information exchanged pursuant to Article 12 of the Council Regulation can be used by the receiving authority. In that case, procedural safeguards in both systems are considered to be equivalent. If on the other hand, both legal systems do not provide for sanctions of a similar kind, the information can only be used if the same level of protection of the rights of the individual has been respected in the case at hand (see Article 12(3) of the Council Regulation). In that latter case however, custodial sanctions can only be imposed where both the transmitting and the receiving authority have the power to impose such a sanction.

30. Under Article 22(2) of the Council Regulation, the Commission can ask an NCA to carry out an inspection on its behalf. The Commission can either adopt a decision pursuant to Article 20(4) of the Council Regulation or simply issue a request to the NCA. The NCA officials will exercise their powers in accordance with their national law. The agents of the Commission may assist the NCA during the inspection.

2.3. Position of undertakings

2.3.1. General

31. All network members will endeavour to make the allocation of cases a quick and efficient process. Given the fact that the Council Regulation has created a system of parallel competences, the allocation of cases between members of the network constitutes a mere division of labour where some authorities abstain from acting. The allocation of cases therefore does not create individual rights for the companies involved in or affected by an infringement to have the case dealt with by a particular authority.

32. If a case is re-allocated to a given competition authority, it is because the application of the allocation criteria set out above led to the conclusion that this authority is well placed to deal with the case by single or parallel action. The competition authority to which the case is re-allocated would have been in a position, in any event, to commence an ex-officio procedure against the infringement.

33. Furthermore, all competition authorities apply Community competition law and the Council Regulation sets out mechanisms to ensure that the rules are applied in a consistent way.

34. If a case is re-allocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved.
2.3.2. Position of complainants

35. If a complaint is lodged with the Commission pursuant to Article 7 of the Council Regulation and if the Commission does not investigate the complaint or prohibit the agreement or practice complained of, the complainant has a right to obtain a decision rejecting his complaint. This is without prejudice to Article 7(3) of the Commission implementing regulation (12). The rights of complainants who lodge a complaint with an NCA are governed by the applicable national law.

36. In addition, Article 13 of the Council Regulation gives all NCAs the possibility of suspending or rejecting a complaint on the ground that another competition authority is dealing or has dealt with the same case. That provision also allows the Commission to reject a complaint on the ground that a competition authority of a Member State is dealing or has dealt with the case. Article 12 of the Council Regulation allows the transfer of information between competition authorities within the network subject to the safeguards provided in that Article (see paragraph 28 above).

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

37. The Commission considers (13) that it is in the Community interest to grant favourable treatment to undertakings which co-operate with it in the investigation of cartel infringements. A number of Member States have also adopted leniency programmes (14) relating to cartel investigations. The aim of these leniency programmes is to facilitate the detection by competition authorities of cartel activity and also thereby to act as a deterrent to participation in unlawful cartels.

38. In the absence of a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article 81 of the Treaty in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question (15). In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to file leniency applications with the relevant authorities simultaneously. It is for the applicant to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.

39. As for all cases where Articles 81 and 82 of the Treaty are applied, where an NCA deals with a case which has been initiated as a result of a leniency application, it must inform the Commission and may make the information available to other members of the network pursuant to Article 11(3) of the Council Regulation (cf. paragraphs 16 et subseq.). The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. In such cases, however, information submitted to the network pursuant to Article 11 will not be used by other members of the network as the basis for starting an investigation on their own behalf whether under the competition rules of the Treaty or, in the case of NCAs, under their national competition law or other laws (16). This is without prejudice to any power of the authority to open an investigation on the basis of information received from other sources or, subject to paragraphs 40 and 41 below, to request, be provided with and use information pursuant to Article 12 from any member of the network, including the network member to whom the leniency application was submitted.

40. Save as provided under paragraph 41, information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to another authority pursuant to Article 12 of the Council Regulation if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. The network members will encourage leniency applicants to give such consent, in particular as regards disclosure to authorities in respect of which it would be open to the applicant to obtain lenient treatment. Once the leniency applicant has given consent to the transmission of information to another authority, that consent may not be withdrawn. This paragraph is without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.

41. Notwithstanding the above, the consent of the applicant for the transmission of information to another authority pursuant to Article 12 of the Council Regulation is not required in any of the following circumstances:

1. No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority.
2. No consent is required where the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions:

(a) on the leniency applicant;

(b) on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme;

(c) on any employee or former employee of any of the persons covered by (a) or (b).

A copy of the receiving authority's written commitment will be provided to the applicant.

3. In the case of information collected by a network member under Article 22(1) of the Council Regulation on behalf of and for the account of the network member to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the network member to whom the application was made.

42. Information relating to cases initiated as a result of a leniency application and which has been submitted to the Commission under Article 11(3) of the Council Regulation (17) will only be made available to those NCAs that have committed themselves to respecting the principles set out above (see paragraph 72). The same principle applies where a case has been initiated by the Commission as a result of a leniency application made to the Commission. This does not affect the power of any authority to be provided with information under Article 12 of the Council Regulation, provided however that the provisions of paragraphs 40 and 41 are respected.

3. CONSISTENT APPLICATION OF EC COMPETITION RULES (18)

3.1. Mechanism of cooperation (Article 11(4) and 11(5) of the Council Regulation)

43. The Council Regulation pursues the objective that Articles 81 and 82 of the Treaty are applied in a consistent manner throughout the Community. In this respect NCAs will respect the convergence rule contained in Article 3(2) of the Council Regulation. In line with Article 16(2) they cannot — when ruling on agreements, decisions and practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision — take decisions, which would run counter to the decisions adopted by the Commission. Within the network of competition authorities the Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law.

44. According to Article 11(4) of the Council Regulation, no later than 30 days before the adoption of a decision applying Articles 81 or 82 of the Treaty and requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block-exemption regulation, NCAs shall inform the Commission. They have to send to the Commission, at the latest 30 days before the adoption of the decision, a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action.

45. As under Article 11(3) of the Council Regulation, the obligation is to inform the Commission, but the information may be shared by the NCA informing the Commission with the other members of the network.

46. Where an NCA has informed the Commission pursuant to Article 11(4) of the Council Regulation and the 30 days deadline has expired, the decision can be adopted as long as the Commission has not initiated proceedings. The Commission may make written observations on the case before the adoption of the decision by the NCA. The NCA and the Commission will make the appropriate efforts to ensure the consistent application of Community law (cf. paragraph 3 above).

47. If special circumstances require that a national decision is taken in less than 30 days following the transmission of information pursuant to Article 11(4) of the Council Regulation, the NCA concerned may ask the Commission for a swifter reaction. The Commission will endeavour to react as quickly as possible.

48. Other types of decisions, i.e. decisions rejecting complaints, decisions closing an ex-officio procedure or decisions ordering interim measures, can also be important from a competition policy point of view, and the network members may have an interest in informing each other about them and possibly discussing them. NCAs can therefore on the basis of Article 11(5) of the Council Regulation inform the Commission and thereby inform the network of any other case in which EC competition law is applied.
49. All members of the network should inform each other about the closure of their procedures which have been notified to the network pursuant to Article 11(2) and (3) of the Council Regulation (19).

3.2. The initiation of proceedings by the Commission under Article 11(6) of the Council Regulation

50. According to the case law of the Court of Justice, the Commission, entrusted by Article 85(1) of the Treaty with the task of ensuring the application of the principles laid down in Articles 81 and 82 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy (20). It can adopt individual decisions under Articles 81 and 82 of the Treaty at any time.

51. Article 11(6) of the Council Regulation states that the initiation by the Commission of proceedings for the adoption of a decision under the Council Regulation shall relieve all NCAs of their competence to apply Articles 81 and 82 of the Treaty. This means that once the Commission has opened proceedings, NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

52. The initiation of proceedings by the Commission is a formal act (21) by which the Commission indicates its intention to adopt a decision under Chapter III of the Council Regulation. It can occur at any stage of the investigation of the case by the Commission. The mere fact that the Commission has received a complaint is not in itself sufficient to relieve NCAs of their competence.

53. Two situations can arise. First, where the Commission is the first competition authority to initiate proceedings in a case for the adoption of a decision under the Council Regulation, national competition authorities may no longer deal with the case. Article 11(6) of the Council Regulation provides that once the Commission has initiated proceedings, the NCAs can no longer start their own procedure with a view to applying Articles 81 and 82 of the Treaty to the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

54. The second situation is where one or more NCAs have informed the network pursuant to Article 11(3) of the Council Regulation that they are acting on a given case. During the initial allocation period (indicative time period of two months, see paragraph 18 above), the Commission can initiate proceedings with the effects of Article 11(6) of the Council Regulation after having consulted the authorities concerned. After the allocation phase, the Commission will in principle only apply Article 11(6) of the Council Regulation if one of the following situations arises:

(a) Network members envisage conflicting decisions in the same case.

(b) Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission;

(c) Network member(s) is (are) unduly drawing out proceedings in the case;

(d) There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement;

(e) The NCA(s) concerned do not object.

55. If an NCA is already acting on a case, the Commission will explain the reasons for the application of Article 11(6) of the Council Regulation in writing to the NCA concerned and to the other members of the Network (22).

56. The Commission will announce to the network its intention of applying Article 11(6) of the Council Regulation in due time, so that Network members will have the possibility of asking for a meeting of the Advisory Committee on the matter before the Commission initiates proceedings.

57. The Commission will normally not — and to the extent that Community interest is not at stake — adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of the Council Regulation has taken place and the Commission has not made use of Article 11(6) of the Council Regulation.
4. THE ROLE AND THE FUNCTIONING OF THE ADVISORY COMMITTEE IN THE NEW SYSTEM

58. The Advisory Committee is the forum where experts from the various competition authorities discuss individual cases and general issues of Community competition law (23).

4.1. Scope of the consultation

4.1.1. Decisions of the Commission

59. The Advisory Committee is consulted prior to the Commission taking any decision pursuant to Articles 7, 8, 9, 10, 23, 24(2) or 29(1) of the Council Regulation. The Commission must take the utmost account of the opinion of the Advisory Committee and inform the Committee of the manner in which its opinion has been taken into account.

60. For decisions adopting interim measures, the Advisory Committee is consulted following a swifter and lighter procedure, on the basis of a short explanatory note and the operative part of the decision.

4.1.2. Decisions of NCAs

61. It is in the interest of the network that important cases dealt with by NCAs under Articles 81 and 82 of the Treaty can be discussed in the Advisory Committee. The Council Regulation enables the Commission to put a given case being dealt with by an NCA on the agenda of the Advisory Committee. Discussion can be requested by the Commission or by any Member State. In either case, the Commission will put the case on the agenda after having informed the NCA(s) concerned. This discussion in the Advisory Committee will not lead to a formal opinion.

62. In important cases, the Advisory Committee could also serve as a forum for the discussion of case allocation. In particular, where the Commission intends to apply Article 11(6) of the Council Regulation after the initial allocation period, the case can be discussed in the Advisory Committee before the Commission initiates proceedings. The Advisory Committee may issue an informal statement on the matter.

4.1.3. Implementing measures, block-exemption regulations, guidelines and other notices (Article 33 of the Council Regulation)

63. The Advisory Committee will be consulted on draft Commission regulations as provided for in the relevant Council Regulations.

64. Beside regulations, the Commission may also adopt notices and guidelines. These more flexible tools are very useful for explaining and announcing the Commission's policy, and for explaining its interpretation of the competition rules. The Advisory Committee will also be consulted on these notices and guidelines.

4.2. Procedure

4.2.1. Normal procedure

65. For consultation on Commission draft decisions, the meeting of the Advisory Committee takes place at the earliest 14 days after the invitation to the meeting is sent by the Commission. The Commission attaches to the invitation a summary of the case, a list of the most important documents, i.e. the documents needed to assess the case, and a draft decision. The Advisory Committee gives an opinion on the Commission draft decision. At the request of one or several members, the opinion shall be reasoned.

66. The Council Regulation allows for the possibility of the Member States agreeing upon a shorter period of time between the sending of the invitation and the meeting.

4.2.2. Written procedure

67. The Council Regulation provides for the possibility of a written consultation procedure. If no Member State objects, the Commission can consult the Member States by sending the documents to them and setting a deadline within which they can comment on the draft. This deadline would not normally be shorter than 14 days, except for decisions on interim measures pursuant to Article 8 of the Council Regulation. Where a Member State requests that a meeting takes place, the Commission will arrange for such a meeting.

4.3. Publication of the opinion of the Advisory Committee

68. The Advisory Committee can recommend the publication of its opinion. In that event, the Commission will carry out such publication simultaneously with the decision, taking into account the legitimate interest of undertakings in the protection of their business secrets.

5. FINAL REMARKS

69. This Notice is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Court of First Instance and the Court of Justice.

70. This Notice will be the subject of periodic review carried out jointly by the NCAs and the Commission. On the basis of the experience acquired, it will be reviewed no later than at the end of the third year after its adoption.

71. This notice replaces the Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 81 and 82 of the Treaty published in 1997 (24).
6. STATEMENT BY OTHER NETWORK MEMBERS

72. The principles set out in this notice will also be abided by those Member States’ competition authorities which have signed a statement in the form of the Annex to this Notice. In this statement they acknowledge the principles of this notice, including the principles relating to the protection of applicants claiming the benefit of a leniency programme (25) and declare that they will abide by them. A list of these authorities is published on the website of the European Commission. It will be updated if appropriate.

(2) In this notice, the European Commission and the NCAs are collectively referred to as ‘the competition authorities’.
(4) See paragraph 8 of the Joint Statement of the Council and the Commission on the functioning of the network available from the Council register at http://register.consilium.eu.int (document No 15435/02 ADD 1).
(5) In this Notice the term ‘procedure’ is used for investigations and/or formal proceedings for the adoption of a decision pursuant to the Council Regulation conducted by an NCA or the Commission, as the case may be.
(6) See Recital 18 of the Council Regulation.
(7) For cases initiated following a leniency application see paragraphs 37 et subseq.
(8) The intention of making any information exchanged pursuant to Article 11 available and easily accessible to all network members is however expressed in the Joint Statement on the functioning of the network mentioned above in footnote 4.
(9) See Commission notice on complaints.
(14) In this Notice, the term ‘leniency programme’ is used to describe all programmes (including the Commission’s programme) which offer either full immunity or a significant reduction in the penalties which would otherwise have been imposed on a participant in a cartel, in exchange for the freely volunteered disclosure of information on the cartel which satisfies specific criteria prior to or during the investigative stage of the case. The term does not cover reductions in the penalty granted for other reasons. The Commission will publish on its website a list of those authorities that operate a leniency programme.
(15) See paragraphs 8 to 15 above.
(16) Similarly, information transmitted with a view to obtaining assistance from the receiving authority under Articles 20 or 21 of the Council Regulation or of carrying out an investigation or other fact-finding measure under Article 22 of the Council Regulation may only be used for the purpose of the application of the said Articles.
(17) See paragraph 17.
(18) Article 15 of the Council Regulation empowers NCAs and the Commission to submit written and, with the permission of the Court, oral submissions in court proceedings for the application of Articles 81 and 82 of the Treaty. This is a very important tool for ensuring consistent application of Community rules. In exercising this power NCAs and the Commission will cooperate closely.
(19) See paragraph 24 of the Joint Statement on the functioning of the network mentioned above in footnote 4.
(21) The ECJ has defined that concept in the case 48/72 — SA Brasserie de Haeucth, [1973] ECR 77: ‘the initiation of a procedure within the meaning of Article 9 of Regulation No 17 implies an authoritative act of the Commission, evidencing its intention of taking a decision.’
(22) See paragraph 22 of the Joint Statement mentioned above in footnote 4.
(23) In accordance with Article 14(2) of the Council Regulation, where horizontal issues such as block-exemption regulations and guidelines are being discussed, Member States can appoint an additional representative competent in competition matters and who does not necessarily belong to the competition authority.
(25) See paragraphs 37 et subseq.
ANNEX

STATEMENT REGARDING THE COMMISSION NOTICE ON COOPERATION WITHIN THE NETWORK OF COMPETITION AUTHORITIES

In order to cooperate closely with a view to protecting competition within the European Union in the interest of consumers, the undersigned competition authority:

1. Acknowledges the principles set out in the Commission Notice on Cooperation within the Network of Competition Authorities; and

2. Declares that it will abide by those principles, which include principles relating to the protection of applicants claiming the benefit of a leniency programme, in any case in which it is acting or may act and to which those principles apply.

..........................................................................................................................  ..........................................................................................................................
(place) (date)
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.

2. The national courts may be called upon to apply Articles 81 or 82 EC in lawsuits between private parties, such as actions relating to contracts or actions for damages. They may also act as public enforcer or as review court. A national court may indeed be designated as a competition authority of a Member State (hereinafter ‘the national competition authority’) pursuant to Article 35(1) of Regulation (EC) No 1/2003 (hereinafter ‘the regulation’). 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.

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, they have the power to apply Articles 81 and 82 EC. Moreover, it should be remembered that Articles 81 and 82 EC are a matter of public policy and are essential to the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market. According to the Court of Justice, where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules, such as the EC competition rules, are concerned. The position is the same if domestic law confers on national courts a discretion to apply of their own motion binding rules of law: national courts must apply the EC competition rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court. However, Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.

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. In particular, where a natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 81 and 82 EC, which is different from the enforcement in the public interest by the Commission or by national competition authorities. Indeed, national courts can give effect to Articles 81 and 82 EC by finding contracts to be void or by awards of damages.

5. National courts can apply Articles 81 and 82 EC, without it being necessary to apply national competition law in parallel. However, where a national court applies national competition law to agreements, decisions of associations of undertakings and concerted practices which affect trade between Member States within the meaning of Article 81(1) EC or to any abuse prohibited by Article 82 EC, they also have to apply EC competition rules to those agreements, decisions or practices.

6. The regulation does not only empower the national courts to apply EC competition law. The parallel application of national competition law to agreements, decisions of associations of undertakings and concerted practices which affect trade between Member States may not lead to a different outcome from that of EC competition law. Article 3(2) of the regulation provides that agreements, decisions or concerted practices which do not infringe
Article 81(1) EC or which fulfil the conditions of Article 81(3) EC cannot be prohibited either under national competition law (12). On the other hand, the Court of Justice has ruled that agreements, decisions or concerted practices that violate Article 81(1) and do not fulfil the conditions of Article 81(3) EC cannot be upheld under national law (13). As to the parallel application of national competition law and Article 82 EC in the case of unilateral conduct, Article 3 of the regulation does not provide for a similar convergence obligation. However, in case of conflicting provisions, the general principle of primacy of Community law requires national courts to disapply any provision of national law which contravenes a Community rule, regardless of whether that national law provision was adopted before or after the Community rule (14).

7. Apart from the application of Articles 81 and 82 EC, national courts are also competent to apply acts adopted by EU institutions in accordance with the EC Treaty or in accordance with the measures adopted to give the Treaty effect, to the extent that these acts have direct effect. National courts may thus have to enforce Commission decisions (15) or regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices. When applying these EC competition rules, national courts act within the framework of Community law and are consequently bound to observe the general principles of Community law (16).

8. The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments (17). When applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices (18). Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission (19). Finally, and without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in Commission regulations and decisions which present elements of analogy with the case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC (20) and in the annual report on competition policy (21).

9. The procedural conditions for the enforcement of EC competition rules by national courts and the sanctions they may impose in case of an infringement of those rules, are largely covered by national law. However, to some extent, Community law also determines the conditions in which EC competition rules are enforced. Those Community law provisions may provide for the faculty of national courts to avail themselves of certain instruments, e.g. to ask for the Commission’s opinion on questions concerning the application of EC competition rules (22) or they may create rules that have an obligatory impact on proceedings before them, e.g. allowing the Commission and national competition authorities to submit written observations (23). These Community law provisions prevail over national rules. Therefore, national courts have to set aside national rules which, if applied, would conflict with these Community law provisions. Where such Community law provisions are directly applicable, they are a direct source of rights and duties for all those affected, and must be fully and uniformly applied in all the Member States from the date of their entry into force (24).

10. In the absence of Community law provisions on procedures and sanctions related to the enforcement of EC competition rules by national courts, the latter apply national procedural law and — to the extent that they are competent to do so — impose sanctions provided for under national law. However, the application of these national provisions must be compatible with the general principles of Community law. In this regard, it is useful to recall the case law of the Court of Justice, according to which:

(a) where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive (25);

(b) where the infringement of Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages (26).
(c) the rules on procedures and sanctions which national courts apply to enforce Community law

— must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness) (35) and they

— must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence) (36).

On the basis of the principle of primacy of Community law, a national court may not apply national rules that are incompatible with these principles.

C. PARALLEL OR CONSECUTIVE APPLICATION OF EC COMPETITION RULES BY THE COMMISSION AND BY NATIONAL COURTS

11. A national court may be applying EC competition law to an agreement, decision, concerted practice or unilateral behaviour affecting trade between Member States at the same time as the Commission or subsequent to the Commission (30). The following points outline some of the obligations national courts have to respect in those circumstances.

12. Where a national court comes to a decision before the Commission does, it must avoid adopting a decision that would conflict with a decision contemplated by the Commission (30). To that effect, the national court may ask the Commission whether it has initiated proceedings regarding the same agreements, decisions or practices (31) and if so, about the progress of proceedings and the likelihood of a decision in that case (32). The national court may, for reasons of legal certainty, also consider staying its proceedings until the Commission has reached a decision (33). The Commission, for its part, will endeavour to give priority to cases for which it has decided to initiate proceedings within the meaning of Article 2(1) of Commission Regulation (EC) No 773/2004 and that are the subject of national proceedings stayed in similar cases, the national court may decide on the case pending before it in accordance with that contemplated or earlier decision without it being necessary to ask the Commission for the information mentioned above or to await the Commission's decision.

13. Where the Commission reaches a decision in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission. The binding effect of the Commission's decision is of course without prejudice to the interpretation of Community law by the Court of Justice. Therefore, if the national court doubts the legality of the Commission's decision, it cannot avoid the binding effects of that decision without a ruling to the contrary by the Court of Justice (34). Consequently, if a national court intends to take a decision that runs counter to that of the Commission, it must refer a question to the Court of Justice for a preliminary ruling (Article 234 EC). The latter will then decide on the compatibility of the Commission's decision with Community law. However, if the Commission's decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission's decision, the national court should stay its proceedings pending final judgment in the action for annulment by the Community courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted (35).

14. When a national court stays proceedings, e.g. awaiting the Commission's decision (situation described in point 12 of this notice) or pending final judgement by the Community courts in an action for annulment or in a preliminary ruling procedure (situation described in point 13), it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties (36).

III. THE CO-OPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

15. Other than the co-operation mechanism between the national courts and the Court of Justice under Article 234 EC, the EC Treaty does not explicitly provide for co-operation between the national courts and the Commission. However, in its interpretation of Article 10 EC, which obliges the Member States to facilitate the achievement of the Community's tasks, the Community courts found that this Treaty provision imposes on the European institutions and the Member States mutual duties of loyal co-operation with a view to attaining the objectives of the EC Treaty. Article 10 EC thus implies that the Commission must assist national courts when they apply Community law (37). Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks (38).
16. It is also appropriate to recall the co-operation between national courts and national authorities, in particular national competition authorities, for the application of Articles 81 and 82 EC. While the co-operation between these national authorities is primarily governed by national rules, Article 15(3) of the regulation provides for the possibility for national competition authorities to submit observations before the national courts of their Member State. Points 31 and 33 to 35 of this notice are mutatis mutandis applicable to those submissions.

A. THE COMMISSION AS AMICUS CURIAE

17. In order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case. Article 15 of the regulation refers to the most frequent types of such assistance: the transmission of information (points 21 to 26) and the Commission's opinions (points 27 to 30), both at the request of a national court and the possibility for the Commission to submit observations (points 31 to 35). Since the regulation provides for these types of assistance, it cannot be limited by any Member States' rule. However, in the absence of Community procedural rules to this effect and to the extent that they are necessary to facilitate these forms of assistance, Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities the regulation offers (\(^4\)).

18. The national court may send its request for assistance in writing to

European Commission
Directorate General for Competition
B-1049 Brussels
Belgium

or send it electronically to comp-amicus@cec.eu.int

19. It should be recalled that whatever form the co-operation with national courts takes, the Commission will respect the independence of national courts. As a consequence, the assistance offered by the Commission does not bind the national court. The Commission has also to make sure that it respects its duty of professional secrecy and that it safeguards its own functioning and independence (\(^5\)). In fulfilling its duty under Article 10 EC, of assisting national courts in the application of EC competition rules, the Commission is committed to remaining neutral and objective in its assistance. Indeed, the Commission's assistance to national courts is part of its duty to defend the public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court. In case the Commission has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether these contacts took place before or after the national court's request for co-operation.

20. The Commission will publish a summary concerning its co-operation with national courts pursuant to this notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

1. The Commission's duty to transmit information to national courts

21. The duty for the Commission to assist national courts in the application of EC competition law is mainly reflected in the obligation for the Commission to transmit information it holds to national courts. A national court may, e.g., ask the Commission for documents in its possession or for information of a procedural nature to enable it to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position. A national court may also ask the Commission when a decision is likely to be taken, so as to be able to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted (\(^6\)).

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 (\textsuperscript{42}). Article 287 EC prevents members, officials and other servants of the Commission from disclosing information covered by the obligation of professional secrecy. The information covered by professional secrecy may be both confidential information and business secrets. Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information might seriously harm the latter's interests (\textsuperscript{43}).

24. The combined reading of Articles 10 and 287 EC does not lead to an absolute prohibition for the Commission to transmit information which is covered by the obligation of professional secrecy to national courts. The case law of the Community courts confirms that the duty of loyal co-operation requires the Commission to provide the national court with whatever information the latter asks for, even information covered by professional secrecy. However, in offering its co-operation to the national courts, the Commission may not in any circumstances undermine the guarantees laid down in Article 287 EC.

25. Consequently, before transmitting information covered by professional secrecy to a national court, the Commission will remind the court of its obligation under Community law to uphold the rights which Article 287 EC confers on natural and legal persons and it will ask the court whether it can and will guarantee protection of confidential information and business secrets. If the national court cannot offer such guarantee, the Commission shall not transmit the information covered by professional secrecy to the national court (\textsuperscript{44}). Only when the national court has offered a guarantee that it will protect the confidential information and business secrets, will the Commission transmit the information requested, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be disclosed.

26. There are further exceptions to the disclosure of information by the Commission to national courts. Particularly, the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it (\textsuperscript{45}). Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.

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 (\textsuperscript{46}). Where these tools do not offer sufficient guidance, the national court may ask the Commission for its opinion on questions concerning the application of EC competition rules. The national court may ask the Commission for its opinion on economic, factual and legal matters (\textsuperscript{47}). The latter is of course without prejudice to the possibility or the obligation for the national court to ask the Court of Justice for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 EC.

28. In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information (\textsuperscript{48}). In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.

29. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.

30. In line with what has been said in point 19 of this notice, the Commission will not hear the parties before formulating its opinion to the national court. The latter will have to deal with the Commission’s opinion in accordance with the relevant national procedural rules, which have to respect the general principles of Community law.
3. The Commission's submission of observations to the national court

31. According to Article 15(3) of the regulation, the national competition authorities and the Commission may submit observations on issues relating to the application of Articles 81 or 82 EC to a national court which is called upon to apply those provisions. The regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court (49).

32. The regulation specifies that the Commission will only submit observations when the coherent application of Articles 81 or 82 EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.

33. In order to enable the Commission to submit useful observations, national courts may be asked to transmit or ensure the transmission to the Commission of a copy of all documents that are necessary for the assessment of the case. In line with Article 15(3), second subparagraph, of the regulation, the Commission will only use those documents for the preparation of its observations (50).

34. Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.

35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles 81 or 82 EC (a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case; (b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness) (51); and (c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).

B. THE NATIONAL COURTS FACILITATING THE ROLE OF THE COMMISSION IN THE ENFORCEMENT OF EC COMPETITION RULES

36. Since the duty of loyal co-operation also implies that Member States' authorities assist the European institutions with a view to attaining the objectives of the EC Treaty (52), the regulation provides for three examples of such assistance: (1) the transmission of documents necessary for the assessment of a case in which the Commission would like to submit observations (see point 33), (2) the transmission of judgements applying Articles 81 or 82 EC); and (3) the role of national courts in the context of a Commission inspection.

1. The transmission of judgements of national courts applying Articles 81 or 82 EC

37. According to Article 15(2) of the regulation, Member States shall send to the Commission a copy of any written judgement of national courts applying Articles 81 or 82 EC without delay after the full written judgement is notified to the parties. The transmission of national judgements on the application of Articles 81 or 82 EC and the resulting information on proceedings before national courts primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgement.

2. The role of national courts in the context of a Commission inspection

38. Finally, national courts may play a role in the context of a Commission inspection of undertakings and associations of undertakings. The role of the national courts depends on whether the inspections are conducted in business premises or in non-business premises.
39. With regard to the inspection of business premises, national legislation may require authorisation from a national court to allow a national enforcement authority to assist the Commission in case of opposition of the undertaking concerned. Such authorisation may also be sought as a precautionary measure. When dealing with the request, the national court has the power to control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national court may ask the Commission, directly or through the national competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 EC, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned (53).

40. With regard to the inspection of non-business premises, the regulation requires the authorisation from a national court before a Commission decision ordering such an inspection can be executed. In that case, the national court may control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national court may ask the Commission, directly or through the national competition authority, for detailed explanations on those elements that are necessary to allow its control of the proportionality of the coercive measures envisaged (54).

41. In both cases referred to in points 39 and 40, the national court may not call into question the lawfulness of the Commission's decision or the necessity for the inspection nor can it demand that it be provided with information in the Commission's file (55). Furthermore, the duty of loyal co-operation requires the national court to take its decision within an appropriate timeframe that allows the Commission to effectively conduct its inspection (56).

IV. FINAL PROVISIONS

42. This notice is issued in order to assist national courts in the application of Articles 81 and 82 EC. It does not bind the national courts, nor does it affect the rights and obligations of the EU Member States and natural or legal persons under Community law.

43. This notice replaces the 1993 notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (57).

(1) For the criteria to determine which entities can be regarded as courts or tribunals within the meaning of Article 234 EC, see e.g. case C-516/99 Schmid [2002] ECR I-4573, 34: 'The Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'.


(3) Notice on the co-operation within the network of competition authorities (OJ C 101, 27.4.2004, p. 43). For the purpose of this notice, a 'national competition authority' is the authority designated by a Member State in accordance with Article 35(1) of the regulation.

(4) The jurisdiction of a national court depends on national, European and international rules of jurisdiction. In this context, it may be recalled that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJ L 12, 16.1.2001, p. 1) is applicable to all competition cases of a civil or commercial nature.

(5) See Article 6 of the regulation.


(8) According to the last sentence of recital 8 of Regulation (EC) No 1/2003, the regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

(2) For further clarification of the effect on trade concept, see the notice on this issue (OJ L 101, 27.4.2004, p. 81).

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

(4) See also the notice on the application of Article 81(3) EC (OJ L 101, 27.4.2004, p. 2).


(7) 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.


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

(12) Case 66/86 Ahmed Saeed Flugreisen [1989] ECR 803, 27 and case C-234/89 Delimitis [1991] ECR I-935, 50. A list of Commission guidelines, notices and regulations in the field of competition policy, in particular the regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices, are annexed to this notice. For the decisions of the Commission applying Articles 81 and 82 EC (since 1964), see http://www.europa.eu.int/comm/competition/antitrust/cases/.


(14) On the possibility for national courts to ask the Commission for an opinion, see further in points 27 to 30.

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


(21) Article 11(6), juncto Article 35(3) and (4) of the regulation prevents a parallel application of Articles 81 or 82 EC by the Commission and a national court only when the latter has been designated as a national competition authority.

(22) Article 16(1) of the regulation.

(23) The Commission makes the initiation of its proceedings with a view to adopting a decision pursuant to Article 7 to 10 of the regulation public (see Article 2(2) of Commission Regulation (EC) No 773/2004 of 7 April relating to proceedings pursuant to Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004). According to the Court of Justice, the initiation of proceedings implies an authoritative act of the Commission, evidencing its intention of taking a decision (case 48/72 Brasserie de Haecht [1973] ECR 77, 16).


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 23 to 26 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 9011.

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 101, 27.4.2004, p. 81)
   - Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 2)

2. Vertical agreements

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
   - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ C 101, 27.4.2004, p. 2)

B. Sector specific rules

1. Insurance

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)

CONSOLIDATED VERSION

OF

THE TREATY ON EUROPEAN UNION

[...]
CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

(2010/C 83/02)
The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

**CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION**

**Preamble**

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.
TITLE I
DIGNITY

Article 1
Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2
Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

Article 3
Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.

Article 4
Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5
Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. Trafficking in human beings is prohibited.
TITLE II
FREEDOMS

Article 6
Right to liberty and security
Everyone has the right to liberty and security of person.

Article 7
Respect for private and family life
Everyone has the right to respect for his or her private and family life, home and communications.

Article 8
Protection of personal data
1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Article 9
Right to marry and right to found a family
The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10
Freedom of thought, conscience and religion
1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.
Article 11
Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 12
Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13
Freedom of the arts and sciences
The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14
Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15
Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

VII - Human Rights - 24
Article 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).

Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III

EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.
Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.
Article 26
Integration of persons with disabilities
The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

TITLE IV
SOLIDARITY

Article 27
Workers’ right to information and consultation within the undertaking
Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Article 28
Right of collective bargaining and action
Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29
Right of access to placement services
Everyone has the right of access to a free placement service.

Article 30
Protection in the event of unjustified dismissal
Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

Article 31
Fair and just working conditions
1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.
Article 32
Prohibition of child labour and protection of young people at work
The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33
Family and professional life
1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34
Social security and social assistance
1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Article 35
Health care
Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.
Article 36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Article 37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V

CITIZENS’ RIGHTS

Article 39

Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

**Article 42**

**Right of access to documents**

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

**Article 43**

**European Ombudsman**

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

**Article 44**

**Right to petition**

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

**Article 45**

**Freedom of movement and of residence**

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.
Article 46
Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

TITLE VI
JUSTICE

Article 47
Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48
Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49
Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.
Article 50
Right not to be tried or punished twice in criminal proceedings for the same criminal offence
No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

TITLE VII
GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51
Field of application
1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52
Scope and interpretation of rights and principles
1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53
Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

Article 54
Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.
EXPLANATIONS (*) RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS

(2007/C 303/02)

These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.

TITLE I — DIGNITY

Explanation on Article 1 — Human dignity

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’ In its judgment of 9 October 2001 in Case C-377/98 Netherlands v European Parliament and Council [2001] ECR I-7079, at grounds 70 — 77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law.

It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.

Explanation on Article 2 — Right to life

1. Paragraph 1 of this Article is based on the first sentence of Article 2(1) of the ECHR, which reads as follows:

   ‘1. Everyone's right to life shall be protected by law ...’.

2. The second sentence of the provision, which referred to the death penalty, was superseded by the entry into force of Article 1 of Protocol No 6 to the ECHR, which reads as follows:

   ‘The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.’

   Article 2(2) of the Charter is based on that provision.

3. The provisions of Article 2 of the Charter correspond to those of the above Articles of the ECHR and its Protocol. They have the same meaning and the same scope, in accordance with Article 52(3) of the Charter. Therefore, the ‘negative’ definitions appearing in the ECHR must be regarded as also forming part of the Charter:

   (a) Article 2(2) of the ECHR:

      ‘Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

         (a) in defence of any person from unlawful violence;

         (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(*) Editor’s note: References to article numbers in the Treaties have been updated and some minor technical errors have been corrected.
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.’

(b) Article 2 of Protocol No 6 to the ECHR:

‘A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions…’.

Explanation on Article 3 — Right to the integrity of the person

1. In its judgment of 9 October 2001 in Case C-377/98 Netherlands v European Parliament and Council [2001] ECR-I 7079, at grounds 70, 78 to 80, the Court of Justice confirmed that a fundamental right to human integrity is part of Union law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient.

2. The principles of Article 3 of the Charter are already included in the Convention on Human Rights and Biomedicine, adopted by the Council of Europe (ETS 164 and additional protocol ETS 168). The Charter does not set out to depart from those principles, and therefore prohibits only reproductive cloning. It neither authorises nor prohibits other forms of cloning. Thus it does not in any way prevent the legislature from prohibiting other forms of cloning.

3. The reference to eugenic practices, in particular those aiming at the selection of persons, relates to possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court adopted in Rome on 17 July 1998 (see its Article 7(1)(g)).

Explanation on Article 4 — Prohibition of torture and inhuman or degrading treatment or punishment

The right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article.

Explanation on Article 5 — Prohibition of slavery and forced labour

1. The right in Article 5(1) and (2) corresponds to Article 4(1) and (2) of the ECHR, which has the same wording. It therefore has the same meaning and scope as the ECHR Article, by virtue of Article 52(3) of the Charter. Consequently:

— no limitation may legitimately affect the right provided for in paragraph 1,

— in paragraph 2, ‘forced or compulsory labour’ must be understood in the light of the ‘negative’ definitions contained in Article 4(3) of the ECHR:

‘For the purpose of this article the term “forced or compulsory labour” shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.'.

2. Paragraph 3 stems directly from human dignity and takes account of recent developments in organised crime, such as the organisation of lucrative illegal immigration or sexual exploitation networks. The Annex to the Europol Convention contains the following definition which refers to trafficking for the purpose of sexual exploitation: 'traffic in human beings: means subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children'. Chapter VI of the Convention implementing the Schengen Agreement, which has been integrated into the Union's acquis, in which the United Kingdom and Ireland participate, contains the following wording in Article 27(1) which refers to illegal immigration networks: 'The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.' On 19 July 2002, the Council adopted a framework decision on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1) whose Article 1 defines in detail the offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation, which the Member States must make punishable by virtue of that framework decision.

TITLE II — FREEDOMS

Explanation on Article 6 — Right to liberty and security

The rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR, in the wording of Article 5:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

The rights enshrined in Article 6 must be respected particularly when the European Parliament and the Council adopt legislative acts in the area of judicial cooperation in criminal matters, on the basis of Articles 82, 83 and 85 of the Treaty on the Functioning of the European Union, notably to define common minimum provisions as regards the categorisation of offences and punishments and certain aspects of procedural law.

Explanation on Article 7 — Respect for private and family life

The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word 'correspondence' has been replaced by 'communications'.

In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Explanation on Article 8 — Protection of personal data

This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union. Reference is also made to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1). The above-mentioned Directive and Regulation contain conditions and limitations for the exercise of the right to the protection of personal data.
Explanation on Article 9 — Right to marry and right to found a family

This Article is based on Article 12 of the ECHR, which reads as follows: ‘Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.’ The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.

Explanation on Article 10 — Freedom of thought, conscience and religion

The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the Convention, which reads as follows: ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

The right guaranteed in paragraph 2 corresponds to national constitutional traditions and to the development of national legislation on this issue.

Explanation on Article 11 — Freedom of expression and information

1. Article 11 corresponds to Article 10 of the European Convention on Human Rights, which reads as follows:

‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations which may be imposed on it may therefore not exceed those provided for in Article 10(2) of the Convention, without prejudice to any restrictions which the competition law of the Union may impose on Member States’ right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR.

Explanations Relating to the Charter of Fundamental Rights

Explanation on Article 12 — Freedom of assembly and of association

1. Paragraph 1 of this Article corresponds to Article 11 of the ECHR, which reads as follows:

‘1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.’

The meaning of the provisions of paragraph 1 of this Article 12 is the same as that of the ECHR, but their scope is wider since they apply at all levels including European level. In accordance with Article 52(3) of the Charter, limitations on that right may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR.

2. This right is also based on Article 11 of the Community Charter of the Fundamental Social Rights of Workers.

3. Paragraph 2 of this Article corresponds to Article 10(4) of the Treaty on European Union.

Explanation on Article 13 — Freedom of the arts and sciences

This right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to Article 1 and may be subject to the limitations authorised by Article 10 of the ECHR.

Explanation on Article 14 — Right to education

1. This Article is based on the common constitutional traditions of Member States and on Article 2 of the Protocol to the ECHR, which reads as follows:

‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’

It was considered useful to extend this Article to access to vocational and continuing training (see point 15 of the Community Charter of the Fundamental Social Rights of Workers and Article 10 of the Social Charter) and to add the principle of free compulsory education. As it is worded, the latter principle merely implies that as regards compulsory education, each child has the possibility of attending an establishment which offers free education. It does not require all establishments which provide education or vocational and continuing training, in particular private ones, to be free of charge. Nor does it exclude certain specific forms of education having to be paid for, if the State takes measures to grant financial compensation. In so far as the Charter applies to the Union, this means that in its training policies the Union must respect free compulsory education, but this does not, of course, create new powers. Regarding the right of parents, it must be interpreted in conjunction with the provisions of Article 24.

2. Freedom to found public or private educational establishments is guaranteed as one of the aspects of freedom to conduct a business but it is limited by respect for democratic principles and is exercised in accordance with the arrangements defined by national legislation.

VII - Human Rights - 25
Explanation on Article 15 — Freedom to choose an occupation and right to engage in work

Freedom to choose an occupation, as enshrined in Article 15(1), is recognised in Court of Justice case-law (see *inter alia* judgment of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraphs 12 to 14 of the grounds; judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; judgment of 8 October 1986, Case 234/85 *Keller* [1986] ECR 2897, paragraph 8 of the grounds).

This paragraph also draws upon Article 1(2) of the European Social Charter, which was signed on 18 October 1961 and has been ratified by all the Member States, and on point 4 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989. The expression ‘working conditions’ is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

Paragraph 2 deals with the three freedoms guaranteed by Articles 26, 45, 49 and 56 of the Treaty on the Functioning of the European Union, namely freedom of movement for workers, freedom of establishment and freedom to provide services.

Paragraph 3 has been based on Article 153(1)(g) of the Treaty on the Functioning of the European Union, and on Article 19(4) of the European Social Charter signed on 18 October 1961 and ratified by all the Member States. Article 52(2) of the Charter is therefore applicable. The question of recruitment of seamen having the nationality of third States for the crews of vessels flying the flag of a Member State of the Union is governed by Union law and national legislation and practice.

Explanation on Article 16 — Freedom to conduct a business

This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraph 14 of the grounds, and of 27 September 1979, Case 230-78 SpA Eridiana and others [1979] ECR 2749, paragraphs 20 and 31 of the grounds) and freedom of contract (see *inter alia* Sukkerfabriken Nykøbing judgment, Case 151/78 [1979] ECR 1, paragraph 19 of the grounds, and judgment of 5 October 1999, C-240/97 *Spain v Commission* [1999] ECR I-6571, paragraph 99 of the grounds) and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter.

Explanation on Article 17 — Right to property

This Article is based on Article 1 of the Protocol to the ECHR:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

This is a fundamental right common to all national constitutions. It has been recognised on numerous occasions by the case-law of the Court of Justice, initially in the *Hauer* judgment (13 December 1979, [1979] ECR 3727). The wording has been updated but, in accordance with Article 52(3), the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there.

Protection of intellectual property, one aspect of the right of property, is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation. Intellectual property covers not only literary and artistic property but also *inter alia* patent and trademark rights and associated rights. The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property.
Explanation on Article 18 — Right to asylum

The text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the Treaties.

Explanation on Article 19 — Protection in the event of removal, expulsion or extradition

Paragraph 1 of this Article has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR concerning collective expulsion. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State (see also Article 13 of the Covenant on Civil and Political Rights).


TITLE III — EQUALITY

Explanation on Article 20 — Equality before the law

This Article corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law (judgment of 13 November 1984, Case 283/83 Racke [1984] ECR 3791, judgment of 17 April 1997, Case C-15/95 EARL [1997] ECR I–1961, and judgment of 13 April 2000, Case C-292/97 Karlsson [2000] ECR 2737).

Explanation on Article 21 — Non-discrimination

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States’ laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union’s powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article.
Explanation on Article 22 — Cultural, religious and linguistic diversity

This Article has been based on Article 6 of the Treaty on European Union and on Article 151(1) and (4) of the EC Treaty, now replaced by Article 167(1) and (4) of the Treaty on the Functioning of the European Union, concerning culture. Respect for cultural and linguistic diversity is now also laid down in Article 3(3) of the Treaty on European Union. The Article is also inspired by Declaration No 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations, now taken over in Article 17 of the Treaty on the Functioning of the European Union.

Explanation on Article 23 — Equality between women and men

The first paragraph has been based on Articles 2 and 3(2) of the EC Treaty, now replaced by Article 3 of the Treaty on European Union and Article 8 of the Treaty on the Functioning of the European Union which impose the objective of promoting equality between men and women on the Union, and on Article 157(1) of the Treaty on the Functioning of the European Union. It draws on Article 20 of the revised European Social Charter of 3 May 1996 and on point 16 of the Community Charter on the rights of workers.

It is also based on Article 157(3) of the Treaty on the Functioning of the European Union and Article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The second paragraph takes over in shorter form Article 157(4) of the Treaty on the Functioning of the European Union which provides that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. In accordance with Article 52(2), the present paragraph does not amend Article 157(4).

Explanation on Article 24 — The rights of the child

This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.

Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.

Explanation on Article 25 — The rights of the elderly

This Article draws on Article 23 of the revised European Social Charter and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. Of course, participation in social and cultural life also covers participation in political life.

Explanation on Article 26 — Integration of persons with disabilities

The principle set out in this Article is based on Article 15 of the European Social Charter and also draws on point 26 of the Community Charter of the Fundamental Social Rights of Workers.
Title IV — Solidarity

Explanation on Article 27 — Workers' right to information and consultation within the undertaking

This Article appears in the revised European Social Charter (Article 21) and in the Community Charter on the rights of workers (points 17 and 18). It applies under the conditions laid down by Union law and by national laws. The reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides. There is a considerable Union acquis in this field: Articles 154 and 155 of the Treaty on the Functioning of the European Union, and Directives 2002/14/EC (general framework for informing and consulting employees in the European Community), 98/59/EC (collective redundancies), 2001/23/EC (transfers of undertakings) and 94/45/EC (European works councils).

Explanation on Article 28 — Right of collective bargaining and action

This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. As regards the appropriate levels at which collective negotiation might take place, see the explanation given for the above Article. The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.

Explanation on Article 29 — Right of access to placement services

This Article is based on Article 1(3) of the European Social Charter and point 13 of the Community Charter of the Fundamental Social Rights of Workers.

Explanation on Article 30 — Protection in the event of unjustified dismissal

This Article draws on Article 24 of the revised Social Charter. See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC.

Explanation on Article 31 — Fair and just working conditions

1. Paragraph 1 of this Article is based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It also draws on Article 3 of the Social Charter and point 19 of the Community Charter on the rights of workers, and, as regards dignity at work, on Article 26 of the revised Social Charter. The expression ‘working conditions’ is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

2. Paragraph 2 is based on Directive 93/104/EC concerning certain aspects of the organisation of working time, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers.

Explanation on Article 32 — Prohibition of child labour and protection of young people at work

This Article is based on Directive 94/33/EC on the protection of young people at work, Article 7 of the European Social Charter and points 20 to 23 of the Community Charter of the Fundamental Social Rights of Workers.
Explanation on Article 33 — Family and professional life

Article 33(1) is based on Article 16 of the European Social Charter.

Paragraph 2 draws on Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. It is also based on Article 8 (protection of maternity) of the European Social Charter and draws on Article 27 (right of workers with family responsibilities to equal opportunities and equal treatment) of the revised Social Charter. ‘Maternity’ covers the period from conception to weaning.

Explanation on Article 34 — Social security and social assistance

The principle set out in Article 34(1) is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers. The Union must respect it when exercising the powers conferred on it by Articles 153 and 156 of the Treaty on the Functioning of the European Union. The reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist. ‘Maternity’ must be understood in the same sense as in the preceding Article.

Paragraph 2 is based on Articles 12(4) and 13(4) of the European Social Charter and point 2 of the Community Charter of the Fundamental Social Rights of Workers and reflects the rules arising from Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68.

Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union.

Explanation on Article 35 — Health care

The principles set out in this Article are based on Article 152 of the EC Treaty, now replaced by Article 168 of the Treaty on the Functioning of the European Union, and on Articles 11 and 13 of the European Social Charter. The second sentence of the Article takes over Article 168(1).

Explanation on Article 36 — Access to services of general economic interest

This Article is fully in line with Article 14 of the Treaty on the Functioning of the European Union and does not create any new right. It merely sets out the principle of respect by the Union for the access to services of general economic interest as provided for by national provisions, when those provisions are compatible with Union law.

Explanation on Article 37 — Environmental protection

The principles set out in this Article have been based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by Article 3(3) of the Treaty on European Union and Articles 11 and 191 of the Treaty on the Functioning of the European Union.

It also draws on the provisions of some national constitutions.
Explanation on Article 38 — Consumer protection

The principles set out in this Article have been based on Article 169 of the Treaty on the Functioning of the European Union.

TITLE V — CITIZENS’ RIGHTS

Explanation on Article 39 — Right to vote and to stand as a candidate at elections to the European Parliament

Article 39 applies under the conditions laid down in the Treaties, in accordance with Article 52(2) of the Charter. Article 39(1) corresponds to the right guaranteed in Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right) and Article 39(2) corresponds to Article 14(3) of the Treaty on European Union. Article 39(2) takes over the basic principles of the electoral system in a democratic State.

Explanation on Article 40 — Right to vote and to stand as a candidate at municipal elections

This Article corresponds to the right guaranteed by Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these Articles in the Treaties.

Explanation on Article 41 — Right to good administration


Paragraph 3 reproduces the right now guaranteed by Article 340 of the Treaty on the Functioning of the European Union. Paragraph 4 reproduces the right now guaranteed by Article 20(2)(d) and Article 25 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

The right to an effective remedy, which is an important aspect of this question, is guaranteed in Article 47 of this Charter.

Explanation on Article 42 — Right of access to documents

The right guaranteed in this Article has been taken over from Article 255 of the EC Treaty, on the basis of which Regulation (EC) No 1049/2001 has subsequently been adopted. The European Convention has extended this right to documents of institutions, bodies and agencies generally, regardless of their form (see Article 15(3) of the Treaty on the Functioning of the European Union). In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) of the Treaty on the Functioning of the European Union.
Explanation on Article 43 — European Ombudsman

The right guaranteed in this Article is the right guaranteed by Articles 20 and 228 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

Explanation on Article 44 — Right to petition

The right guaranteed in this Article is the right guaranteed by Articles 20 and 227 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

Explanation on Article 45 — Freedom of movement and of residence

The right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 21; and the judgment of the Court of Justice of 17 September 2002, Case C-413/99 Baumbast [2002] ECR I-7091). In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

Paragraph 2 refers to the power granted to the Union by Articles 77, 78 and 79 of the Treaty on the Functioning of the European Union. Consequently, the granting of this right depends on the institutions exercising that power.

Explanation on Article 46 — Diplomatic and consular protection

The right guaranteed in this Article is the right guaranteed by Article 20 of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 23). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

TITLE VI — JUSTICE

Explanation on Article 47 — Right to an effective remedy and to a fair trial

The first paragraph is based on Article 13 of the ECHR:

‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 Heylens [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 Borelli [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union’s system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.
The second paragraph corresponds to Article 6(1) of the ECHR which reads as follows:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, ‘Les Verts’ v European Parliament (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union.

Explanation on Article 48 — Presumption of innocence and right of defence

Article 48 is the same as Article 6(2) and (3) of the ECHR, which reads as follows:

‘2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’

In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR.

Explanation on Article 49 — Principles of legality and proportionality of criminal offences and penalties

This Article follows the traditional rule of the non-retroactivity of laws and criminal sanctions. There has been added the rule of the retroactivity of a more lenient penal law, which exists in a number of Member States and which features in Article 15 of the Covenant on Civil and Political Rights.
Article 7 of the ECHR is worded as follows:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

In paragraph 2, the reference to ‘civilised’ nations has been deleted; this does not change the meaning of this paragraph, which refers to crimes against humanity in particular. In accordance with Article 52(3), the right guaranteed here therefore has the same meaning and scope as the right guaranteed by the ECHR.

Paragraph 3 states the general principle of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities.

**Explanation on Article 50 — Right not to be tried or punished twice in criminal proceedings for the same criminal offence**

Article 4 of Protocol No 7 to the ECHR reads as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

The ‘non bis in idem’ rule applies in Union law (see, among the many precedents, the judgment of 5 May 1966, Joined Cases 18/65 and 35/65 Gutmann v Commission [1966] ECR 149 and a recent case, the decision of the Court of First Instance of 20 April 1999, Joined Cases T-305/94 and others Limburgse Vinyl Maatschappij NV v Commission [1999] ECR II-931). The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties.

In accordance with Article 50, the ‘non bis in idem’ rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 Gözütok [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the ‘non bis in idem’ rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.
Explanation on Article 51 — Field of application

The aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union, which required the Union to respect fundamental rights, and with the mandate issued by the Cologne European Council. The term ‘institutions’ is enshrined in the Treaties. The expression ‘bodies, offices and agencies’ is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation (see, e.g., Articles 15 or 16 of the Treaty on the Functioning of the European Union).

As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...’ (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union’s institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 Grant [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be ‘implementation of Union law’ (within the meaning of paragraph 1 and the above-mentioned case-law).

Explanation on Article 52 — Scope and interpretation of rights and principles

The purpose of Article 52 is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights. The wording is based on the case-law of the Court of Justice: ‘... it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights’ (judgment of 13 April 2000, Case C-292/97, paragraph 45 of the grounds). The reference to general interests recognised by the Union covers both the objectives mentioned in Article 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties such as Article 4(1) of the Treaty on European Union and Articles 35(3), 36 and 346 of the Treaty on the Functioning of the European Union.
Paragraph 2 refers to rights which were already expressly guaranteed in the Treaty establishing the European Community and have been recognised in the Charter, and which are now found in the Treaties (notably the rights derived from Union citizenship). It clarifies that such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties. The Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties.

Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

The Charter does not affect the possibilities of Member States to avail themselves of Article 15 ECHR, allowing derogations from ECHR rights in the event of war or of other public dangers threatening the life of the nation, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4(1) of the Treaty on European Union and in Articles 72 and 347 of the Treaty on the Functioning of the European Union.

The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter. It does not include rights additional to those in the ECHR.

1. Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:

   — Article 2 corresponds to Article 2 of the ECHR,

   — Article 4 corresponds to Article 3 of the ECHR,

   — Article 5(1) and (2) corresponds to Article 4 of the ECHR,

   — Article 6 corresponds to Article 5 of the ECHR,

   — Article 7 corresponds to Article 8 of the ECHR,

   — Article 10(1) corresponds to Article 9 of the ECHR,

   — Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States’ right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR,
— Article 17 corresponds to Article 1 of the Protocol to the ECHR,

— Article 19(1) corresponds to Article 4 of Protocol No 4,

— Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights,

— Article 48 corresponds to Article 6(2) and(3) of the ECHR,

— Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR.

2. Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:

— Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation,

— Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level,

— Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training,

— Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents,

— Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation,

— Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States,

— Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.

The rule of interpretation contained in paragraph 4 has been based on the wording of Article 6(3) of the Treaty on European Union and takes due account of the approach to common constitutional traditions followed by the Court of Justice (e.g., judgment of 13 December 1979, Case 44/79 Hauer [1979] ECR 3727; judgment of 18 May 1982, Case 155/79 AM&S [1982] ECR 1575). Under that rule, rather than following a rigid approach of ‘a lowest common denominator’, the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.
Paragraph 5 clarifies the distinction between ‘rights’ and ‘principles’ set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (cf. notably case-law on the ‘precautionary principle’ in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of 11 September 2002, Case T-13/99 Pfizer v Council, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 Van den Berg [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States’ constitutional systems to ‘principles’, particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34.

Paragraph 6 refers to the various Articles in the Charter which, in the spirit of subsidiarity, make reference to national laws and practices.

Explanation on Article 53 — Level of protection

This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR.

Explanation on Article 54 — Prohibition of abuse of rights

This Article corresponds to Article 17 of the ECHR:

‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’.
Constitution for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

[...]

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[...]
1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.
General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.
REGULATION (EC) No 1049/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 30 May 2001
regarding public access to European Parliament, Council and Commission documents

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,

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

Acting in accordance with the procedure referred to in Article 251 of the Treaty (2),

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

(5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the Treaty of Amsterdam, draw guidance from this Regulation as regards documents concerning the activities covered by those two Treaties.

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions’ decision-making process. Such documents should be made directly accessible to the greatest possible extent.

(7) In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules.

(8) In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation.

(9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.

(12) All rules concerning access to documents of the institutions should be in conformity with this Regulation.

(1) OJ C 177 E, 27.6.2000, p. 70.
In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.

Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.

Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.

This Regulation is without prejudice to existing rights of access to documents for Member States, judicial authorities or investigative bodies.

In accordance with Article 255(3) of the EC Treaty, each institution lays down specific provisions regarding access to its documents in its rules of procedure. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (1), Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (2), European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents (3), and the rules on confidentiality of Schengen documents should therefore, if necessary, be modified or be repealed.

H ave A dopted this Regulation:

Article 1

Purpose

The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as ‘the institutions’) documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

Article 2

Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

Article 3

Definitions

For the purpose of this Regulation:

(a) ‘document’ shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility;

(b) ‘third party’ shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:
   — public security,
   — defence and military matters,
   — international relations,
   — the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
   — commercial interests of a natural or legal person, including intellectual property,
   — court proceedings and legal advice,
   — the purpose of inspections, investigations and audits,
   unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Article 5

Documents in the Member States

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

Article 6

Applications

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.
3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

**Article 8**

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

**Article 9**

Treatment of sensitive documents

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.

**Article 10**

Access following an application

1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

**Article 11**

Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.
Article 12

Direct access in electronic form or through a register

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

Article 13

Publication in the Official Journal

1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:

(a) Commission proposals;

(b) common positions adopted by the Council in accordance with the procedures referred to in Articles 251 and 252 of the EC Treaty and the reasons underlying those common positions, as well as the European Parliament’s positions in these procedures;

(c) framework decisions and decisions referred to in Article 34(2) of the EU Treaty;

(d) conventions established by the Council in accordance with Article 34(2) of the EU Treaty;

(e) conventions signed between Member States on the basis of Article 293 of the EC Treaty;

(f) international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty.

2. As far as possible, the following documents shall be published in the Official Journal:

(a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant to Article 34(2) of the EU Treaty;

(b) common positions referred to in Article 34(2) of the EU Treaty;

(c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

Article 14

Information

1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.

2. The Member States shall cooperate with the institutions in providing information to the citizens.

Article 15

Administrative practice in the institutions

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.

2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

Article 16

Reproduction of documents

This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party’s right to reproduce or exploit released documents.

Article 17

Reports

1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.

2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.
Article 18

Application measures

1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.

2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community (1) with this Regulation in order to ensure the preservation and archiving of documents to the fullest extent possible.

3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

Article 19

Entry into force

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

It shall be applicable from 3 December 2001.

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

Done at Brussels, 30 May 2001.

For the European Parliament
The President
N. Fontaine

For the Council
The President
B. Lejon

I

(Acts whose publication is obligatory)

REGULATION (EC) No 45/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 18 December 2000
on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 286 thereof,

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

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty (3),

Whereas:

(1) Article 286 of the Treaty requires the application to the Community institutions and bodies of the Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data.

(2) A fully-fledged system of protection of personal data not only requires the establishment of rights for data subjects and obligations for those who process personal data, but also appropriate sanctions for offenders and monitoring by an independent supervisory body.

(3) Article 286(2) of the Treaty requires the establishment of an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies.

(4) Article 286(2) of the Treaty requires the adoption of any other relevant provisions as appropriate.

(5) A Regulation is necessary to provide the individual with legally enforceable rights, to specify the data processing obligations of the controllers within the Community institutions and bodies, and to create an independent supervisory authority responsible for monitoring the processing of personal data by the Community institutions and bodies.

(6) The Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up under Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (4) has been consulted.

(7) The persons to be protected are those whose personal data are processed by Community institutions or bodies in any context whatsoever, for example because they are employed by those institutions or bodies.

(8) The principles of data protection should apply to any information concerning an identified or identifiable person. To determine whether a person is identifiable, account should be taken of all the means likely to be reasonably used either by the controller or by any other person to identify the said person. The principles of protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.

(9) Directive 95/46/EC requires Member States to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, in order to ensure the free flow of personal data in the Community.


Various other Community measures, including measures on mutual assistance between national authorities and the Commission, are also designed to specify and add to Directive 95/46/EC in the sectors to which they relate.

Consistent and homogeneous application of the rules for the protection of individuals’ fundamental rights and freedoms with regard to the processing of personal data should be ensured throughout the Community.

The aim is to ensure both effective compliance with the rules governing the protection of individuals’ fundamental rights and freedoms and the free flow of personal data between Member States and the Community institutions and bodies or between the Community institutions and bodies for purposes connected with the exercise of their respective competences.

To this end measures should be adopted which are binding on the Community institutions and bodies. These measures should apply to all processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law.

Where such processing is carried out by Community institutions or bodies in the exercise of activities falling outside the scope of this Regulation, in particular those laid down in Titles V and VI of the Treaty on European Union, the protection of individuals’ fundamental rights and freedoms shall be ensured with due regard to Article 6 of the Treaty on European Union. Access to documents, including conditions for access to documents containing personal data, is governed by the rules adopted on the basis of Article 255 of the EC Treaty the scope of which includes Titles V and VI of the Treaty on European Union.

The measures should not apply to bodies established outside the Community framework, nor should the European Data Protection Supervisor be competent to monitor the processing of personal data by such bodies.

The effectiveness of the protection of individuals with regard to the processing of personal data in the Union presupposes the consistency of the relevant rules and procedures applicable to activities pertaining to different legal contexts. The development of fundamental principles on the protection of personal data in the fields of privacy in the telecommunications sector.

This Regulation should not affect the rights and obligations of Member States under Directives 95/46/EC and 97/66/EC. It is not intended to change existing procedures and practices lawfully implemented by the Member States in the field of national security, prevention of disorder or prevention, detection, investigation and prosecution of criminal offences in compliance with the Protocol on Privileges and Immunities of the European Communities and with international law.

The Community institutions and bodies should inform the competent authorities in the Member States when they consider that communications on their telecommunications networks should be intercepted, in keeping with the national provisions applicable.

The provisions applicable to the Community institutions and bodies should correspond to those provisions laid down in connection with the harmonisation of national laws or the implementation of other Community policies, notably in the mutual assistance sphere. It may be necessary, however, to specify and add to those provisions when it comes to ensuring protection in the case of the processing of personal data by the Community institutions and bodies.

This holds true for the rights of the individuals whose data are being processed, for the obligations of the Community institutions and bodies doing the processing, and for the powers to be vested in the independent supervisory authority responsible for ensuring that this Regulation is properly applied.

The rights accorded the data subject and the exercise thereof should not affect the obligations placed on the controller.

The independent supervisory authority should exercise its supervisory functions in accordance with the Treaty and in compliance with human rights and fundamental freedoms. It should conduct its enquiries in compliance with the Protocol on Privileges and Immunities and with the Staff Regulations of Officials of the European Communities and the conditions of employment applicable to Other Servants of the Communities.

The necessary technical measures should be adopted to allow access to the registers of processing operations carried out by Data Protection Officers through the independent supervisory authority.

(25) The decisions of the independent supervisory authority regarding exemptions, guarantees, authorisations and conditions relating to data processing operations, as defined in this Regulation, shall be published in the activities report. Independently of the publication of an annual activities report, the independent supervisory authority may publish reports on specific subjects.

(26) Certain processing operations likely to present specific risks with respect to the rights and freedoms of data subjects are subject to prior checking by the independent supervisory authority. The opinion given in the context of such prior checking, including the opinion resulting from failure to reply within the set period, shall be without prejudice to the subsequent exercise by the independent supervisory authority of its powers with regard to the processing operation in question.

(27) Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies.

(28) In certain cases the processing of data should be authorised by Community provisions or by acts transposing Community provisions. Nevertheless, in the transitional period during which such provisions do not exist, pending their adoption, the European Data Protection Supervisor may authorise processing of such data provided that adequate safeguards are adopted. In so doing, he should take account in particular of the provisions adopted by the Member States to deal with similar cases.

(29) These cases concern the processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life which are necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law or for reasons of substantial public interest. They also concern the processing of data relating to offences, criminal convictions or security measures and authorisation to apply a decision to the data subject which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her.

(30) It may be necessary to monitor the computer networks operated under the control of the Community institutions and bodies for the purposes of prevention of unauthorised use. The European Data Protection Supervisor should determine whether and under what conditions that is possible.

(31) Liability arising from any breach of this Regulation is governed by the second paragraph of Article 288 of the Treaty.

(32) In each Community institution or body one or more Data Protection Officers should ensure that the provisions of this Regulation are applied and should advise controllers on fulfilling their obligations.

(33) Under Article 21 of Council Regulation (EC) No 322/97 of 17 February 1997 on Community statistics (¹), that Regulation is to apply without prejudice to Directive 95/46/EC.

(34) Under Article 8(8) of Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (²), that Regulation is to apply without prejudice to Directive 95/46/EC.

(35) Under Article 1(2) of Council Regulation (Euratom, EEC) No 1588/90 of 11 June 1990 on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities (³), that Regulation does not derogate from the special Community or national provisions concerning the safeguarding of confidentiality other than statistical confidentiality.

(36) This Regulation does not aim to limit Member States’ room for manoeuvre in drawing up their national laws on data protection under Article 32 of Directive 95/46/EC, in accordance with Article 249 of the Treaty,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Object of the Regulation

1. In accordance with this Regulation, the institutions and bodies set up by, or on the basis of, the Treaties establishing the European Communities, hereinafter referred to as ‘Community institutions or

bodies’, shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and shall neither restrict nor prohibit the free flow of personal data between themselves or to recipients subject to the national law of the Member States implementing Directive 95/46/EC.

2. The independent supervisory authority established by this Regulation, hereinafter referred to as the European Data Protection Supervisor, shall monitor the application of the provisions of this Regulation to all processing operations carried out by a Community institution or body.

**Article 2**

**Definitions**

For the purposes of this Regulation:

(a) ‘personal data’ shall mean any information relating to an identified or identifiable natural person hereinafter referred to as ‘data subject’; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity;

(b) ‘processing of personal data’ hereinafter referred to as ‘processing’ shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c) ‘personal data filing system’ hereinafter referred to as ‘filing system’ shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

(d) ‘controller’ shall mean the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by a specific Community act, the controller or the specific criteria for its nomination may be designated by such Community act;

(e) ‘processor’ shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;

(f) ‘third party’ shall mean a natural or legal person, public authority, agency or body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorised to process the data;

(g) ‘recipient’ shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients;

(h) ‘the data subject’s consent’ shall mean any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed.

**Article 3**

**Scope**

1. This Regulation shall apply to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law.
2. This Regulation shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

CHAPTER II

GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING OF PERSONAL DATA

SECTION 1

PRINCIPLES RELATING TO DATA QUALITY

Article 4

Data quality

1. Personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of personal data for historical, statistical or scientific purposes shall not be considered incompatible provided that the controller provides appropriate safeguards, in particular to ensure that the data are not processed for any other purposes or used in support of measures or decisions regarding any particular individual;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes.

2. It shall be for the controller to ensure that paragraph 1 is complied with.

SECTION 2

CRITERIA FOR MAKING DATA PROCESSING LEGITIMATE

Article 5

Lawfulness of processing

Personal data may be processed only if:

(a) processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed, or
(b) processing is necessary for compliance with a legal obligation to which the controller is subject, or

c) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract, or

d) the data subject has unambiguously given his or her consent, or

e) processing is necessary in order to protect the vital interests of the data subject.

**Article 6**

**Change of purpose**

Without prejudice to Articles 4, 5 and 10:

1. Personal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the Community institution or body.

2. Personal data collected exclusively for ensuring the security or the control of the processing systems or operations shall not be used for any other purpose, with the exception of the prevention, investigation, detection and prosecution of serious criminal offences.

**Article 7**

**Transfer of personal data within or between Community institutions or bodies**

Without prejudice to Articles 4, 5, 6 and 10:

1. Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.

2. Where the data are transferred following a request from the recipient, both the controller and the recipient shall bear the responsibility for the legitimacy of this transfer.

   The controller shall be required to verify the competence of the recipient and to make a provisional evaluation of the necessity for the transfer of the data. If doubts arise as to this necessity, the controller shall seek further information from the recipient.

   The recipient shall ensure that the necessity for the transfer of the data can be subsequently verified.

3. The recipient shall process the personal data only for the purposes for which they were transmitted.

**Article 8**

**Transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC**

Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC,

(a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or

(b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.
Article 9

Transfer of personal data to recipients, other than Community institutions and bodies, which are not subject to Directive 95/46/EC

1. Personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out.

2. The adequacy of the level of protection afforded by the third country or international organisation in question shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the recipient third country or recipient international organisation, the rules of law, both general and sectoral, in force in the third country or international organisation in question and the professional rules and security measures which are complied with in that third country or international organisation.

3. The Community institutions and bodies shall inform the Commission and the European Data Protection Supervisor of cases where they consider the third country or international organisation in question does not ensure an adequate level of protection within the meaning of paragraph 2.

4. The Commission shall inform the Member States of any cases as referred to in paragraph 3.

5. The Community institutions and bodies shall take the necessary measures to comply with decisions taken by the Commission when it establishes, pursuant to Article 25(4) and (6) of Directive 95/46/EC, that a third country or an international organisation ensures or does not ensure an adequate level of protection.

6. By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if:

   (a) the data subject has given his or her consent unambiguously to the proposed transfer; or

   (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request; or

   (c) the transfer is necessary for the conclusion or performance of a contract entered into in the interest of the data subject between the controller and a third party; or

   (d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or

   (e) the transfer is necessary in order to protect the vital interests of the data subject; or

   (f) the transfer is made from a register which, according to Community law, is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, to the extent that the conditions laid down in Community law for consultation are fulfilled in the particular case.

7. Without prejudice to paragraph 6, the European Data Protection Supervisor may authorise a transfer or a set of transfers of personal data to a third country or international organisation which does not ensure an adequate level of protection within the meaning of paragraphs 1 and 2, where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

8. The Community institutions and bodies shall inform the European Data Protection Supervisor of categories of cases where they have applied paragraphs 6 and 7.
SECTION 3

SPECIAL CATEGORIES OF PROCESSING

Article 10

The processing of special categories of data

1. The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited.

2. Paragraph 1 shall not apply where:

(a) the data subject has given his or her express consent to the processing of those data, except where the internal rules of the Community institution or body provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his or her consent, or

(b) processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof, or, if necessary, insofar as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards, or

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his or her consent, or

(d) processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims, or

(e) processing is carried out in the course of its legitimate activities with appropriate safeguards by a non-profit-seeking body which constitutes an entity integrated in a Community institution or body, not subject to national data protection law by virtue of Article 4 of Directive 95/46/EC, and with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of this body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects.

3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.

4. Subject to the provision of appropriate safeguards, and for reasons of substantial public interest, exemptions in addition to those laid down in paragraph 2 may be laid down by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by decision of the European Data Protection Supervisor.

5. Processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards.

6. The European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body.
SECTION 4

INFORMATION TO BE GIVEN TO THE DATA SUBJECT

**Article 11**

Information to be supplied where the data have been obtained from the data subject

1. The controller shall provide a data subject from whom data relating to himself/herself are collected with at least the following information, except where he or she already has it:

   (a) the identity of the controller;
   (b) the purposes of the processing operation for which the data are intended;
   (c) the recipients or categories of recipients of the data;
   (d) whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply;
   (e) the existence of the right of access to, and the right to rectify, the data concerning him or her;
   (f) any further information such as:
      (i) the legal basis of the processing operation for which the data are intended,
      (ii) the time-limits for storing the data,
      (iii) the right to have recourse at any time to the European Data Protection Supervisor,
   insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

2. By way of derogation from paragraph 1, the provision of information or part of it, except for the information referred to in paragraph 1(a), (b) and (d), may be deferred as long as this is necessary for statistical purposes. The information must be provided as soon as the reason for which the information is withheld ceases to exist.

**Article 12**

Information to be supplied where the data have not been obtained from the data subject

1. Where the data have not been obtained from the data subject, the controller shall at the time of undertaking the recording of personal data or, if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed, provide the data subject with at least the following information, except where he or she already has it:

   (a) the identity of the controller;
   (b) the purposes of the processing operation;
   (c) the categories of data concerned;
   (d) the recipients or categories of recipients;
   (e) the existence of the right of access to, and the right to rectify, the data concerning him or her;
   (f) any further information such as:
      (i) the legal basis of the processing operation for which the data are intended,
      (ii) the time-limits for storing the data,
      (iii) the right to have recourse at any time to the European Data Protection Supervisor,
(iv) the origin of the data, except where the controller cannot disclose this information for reasons of professional secrecy,

insofar as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.

2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by Community law. In these cases the Community institution or body shall provide for appropriate safeguards after consulting the European Data Protection Supervisor.

SECTION 5

RIGHTS OF THE DATA SUBJECT

Article 13

Right of access

The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller:

(a) confirmation as to whether or not data related to him or her are being processed;

(b) information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;

(c) communication in an intelligible form of the data undergoing processing and of any available information as to their source;

(d) knowledge of the logic involved in any automated decision process concerning him or her.

Article 14

Rectification

The data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data.

Article 15

Blocking

1. The data subject shall have the right to obtain from the controller the blocking of data where:

(a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy, including the completeness, of the data, or;

(b) the controller no longer needs them for the accomplishment of its tasks but they have to be maintained for purposes of proof, or;

(c) the processing is unlawful and the data subject opposes their erasure and demands their blocking instead.

2. In automated filing systems blocking shall in principle be ensured by technical means. The fact that the personal data are blocked shall be indicated in the system in such a way that it becomes clear that the personal data may not be used.

3. Personal data blocked pursuant to this Article shall, with the exception of their storage, only be processed for purposes of proof, or with the data subject's consent, or for the protection of the rights of a third party.
4. The data subject who requested and obtained the blocking of his or her data shall be informed by the controller before the data are unblocked.

**Article 16**

**Erasure**

The data subject shall have the right to obtain from the controller the erasure of data if their processing is unlawful, particularly where the provisions of Sections 1, 2 and 3 of Chapter II have been infringed.

**Article 17**

**Notification to third parties**

The data subject shall have the right to obtain from the controller the notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking pursuant to Articles 13 to 16 unless this proves impossible or involves a disproportionate effort.

**Article 18**

**The data subject's right to object**

The data subject shall have the right:

(a) to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in the cases covered by Article 5(b), (c) and (d). Where there is a justified objection, the processing in question may no longer involve those data;

(b) to be informed before personal data are disclosed for the first time to third parties or before they are used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosure or use.

**Article 19**

**Automated individual decisions**

The data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her, such as his or her performance at work, reliability or conduct, unless the decision is expressly authorised pursuant to national or Community legislation or, if necessary, by the European Data Protection Supervisor. In either case, measures to safeguard the data subject's legitimate interests, such as arrangements allowing him or her to put his or her point of view, must be taken.

**SECTION 6**

**EXEMPTIONS AND RESTRICTIONS**

**Article 20**

**Exemptions and restrictions**

1. The Community institutions and bodies may restrict the application of Article 4(1), Article 11, Article 12(1), Articles 13 to 17 and Article 37(1) where such restriction constitutes a necessary measure to safeguard:

(a) the prevention, investigation, detection and prosecution of criminal offences;

(b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters;

(c) the protection of the data subject or of the rights and freedoms of others;
(d) the national security, public security or defence of the Member States;

(e) a monitoring, inspection or regulatory task connected, even occasionally, with the exercise of official authority in the cases referred to in (a) and (b).

2. Articles 13 to 16 shall not apply when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of compiling statistics, provided that there is clearly no risk of breaching the privacy of the data subject and that the controller provides adequate legal safeguards, in particular to ensure that the data are not used for taking measures or decisions regarding particular individuals.

3. If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the European Data Protection Supervisor.

4. If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made.

5. Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.

SECTION 7

CONFIDENTIALITY AND SECURITY OF PROCESSING

Article 21

Confidentiality of processing

A person employed with a Community institution or body and any Community institution or body itself acting as processor, with access to personal data, shall not process them except on instructions from the controller, unless required to do so by national or Community law.

Article 22

Security of processing

1. Having regard to the state of the art and the cost of their implementation, the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected.

Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing.

2. Where personal data are processed by automated means, measures shall be taken as appropriate in view of the risks in particular with the aim of:

(a) preventing any unauthorised person from gaining access to computer systems processing personal data;

(b) preventing any unauthorised reading, copying, alteration or removal of storage media;

(c) preventing any unauthorised memory inputs as well as any unauthorised disclosure, alteration or erasure of stored personal data;
(d) preventing unauthorised persons from using data-processing systems by means of data transmission facilities;
(e) ensuring that authorised users of a data-processing system can access no personal data other than those to which their access right refers;
(f) recording which personal data have been communicated, at what times and to whom;
(g) ensuring that it will subsequently be possible to check which personal data have been processed, at what times and by whom;
(h) ensuring that personal data being processed on behalf of third parties can be processed only in the manner prescribed by the contracting institution or body;
(i) ensuring that, during communication of personal data and during transport of storage media, the data cannot be read, copied or erased without authorisation;
(j) designing the organisational structure within an institution or body in such a way that it will meet the special requirements of data protection.

Article 23

Processing of personal data on behalf of controllers

1. Where a processing operation is carried out on its behalf, the controller shall choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 and ensure compliance with those measures.

2. The carrying out of a processing operation by way of a processor shall be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:

(a) the processor shall act only on instructions from the controller;
(b) the obligations set out in Articles 21 and 22 shall also be incumbent on the processor unless, by virtue of Article 16 or Article 17(3), second indent, of Directive 95/46/EC, the processor is already subject to obligations with regard to confidentiality and security laid down in the national law of one of the Member States.

3. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in Article 22 shall be in writing or in another equivalent form.

SECTION 8

DATA PROTECTION OFFICER

Article 24

Appointment and tasks of the Data Protection Officer

1. Each Community institution and Community body shall appoint at least one person as data protection officer. That person shall have the task of:

(a) ensuring that controllers and data subjects are informed of their rights and obligations pursuant to this Regulation;
(b) responding to requests from the European Data Protection Supervisor and, within the sphere of his or her competence, cooperating with the European Data Protection Supervisor at the latter's request or on his or her own initiative;
(c) ensuring in an independent manner the internal application of the provisions of this Regulation;
(d) keeping a register of the processing operations carried out by the controller, containing the items of information referred to in Article 25(2);

(e) notifying the European Data Protection Supervisor of the processing operations likely to present specific risks within the meaning of Article 27.

That person shall thus ensure that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.

2. The Data Protection Officer shall be selected on the basis of his or her personal and professional qualities and, in particular, his or her expert knowledge of data protection.

3. The selection of the Data Protection Officer shall not be liable to result in a conflict of interests between his or her duty as Data Protection Officer and any other official duties, in particular in relation to the application of the provisions of this Regulation.

4. The Data Protection Officer shall be appointed for a term of between two and five years. He or she shall be eligible for reappointment up to a maximum total term of ten years. He or she may be dismissed from the post of Data Protection Officer by the Community institution or body which appointed him or her only with the consent of the European Data Protection Supervisor, if he or she no longer fulfils the conditions required for the performance of his or her duties.

5. After his or her appointment the Data Protection Officer shall be registered with the European Data Protection Supervisor by the institution or body which appointed him or her.

6. The Community institution or body which appointed the Data Protection Officer shall provide him or her with the staff and resources necessary to carry out his or her duties.

7. With respect to the performance of his or her duties, the Data Protection Officer may not receive any instructions.

8. Further implementing rules concerning the Data Protection Officer shall be adopted by each Community institution or body in accordance with the provisions in the Annex. The implementing rules shall in particular concern the tasks, duties and powers of the Data Protection Officer.

**Article 25**

**Notification to the Data Protection Officer**

1. The controller shall give prior notice to the Data Protection Officer of any processing operation or set of such operations intended to serve a single purpose or several related purposes.

2. The information to be given shall include:

(a) the name and address of the controller and an indication of the organisational parts of an institution or body entrusted with the processing of personal data for a particular purpose;

(b) the purpose or purposes of the processing;

(c) a description of the category or categories of data subjects and of the data or categories of data relating to them;

(d) the legal basis of the processing operation for which the data are intended;

(e) the recipients or categories of recipient to whom the data might be disclosed;

(f) a general indication of the time limits for blocking and erasure of the different categories of data;

(g) proposed transfers of data to third countries or international organisations;

(h) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Article 22 to ensure security of processing.
3. Any change affecting information referred to in paragraph 2 shall be notified promptly to the Data Protection Officer.

Article 26

Register

A register of processing operations notified in accordance with Article 25 shall be kept by each Data Protection Officer.

The registers shall contain at least the information referred to in Article 25(2)(a) to (g). The registers may be inspected by any person directly or indirectly through the European Data Processing Supervisor.

SECTION 9

PRIOR CHECKING BY THE EUROPEAN DATA PROTECTION SUPERVISOR AND OBLIGATION TO COOPERATE

Article 27

Prior checking

1. Processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes shall be subject to prior checking by the European Data Protection Supervisor.

2. The following processing operations are likely to present such risks:

   (a) processing of data relating to health and to suspected offences, offences, criminal convictions or security measures;
   (b) processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct;
   (c) processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes;
   (d) processing operations for the purpose of excluding individuals from a right, benefit or contract.

3. The prior checks shall be carried out by the European Data Protection Supervisor following receipt of a notification from the Data Protection Officer who, in case of doubt as to the need for prior checking, shall consult the European Data Protection Supervisor.

4. The European Data Protection Supervisor shall deliver his or her opinion within two months following receipt of the notification. This period may be suspended until the European Data Protection Supervisor has obtained any further information that he or she may have requested. When the complexity of the matter so requires, this period may also be extended for a further two months, by decision of the European Data Protection Supervisor. This decision shall be notified to the controller prior to expiry of the initial two-month period.

If the opinion has not been delivered by the end of the two-month period, or any extension thereof, it shall be deemed to be favourable.

If the opinion of the European Data Protection Supervisor is that the notified processing may involve a breach of any provision of this Regulation, he or she shall where appropriate make proposals to avoid such breach. Where the controller does not modify the processing operation accordingly, the European Data Protection Supervisor may exercise the powers granted to him or her under Article 47(1).

5. The European Data Protection Supervisor shall keep a register of all processing operations that have been notified to him or her pursuant to paragraph 2. The register shall contain the information referred to in Article 25 and shall be open to public inspection.
Article 28

Consultation

1. The Community institutions and bodies shall inform the European Data Protection Supervisor when drawing up administrative measures relating to the processing of personal data involving a Community institution or body alone or jointly with others.

2. When it adopts a legislative proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data, the Commission shall consult the European Data Protection Supervisor.

Article 29

Obligation to provide information

The Community institutions and bodies shall inform the European Data Protection Supervisor of the measures taken further to his or her decisions or authorisations as referred to in Article 46(h).

Article 30

Obligation to cooperate

At his or her request, controllers shall assist the European Data Protection Supervisor in the performance of his or her duties, in particular by providing the information referred to in Article 47(2)(a) and by granting access as provided in Article 47(2)(b).

Article 31

Obligation to react to allegations

In response to the European Data Protection Supervisor's exercise of his or her powers under Article 47(1)(b), the controller concerned shall inform the Supervisor of its views within a reasonable period to be specified by the Supervisor. The reply shall also include a description of the measures taken, if any, in response to the remarks of the European Data Protection Supervisor.

CHAPTER III
REMEDIES

Article 32

Remedies

1. The Court of Justice of the European Communities shall have jurisdiction to hear all disputes which relate to the provisions of this Regulation, including claims for damages.

2. Without prejudice to any judicial remedy, every data subject may lodge a complaint with the European Data Protection Supervisor if he or she considers that his or her rights under Article 286 of the Treaty have been infringed as a result of the processing of his or her personal data by a Community institution or body.

In the absence of a response by the European Data Protection Supervisor within six months, the complaint shall be deemed to have been rejected.

3. Actions against decisions of the European Data Protection Supervisor shall be brought before the Court of Justice of the European Communities.

4. Any person who has suffered damage because of an unlawful processing operation or any action incompatible with this Regulation shall have the right to have the damage made good in accordance with Article 288 of the Treaty.

Article 33

Complaints by Community staff

Any person employed with a Community institution or body may lodge a complaint with the European Data Protection Supervisor regarding an alleged breach of the provisions of this Regulation governing the processing of personal data, without acting through official channels. No-one shall suffer prejudice on account of a complaint lodged with the European Data Protection Supervisor alleging a breach of the provisions governing the processing of personal data.
CHAPTER IV

PROTECTION OF PERSONAL DATA AND PRIVACY IN THE CONTEXT OF INTERNAL TELECOMMUNICATIONS NETWORKS

Article 34

Scope

Without prejudice to the other provisions of this Regulation, this Chapter shall apply to the processing of personal data in connection with the use of telecommunications networks or terminal equipment operated under the control of a Community institution or body.

For the purposes of this Chapter, ‘user’ shall mean any natural person using a telecommunications network or terminal equipment operated under the control of a Community institution or body.

Article 35

Security

1. The Community institutions and bodies shall take appropriate technical and organisational measures to safeguard the secure use of the telecommunications networks and terminal equipment, if necessary in conjunction with the providers of publicly available telecommunications services or the providers of public telecommunications networks. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

2. In the event of any particular risk of a breach of the security of the network and terminal equipment, the Community institution or body concerned shall inform users of the existence of that risk and of any possible remedies and alternative means of communication.

Article 36

Confidentiality of communications

Community institutions and bodies shall ensure the confidentiality of communications by means of telecommunications networks and terminal equipment, in accordance with the general principles of Community law.

Article 37

Traffic and billing data

1. Without prejudice to the provisions of paragraphs 2, 3 and 4, traffic data relating to users which are processed and stored to establish calls and other connections over the telecommunications network shall be erased or made anonymous upon termination of the call or other connection.

2. If necessary, traffic data as indicated in a list agreed by the European Data Protection Supervisor may be processed for the purpose of telecommunications budget and traffic management, including the verification of authorised use of the telecommunications systems. These data shall be erased or made anonymous as soon as possible and no later than six months after collection, unless they need to be kept for a longer period to establish, exercise or defend a right in a legal claim pending before a court.

3. Processing of traffic and billing data shall only be carried out by persons handling billing, traffic or budget management.

4. Users of the telecommunication networks shall have the right to receive non-itemised bills or other records of calls made.

Article 38

Directories of users

1. Personal data contained in printed or electronic directories of users and access to such directories shall be limited to what is strictly necessary for the specific purposes of the directory.
2. The Community institutions and bodies shall take all the necessary measures to prevent personal data contained in those directories, regardless of whether they are accessible to the public or not, from being used for direct marketing purposes.

**Article 39**

**Presentation and restriction of calling and connected line identification**

1. Where presentation of calling-line identification is offered, the calling user shall have the possibility via a simple means, free of charge, to eliminate the presentation of the calling-line identification.

2. Where presentation of calling-line identification is offered, the called user shall have the possibility via a simple means, free of charge, to prevent the presentation of the calling-line identification of incoming calls.

3. Where presentation of connected-line identification is offered, the called user shall have the possibility via a simple means, free of charge, to eliminate the presentation of the connected-line identification to the calling user.

4. Where presentation of calling or connected-line identification is offered, the Community institutions and bodies shall inform the users thereof and of the possibilities set out in paragraphs 1, 2 and 3.

**Article 40**

**Derogations**

Community institutions and bodies shall ensure that there are transparent procedures governing the way in which they may override the elimination of the presentation of calling-line identification:

(a) on a temporary basis, upon application of a user requesting the tracing of malicious or nuisance calls;

(b) on a per-line basis for organisational entities dealing with emergency calls, for the purpose of answering such calls.

**CHAPTER V**

**INDEPENDENT SUPERVISORY AUTHORITY: THE EUROPEAN DATA PROTECTION SUPERVISOR**

**Article 41**

**European Data Protection Supervisor**

1. An independent supervisory authority is hereby established referred to as the European Data Protection Supervisor.

2. With respect to the processing of personal data, the European Data Protection Supervisor shall be responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies.

The European Data Protection Supervisor shall be responsible for monitoring and ensuring the application of the provisions of this Regulation and any other Community act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Community institution or body, and for advising Community institutions and bodies and data subjects on all matters concerning the processing of personal data. To these ends he or she shall fulfil the duties provided for in Article 46 and exercise the powers granted in Article 47.

**Article 42**

**Appointment**

1. The European Parliament and the Council shall appoint by common accord the European Data Protection Supervisor for a term of five years, on the basis of a list drawn up by the Commission following a public call for candidates.

An Assistant Supervisor shall be appointed in accordance with the same procedure and for the same term, who shall assist the Supervisor in all the latter’s duties and act as a replacement when the Supervisor is absent or prevented from attending to them.
2. The European Data Protection Supervisor shall be chosen from persons whose independence is beyond doubt and who are acknowledged as having the experience and skills required to perform the duties of European Data Protection Supervisor, for example because they belong or have belonged to the supervisory authorities referred to in Article 28 of Directive 95/46/EC.

3. The European Data Protection Supervisor shall be eligible for reappointment.

4. Apart from normal replacement or death, the duties of the European Data Protection Supervisor shall end in the event of resignation or compulsory retirement in accordance with paragraph 5.

5. The European Data Protection Supervisor may be dismissed or deprived of his or her right to a pension or other benefits in its stead by the Court of Justice at the request of the European Parliament, the Council or the Commission, if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she is guilty of serious misconduct.

6. In the event of normal replacement or voluntary resignation, the European Data Protection Supervisor shall nevertheless remain in office until he or she has been replaced.

7. Articles 12 to 15 and 18 of the Protocol on the Privileges and Immunities of the European Communities shall also apply to the European Data Protection Supervisor.

8. Paragraphs 2 to 7 shall apply to the Assistant Supervisor.

Article 43

Regulations and general conditions governing the performance of the European Data Protection Supervisor's duties, staff and financial resources

1. The European Parliament, the Council and the Commission shall by common accord determine the regulations and general conditions governing the performance of the European Data Protection Supervisor's duties and in particular his or her salary, allowances and any other benefits in lieu of remuneration.

2. The budget authority shall ensure that the European Data Protection Supervisor is provided with the human and financial resources necessary for the performance of his or her tasks.

3. The European Data Protection Supervisor's budget shall be shown in a separate budget heading in Section VIII of the general budget of the European Union.

4. The European Data Protection Supervisor shall be assisted by a Secretariat. The officials and the other staff members of the Secretariat shall be appointed by the European Data Protection Supervisor; their superior shall be the European Data Protection Supervisor and they shall be subject exclusively to his or her direction. Their numbers shall be decided each year as part of the budgetary procedure.

5. The officials and the other staff members of the European Data Protection Supervisor's Secretariat shall be subject to the rules and regulations applicable to officials and other servants of the European Communities.

6. In matters concerning the Secretariat staff, the European Data Protection Supervisor shall have the same status as the institutions within the meaning of Article 1 of the Staff Regulations of Officials of the European Communities.

Article 44

Independence

1. The European Data Protection Supervisor shall act in complete independence in the performance of his or her duties.

2. The European Data Protection Supervisor shall, in the performance of his or her duties, neither seek nor take instructions from anybody.

3. The European Data Protection Supervisor shall refrain from any action incompatible with his or her duties and shall not, during his or her term of office, engage in any other occupation, whether gainful or not.
4. The European Data Protection Supervisor shall, after his or her term of office, behave with integrity and discretion as regards the acceptance of appointments and benefits.

**Article 45**

**Professional secrecy**

The European Data Protection Supervisor and his or her staff shall, both during and after their term of office, be subject to a duty of professional secrecy with regard to any confidential information which has come to their knowledge in the course of the performance of their official duties.

**Article 46**

**Duties**

The European Data Protection Supervisor shall:

(a) hear and investigate complaints, and inform the data subject of the outcome within a reasonable period;

(b) conduct inquiries either on his or her own initiative or on the basis of a complaint, and inform the data subjects of the outcome within a reasonable period;

(c) monitor and ensure the application of the provisions of this Regulation and any other Community act relating to the protection of natural persons with regard to the processing of personal data by a Community institution or body with the exception of the Court of Justice of the European Communities acting in its judicial capacity;

(d) advise all Community institutions and bodies, either on his or her own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data;

(e) monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies;

(f) (i) cooperate with the national supervisory authorities referred to in Article 28 of Directive 95/46/EC in the countries to which that Directive applies to the extent necessary for the performance of their respective duties, in particular by exchanging all useful information, requesting such authority or body to exercise its powers or responding to a request from such authority or body;

(ii) also cooperate with the supervisory data protection bodies established under Title VI of the Treaty on European Union particularly with a view to improving consistency in applying the rules and procedures with which they are respectively responsible for ensuring compliance;

(g) participate in the activities of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up by Article 29 of Directive 95/46/EC;

(h) determine, give reasons for and make public the exemptions, safeguards, authorisations and conditions mentioned in Article 10(2)(b),(4), (5) and (6), in Article 12(2), in Article 19 and in Article 37(2);

(i) keep a register of processing operations notified to him or her by virtue of Article 27(2) and registered in accordance with Article 27(5), and provide means of access to the registers kept by the Data Protection Officers under Article 26;

(j) carry out a prior check of processing notified to him or her;

(k) establish his or her Rules of Procedure.
Article 47

Powers

1. The European Data Protection Supervisor may:

(a) give advice to data subjects in the exercise of their rights;

(b) refer the matter to the controller in the event of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, make proposals for remedying that breach and for improving the protection of the data subjects;

(c) order that requests to exercise certain rights in relation to data be complied with where such requests have been refused in breach of Articles 13 to 19;

(d) warn or admonish the controller;

(e) order the rectification, blocking, erasure or destruction of all data when they have been processed in breach of the provisions governing the processing of personal data and the notification of such actions to third parties to whom the data have been disclosed;

(f) impose a temporary or definitive ban on processing;

(g) refer the matter to the Community institution or body concerned and, if necessary, to the European Parliament, the Council and the Commission;

(h) refer the matter to the Court of Justice of the European Communities under the conditions provided for in the Treaty;

(i) intervene in actions brought before the Court of Justice of the European Communities.

2. The European Data Protection Supervisor shall have the power:

(a) to obtain from a controller or Community institution or body access to all personal data and to all information necessary for his or her enquiries;

(b) to obtain access to any premises in which a controller or Community institution or body carries on its activities when there are reasonable grounds for presuming that an activity covered by this Regulation is being carried out there.

Article 48

Activities report

1. The European Data Protection Supervisor shall submit an annual report on his or her activities to the European Parliament, the Council and the Commission and at the same time make it public.

2. The European Data Protection Supervisor shall forward the activities report to the other Community institutions and bodies, which may submit comments with a view to possible examination of the report in the European Parliament, in particular in relation to the description of the measures taken in response to the remarks made by the European Data Protection Supervisor under Article 31.

CHAPTER VI

FINAL PROVISIONS

Article 49

Sanctions

Any failure to comply with the obligations pursuant to this Regulation, whether intentionally or through negligence on his or her part, shall make an official or other servant of the European Communities liable to disciplinary action, in accordance with the rules and procedures laid down in the Staff Regulations of Officials of the European Communities or in the conditions of employment applicable to other servants.
Article 50

Transitional period

Community institutions and bodies shall ensure that processing operations already under way on the date this Regulation enters into force are brought into conformity with this Regulation within one year of that date.

Article 51

Entry into force

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

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

Done at Brussels, 18 December 2000.

For the European Parliament
The President
N. Fontaine

For the Council
The President
D. Voynet

ANNEX

1. The Data Protection Officer may make recommendations for the practical improvement of data protection to the Community institution or body which appointed him or her and advise it and the controller concerned on matters concerning the application of data protection provisions. Furthermore he or she may, on his or her own initiative or at the request of the Community institution or body which appointed him or her, the controller, the Staff Committee concerned or any individual, investigate matters and occurrences directly relating to his or her tasks and which come to his or her notice, and report back to the person who commissioned the investigation or to the controller.

2. The Data Protection Officer may be consulted by the Community institution or body which appointed him or her, by the controller concerned, by the Staff Committee concerned and by any individual, without going through the official channels, on any matter concerning the interpretation or application of this Regulation.

3. No one shall suffer prejudice on account of a matter brought to the attention of the competent Data Protection Officer alleging that a breach of the provisions of this Regulation has taken place.

4. Every controller concerned shall be required to assist the Data Protection Officer in performing his or her duties and to give information in reply to questions. In performing his or her duties, the Data Protection Officer shall have access at all times to the data forming the subject-matter of processing operations and to all offices, data-processing installations and data carriers.

5. To the extent required, the Data Protection Officer shall be relieved of other activities. The Data Protection Officer and his or her staff, to whom Article 287 of the Treaty apply, shall be required not to divulge information or documents which they obtain in the course of their duties.
REGULATION No 1
determining the languages to be used by the European Economic Community

(0J L 17, 6.10.1958, p. 385)

Amended by:

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Amended by:

|►A2 | Act of Accession of Greece | L 291 | 17 | 19.11.1979 |
|►A3 | Act of Accession of Spain and Portugal | L 302 | 23 | 15.11.1985 |
|►A5 | Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded | L 236 | 33 | 23.9.2003 |
REGULATION No 1
determining the languages to be used by the European Economic Community

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

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

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

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

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

Article 3

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

Article 4

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

Article 5

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

Article 6

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.
Article 7

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

Article 8

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.
REGULATION (EEC, EURATOM) No 1182/71 OF THE COUNCIL
of 3 June 1971
determining the rules applicable to periods, dates and time limits

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

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

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament1;

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

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

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

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

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

HAS ADOPTED THIS REGULATION:

Article 1

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

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

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

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

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

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

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

CHAPTER II

Dates and time limits

Article 4

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

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

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

Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission—or of any provisions of such acts—fixed at a given date shall occur at the beginning of the first hour of the day falling on that date.

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

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

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

This Regulation shall enter into force on 1 July 1971.

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

Done at Luxembourg, 3 June 1971.

For the Council

The President

R. PLEVEN
COMMISSION DECISION
of 17 October 2000
amending its Rules of Procedure

(2000/633/EC, ECSC, Euratom)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 218(2) thereof,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 16 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 131 thereof,

Having regard to the Treaty on the European Union, and in particular Articles 28(1) and 41(1) thereof,

HAS DECIDED AS FOLLOWS:

Article 1

The rules of Procedure of the Commission are hereby amended as follows:

1. In Article 23, the following paragraph is added:

‘The Commission may adopt supplementary measures relating to the functioning of the Commission and of its departments, which shall be annexed to these Rules of Procedure.’

2. The Code of Good Administrative Behaviour contained in the Annex to this Decision is annexed.

Article 2

This Decision shall enter into force on 1 November 2000.

Article 3

This Decision shall be published in the Official Journal of the European Communities.

Done at Brussels, 17 October 2000.

For the Commission

The President

Romano PRODI
ANNEX

CODE OF GOOD ADMINISTRATIVE BEHAVIOUR FOR STAFF OF THE EUROPEAN COMMISSION IN THEIR RELATIONS WITH THE PUBLIC

Quality service

The Commission and its staff have a duty to serve the Community interest and, in so doing, the public interest. The public legitimately expects quality service and an administration that is open, accessible and properly run. Quality service calls for the Commission and its staff to be courteous, objective and impartial.

Purpose

In order to enable the Commission to meet its obligations of good administrative behaviour and in particular in the dealings that the Commission has with the public, the Commission undertakes to observe the standards of good administrative behaviour set out in this Code and to be guided by these in its daily work.

Scope

The Code is binding on all staff covered by the Staff Regulations of officials of the European Communities and the Conditions of employment of other servants of the European Communities (hereinafter referred to as the “Staff Regulations”) and the other provisions on relations between the Commission and its staff that are applicable to officials and other servants of the European Communities. However, persons employed under private law contracts, experts on secondment from national civil services and trainees, etc. working for the Commission should also be guided by it in their daily work.

Relations between the Commission and its staff are governed exclusively by the Staff Regulations.

1. GENERAL PRINCIPLES OF GOOD ADMINISTRATION

The Commission respects the following general principles in its relations with the public.

Lawfulness

The Commission acts in accordance with the law and applies the Rules and Procedures laid down in Community legislation.

Non-discrimination and equal treatment

The Commission respects the principle of non-discrimination and in particular, guarantees equal treatment for members of the public irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation. Thus, differences in treatment of similar cases must be specifically warranted by the relevant features of the particular case in hand.

Proportionality

The Commission ensures that the measures taken are proportional to the aim pursued.

In particular, the Commission will ensure that the applications of this Code never leads to the imposition of administrative or budgetary burdens out of proportion to the benefit expected.

Consistency

The Commission shall be consistent in its administrative behaviour and shall follow its normal practice. Any exceptions to this principle must be duly justified.

2. GUIDELINES FOR GOOD ADMINISTRATIVE BEHAVIOUR

Objectivity and impartiality

Staff shall always act objectively and impartially, in the Community interest and for the public good. They shall act independently within the framework of the policy fixed by the Commission and their conduct shall never be guided by personal or national interest or political pressure.
Information on administrative procedures

Where a member of the public requires information relating to a Commission administrative procedure, staff shall ensure that this information is provided within the deadline fixed for the relevant procedure.

3. INFORMATION ON THE RIGHTS OF INTERESTED PARTIES

Listening to all parties with a direct interest

Where Community law provides that interested parties should be heard, staff shall ensure that an opportunity is given to them to make their views known.

Duty to justify decisions

A Commission decision should clearly state the reasons on which it is based and should be communicated to the persons and parties concerned.

As a general rule, full justification for decisions should be given. However, where it may not be possible, for example because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of individual decisions, standard replies may be given. These standard replies should include the principal reasons justifying the decision taken. Furthermore, an interested party who expressly requests a detailed justification shall be provided with it.

Duty to state arrangements for appeals

Where Community law so provides, decisions notified shall clearly state that an appeal is possible and describe how to submit it, (the name and office address of the person or department with whom the appeal must be lodged and the deadline for lodging it).

Where appropriate, decisions should refer to the possibility of starting judicial proceedings and/or of lodging a complaint with the European Ombudsman in accordance with Article 230 or 195 of the Treaty establishing the European Community.

4. DEALING WITH ENQUIRIES

The Commission undertakes to answer enquiries in the most appropriate manner and as quickly as possible.

Requests for documents

If a document has already been published, the person making the enquiry should be directed to the sales agents of the Office for Official Publications of the European Communities or to the documentation or information centres which provide free access to documents, such as Info-Points, European documentation centres, etc. Many documents are also easily accessible in electronic form.

The rules on access to documents are laid down in a specific measure.

Correspondence

In accordance with Article 21 of the Treaty establishing the European Community, the Commission shall reply to letters in the language of the initial letter, provided that it was written in one of the official languages of the Community.

A reply to a letter addressed to the Commission shall be sent within 15 working days from the date of receipt of the letter by the responsible Commission department. The reply should identify the person responsible for the matter and state how he or she may be contacted.

If a reply cannot be sent within 15 working days, and in all cases where the reply requires other work on it, such as interdepartmental consultation or translation, the member of staff responsible should send a holding reply, indicating a date by which the addressee may expect to be sent a reply in the light of this additional work, taking into account the relative urgency and complexity of the matter.

If the reply is to be drawn up by a department other than the one to which the initial correspondence is addressed, the person making the enquiry should be informed of the name and office address of the person to whom the letter has been passed.

These rules do not apply to correspondence which can reasonably be regarded as improper, for example, because it is repetitive, abusive and/or pointless. Then the Commission reserves the right to discontinue any such exchanges of correspondence.

Telephone communication

When answering the telephone, staff shall identify themselves or their department. They shall return telephone calls as promptly as possible.

Staff replying to enquiries shall provide information on subjects for which they have direct responsibility and should direct the caller to the specific appropriate source in other cases. If necessary, they should refer callers to their superior or consult him or her before giving the information.
Where enquiries concern areas for which staff are directly responsible, they shall establish the identity of the caller and check whether the information has already been made public before giving it out. If this is not the case, the member of staff may consider that it is not in the Community interest for the information to be disclosed. In this case he or she should explain why they are unable to disclose it and refer in appropriate cases to the obligation to exercise discretion as laid down in Article 17 of the Staff Regulations.

When appropriate, staff should request confirmation in writing of the enquiries made by telephone.

Electronic mail

Staff shall reply to e-mail messages promptly following the guidelines described in the section on telephone communication.

However, where the e-mail message is, by its nature, the equivalent of a letter, it shall be handled according to the guidelines for handling correspondence and shall be subject to the same deadlines.

Requests from the media

The Press and Communication Service is responsible for contacts with the media. However, when requests for information concern technical subjects falling within their specific areas of responsibility, staff may answer them.

5. PROTECTION OF PERSONAL DATA AND CONFIDENTIAL INFORMATION

The Commission and its staff shall respect, in particular:

— the rules on the protection of personal privacy and personal data,
— the obligations set out in Article 287 of the Treaty establishing the European Community and in particular those which relate to professional secrecy,
— the rules on secrecy in criminal investigations,
— the confidentiality of matters falling within the ambit of the various committees and bodies provided for in Article 9 of and Annexes II and III to the Staff Regulations.

6. COMPLAINTS

The European Commission

Complaints may be lodged concerning a possible breach of the principles set out in this Code directly with the Secretariat-General of the European Commission, which shall forward it to the relevant department.

The Director-General or head of Department shall reply to the complainant in writing, within two months. The complainant then has one month in which to apply to the Secretary-General of the European Commission to review the outcome of the complaint. The Secretary-General shall reply to the request for a review within one month.

The European Ombudsman

Complaints may also be lodged with the European Ombudsman in accordance with Article 195 of the Treaty establishing the European Community and the Statute of the European Ombudsman.'
Empowerment documents - listing

General


Empowerment in relation to Regulation No 1/2003


• Empowerment for the application of Art. 22(2) of Regulation No 1/2003 (decision requesting an NCA to undertake an inspection) (PV(2006) 1763 (pt. 5.4) and SEC(2006) 1368)

Empowerment on Leniency

• Empowerment for the granting/rejecting of immunity/reduction of fines (Leniency notice 2002) (PV(2002)1555 (pt. 7.4) and SEC(2002)119)

• Empowerment for the granting/rejecting of immunity/reduction of fines (Leniency notice 2006) (PV(2002) 1733 (pt. 4.4) and SEC(2006)187/2)


Sub-delegation

• Measures sub-delegated by the Competition Commissioner to the Director General (PH/2004/769)

• Modalities of the exercise of the sub-delegation to the Director General: Note of P. Lowe to M. Monti of 25.5.2004 (D(2004) 002885)

Delegation

EU Competition Law
Cartel legislation
and other reference texts on 1 January 2013

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