

Commission Notice on cooperation within the Network of Competition Authorities

(2004/C 101/03)

(Text with EEA relevance)

1. INTRODUCTION

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ⁽¹⁾ (hereafter the 'Council Regulation') creates a system of parallel competences in which the Commission and the Member States' competition authorities (hereafter the 'NCAs') ⁽²⁾ can apply Article 81 and Article 82 of the EC Treaty (hereafter the 'Treaty'). Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe. The network is called 'European Competition Network' (ECN).
2. The structure of the NCAs varies between Member States. In some Member States, one body investigates cases and takes all types of decisions. In other Member States, the functions are divided between two bodies, one which is in charge of the investigation of the case and another, often a college, which is responsible for deciding the case. Finally, in certain Member States, prohibition decisions and/or decisions imposing a fine can only be taken by a court: another competition authority acts as a prosecutor bringing the case before that court. Subject to the general principle of effectiveness, Article 35 of the Council Regulation allows Member States to choose the body or bodies which will be designated as national competition authorities and to allocate functions between them. Under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law ⁽³⁾. The enforcement systems of the Member States differ but they have recognised the standards of each other's systems as a basis for cooperation ⁽⁴⁾.
3. The network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules. The Council Regulation together with the joint statement of the Council and the Commission on the functioning of the European Competition Network sets out the main principles of the functioning of the network. This notice presents the details of the system.
4. Consultations and exchanges within the network are matters between public enforcers and do not alter any

rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring due process in the cases it deals with.

2. DIVISION OF WORK**2.1. Principles of allocation**

5. The Council Regulation is based on a system of parallel competences in which all competition authorities have the power to apply Articles 81 or 82 of the Treaty and are responsible for an efficient division of work with respect to those cases where an investigation is deemed to be necessary. At the same time each network member retains full discretion in deciding whether or not to investigate a case. Under this system of parallel competences, cases will be dealt with by:
 - a single NCA, possibly with the assistance of NCAs of other Member States; or
 - several NCAs acting in parallel; or
 - the Commission.
6. In most instances the authority that receives a complaint or starts an ex-officio procedure ⁽⁵⁾ will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure (see paragraph 18 below) where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act (see paragraphs 8 to 15 below).
7. Where re-allocation is found to be necessary for an effective protection of competition and of the Community interest, network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible ⁽⁶⁾. In any event, re-allocation should be a quick and efficient process and not hold up ongoing investigations.

8. An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:

1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

9. The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is better placed to act (see below paragraphs 14 and 15).

10. It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory.

Example 1: Undertakings situated in Member State A are involved in a price fixing cartel on products that are mainly sold in Member State A.

The NCA in A is well placed to deal with the case.

11. Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end.

Example 2: Two undertakings have set up a joint venture in Member State A. The joint venture provides services in Member States A and B and gives rise to a competition problem. A cease-and-desist order is considered to be sufficient to deal with the case effectively because it can bring an end to the entire infringement. Evidence is located mainly at the offices of the joint venture in Member State A.

The NCAs in A and B are both well placed to deal with the case but single action by the NCA in A would be sufficient and more efficient than single action by NCA in B or parallel action by both NCAs.

12. Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.

Example 3: Two undertakings agree on a market sharing agreement, restricting the activity of the company located in Member State A to Member State A and the activity of the company located in Member State B to Member State B.

The NCAs in A and B are well placed to deal with the case in parallel, each one for its respective territory.

13. The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

14. The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).

Example 4: Two undertakings agree to share markets or fix prices for the whole territory of the Community. The Commission is well placed to deal with the case.

Example 5: An undertaking, dominant in four different national markets, abuses its position by imposing fidelity rebates on its distributors in all these markets. The Commission is well placed to deal with the case. It could also deal with one national market so as to create a 'leading' case and other national markets could be dealt with by NCAs, particularly if each national market requires a separate assessment.

15. Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.

2.2. Mechanisms of cooperation for the purpose of case allocation and assistance

2.2.1. Information at the beginning of the procedure (Article 11 of the Council Regulation)

16. In order to detect multiple procedures and to ensure that cases are dealt with by a well placed competition authority, the members of the network have to be informed at an early stage of the cases pending before the various competition authorities (7). If a case is to be re-allocated, it is indeed in the best interest both of the network and of the undertakings concerned that the re-allocation takes place quickly.

17. The Council Regulation creates a mechanism for the competition authorities to inform each other in order to ensure an efficient and quick re-allocation of cases. Article 11(3) of the Council Regulation lays down an obligation for NCAs to inform the Commission when acting under Article 81 or 82 of the Treaty before or without delay after commencing the first formal investigative measure. It also states that the information may be made available to other NCAs (8). The rationale of Article 11(3) of the Council Regulation is to allow the network to detect multiple procedures and address possible case re-allocation issues as soon as an authority starts investigating a case. Information should therefore be provided to NCAs and the Commission before or just after any step similar to the measures of investigation that can be undertaken by the Commission under Articles 18 to 21 of the Council Regulation. The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. Network members will inform each other of pending cases by means of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case. They will also provide each other with updates when a relevant change occurs.

18. Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two

months, starting from the date of the first information sent to the network pursuant to Article 11 of the Council Regulation. During this period, competition authorities will endeavour to reach an agreement on a possible re-allocation and, where relevant, on the modalities for parallel action.

19. In general, the competition authority or authorities that is/are dealing with a case at the end of the re-allocation period should continue to deal with the case until the completion of the proceedings. Re-allocation of a case after the initial allocation period of two months should only occur where the facts known about the case change materially during the course of the proceedings.

2.2.2. Suspension or termination of proceedings (Article 13 of the Council Regulation)

20. If the same agreement or practice is brought before several competition authorities, be it because they have received a complaint or have opened a procedure on their own initiative, Article 13 of the Council Regulation provides a legal basis for suspending proceedings or rejecting a complaint on the grounds that another authority is dealing with the case or has dealt with the case. In Article 13 of the Council Regulation, 'dealing with the case' does not merely mean that a complaint has been lodged with another authority. It means that the other authority is investigating or has investigated the case on its own behalf.

21. Article 13 of the Council Regulation applies when another authority has dealt or is dealing with the competition issue raised by the complainant, even if the authority in question has acted or acts on the basis of a complaint lodged by a different complainant or as a result of an *ex-officio* procedure. This implies that Article 13 of the Council Regulation can be invoked when the agreement or practice involves the same infringement(s) on the same relevant geographic and product markets.

22. An NCA may suspend or close its proceedings but it has no obligation to do so. Article 13 of the Council Regulation leaves scope for appreciation of the peculiarities of each individual case. This flexibility is important: if a complaint was rejected by an authority following an investigation of the substance of the case, another authority may not want to re-examine the case. On the other hand, if a complaint was rejected for other reasons (e.g. the authority was unable to collect the evidence necessary

to prove the infringement), another authority may wish to carry out its own investigation and deal with the case. This flexibility is also reflected, for pending cases, in the choice open to each NCA as to whether it closes or suspends its proceedings. An authority may be unwilling to close a case before the outcome of another authority's proceedings is clear. The ability to suspend its proceedings allows the authority to retain its ability to decide at a later point whether or not to terminate its proceedings. Such flexibility also facilitates consistent application of the rules.

23. Where an authority closes or suspends proceedings because another authority is dealing with the case, it may transfer — in accordance with Article 12 of the Council Regulation — the information provided by the complainant to the authority which is to deal with the case.

24. Article 13 of the Council Regulation can also be applied to part of a complaint or to part of the proceedings in a case. It may be that only part of a complaint or of an ex-officio procedure overlaps with a case already dealt or being dealt with by another competition authority. In that case, the competition authority to which the complaint is brought is entitled to reject part of the complaint on the basis of Article 13 of the Council Regulation and to deal with the rest of the complaint in an appropriate manner. The same principle applies to the termination of proceedings.

25. Article 13 of the Council Regulation is not the only legal basis for suspending or closing ex-officio proceedings or rejecting complaints. NCAs may also be able to do so according to their national procedural law. The Commission may also reject a complaint for lack of Community interest or other reasons pertaining to the nature of the complaint⁽⁹⁾.

2.2.3. Exchange and use of confidential information (Article 12 of the Council Regulation)

26. A key element of the functioning of the network is the power of all the competition authorities to exchange and use information (including documents, statements and digital information) which has been collected by them for the purpose of applying Article 81 or Article 82 of the Treaty. This power is a precondition for efficient and effective allocation and handling of cases.

27. Article 12 of the Council Regulation states that for the purpose of applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities of the Member States shall have the power to provide one

another with and use in evidence any matter of fact or of law, including confidential information. This means that exchanges of information may not only take place between an NCA and the Commission but also between and amongst NCAs. Article 12 of the Council Regulation takes precedence over any contrary law of a Member State. The question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. When transmitting information the transmitting authority may inform the receiving authority whether the gathering of the information was contested or could still be contested.

28. The exchange and use of information contains in particular the following safeguards for undertakings and individuals.

(a) First, Article 28 of the Council Regulation states that 'the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities (. . .) shall not disclose information acquired or exchanged by them pursuant to the' Council Regulation which is 'of the kind covered by the obligation of professional secrecy'. However, the legitimate interest of undertakings in the protection of their business secrets may not prejudice the disclosure of information necessary to prove an infringement of Articles 81 and 82 of the Treaty. The term 'professional secrecy' used in Article 28 of the Council Regulation is a Community law concept and includes in particular business secrets and other confidential information. This will create a common minimum level of protection throughout the Community.

(b) The second safeguard given to undertakings relates to the use of information which has been exchanged within the network. Under Article 12(2) of the Council Regulation, information so exchanged can only be used in evidence for the application of Articles 81 and 82 of the Treaty and for the subject matter for which it was collected⁽¹⁰⁾. According to Article 12(2) of the Council Regulation, the information exchanged may also be used for the purpose of applying national competition law in parallel in the same case. This is, however, only possible if the application of national law does not lead to an outcome as regards the finding of an infringement different from that under Articles 81 and 82 of the Treaty.

(c) The third safeguard given by the Council Regulation relates to sanctions on individuals on the basis of information exchanged pursuant to Article 12(1). The Council Regulation only provides for sanctions on undertakings for violations of Articles 81 and 82 of

the Treaty. Some national laws also provide for sanctions on individuals in connection with violations of Articles 81 and 82 of the Treaty. Individuals normally enjoy more extensive rights of defence (e.g. a right to remain silent compared to undertakings which may only refuse to answer questions which would lead them to admit that they have committed an infringement⁽¹¹⁾). Article 12(3) of the Council Regulation ensures that information collected from undertakings cannot be used in a way which would circumvent the higher protection of individuals. This provision precludes sanctions being imposed on individuals on the basis of information exchanged pursuant to the Council Regulation if the laws of the transmitting and the receiving authorities do not provide for sanctions of a similar kind in respect of individuals, unless the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the receiving authority. The qualification of the sanctions by national law ('administrative' or 'criminal') is not relevant for the purpose of applying Article 12(3) of the Council Regulation. The Council Regulation intends to create a distinction between sanctions which result in custody and other types of sanctions such as fines on individuals and other personal sanctions. If both the legal system of the transmitting and that of the receiving authority provide for sanctions of a similar kind (e.g. in both Member States, fines can be imposed on a member of the staff of an undertaking who has been involved in the violation of Article 81 or 82 of the Treaty), information exchanged pursuant to Article 12 of the Council Regulation can be used by the receiving authority. In that case, procedural safeguards in both systems are considered to be equivalent. If on the other hand, both legal systems do not provide for sanctions of a similar kind, the information can only be used if the same level of protection of the rights of the individual has been respected in the case at hand (see Article 12(3) of the Council Regulation). In that latter case however, custodial sanctions can only be imposed where both the transmitting and the receiving authority have the power to impose such a sanction.

2.2.4. Investigations (Article 22 of the Council Regulation)

29. The Council Regulation provides that an NCA may ask another NCA for assistance in order to collect information on its behalf. An NCA can ask another NCA to carry out fact-finding measures on its behalf. Article 12 of the Council Regulation empowers the assisting NCA to transmit the information it has collected to the requesting NCA. Any exchange between or amongst NCAs and use in evidence by the requesting NCA of such information shall be carried out in accordance with Article 12 of the Council Regulation. Where an NCA acts on behalf of another NCA, it acts pursuant to its own rules of procedure, and under its own powers of investigation.

30. Under Article 22(2) of the Council Regulation, the Commission can ask an NCA to carry out an inspection on its behalf. The Commission can either adopt a decision pursuant to Article 20(4) of the Council Regulation or simply issue a request to the NCA. The NCA officials will exercise their powers in accordance with their national law. The agents of the Commission may assist the NCA during the inspection.

2.3. Position of undertakings

2.3.1. General

31. All network members will endeavour to make the allocation of cases a quick and efficient process. Given the fact that the Council Regulation has created a system of parallel competences, the allocation of cases between members of the network constitutes a mere division of labour where some authorities abstain from acting. The allocation of cases therefore does not create individual rights for the companies involved in or affected by an infringement to have the case dealt with by a particular authority.

32. If a case is re-allocated to a given competition authority, it is because the application of the allocation criteria set out above led to the conclusion that this authority is well placed to deal with the case by single or parallel action. The competition authority to which the case is re-allocated would have been in a position, in any event, to commence an *ex-officio* procedure against the infringement.

33. Furthermore, all competition authorities apply Community competition law and the Council Regulation sets out mechanisms to ensure that the rules are applied in a consistent way.

34. If a case is re-allocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved.

2.3.2. Position of complainants

35. If a complaint is lodged with the Commission pursuant to Article 7 of the Council Regulation and if the Commission does not investigate the complaint or prohibit the agreement or practice complained of, the complainant has a right to obtain a decision rejecting his complaint. This is without prejudice to Article 7(3) of the Commission implementing regulation⁽¹²⁾. The rights of complainants who lodge a complaint with an NCA are governed by the applicable national law.
36. In addition, Article 13 of the Council Regulation gives all NCAs the possibility of suspending or rejecting a complaint on the ground that another competition authority is dealing or has dealt with the same case. That provision also allows the Commission to reject a complaint on the ground that a competition authority of a Member State is dealing or has dealt with the case. Article 12 of the Council Regulation allows the transfer of information between competition authorities within the network subject to the safeguards provided in that Article (see paragraph 28 above).

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

37. The Commission considers⁽¹³⁾ that it is in the Community interest to grant favourable treatment to undertakings which co-operate with it in the investigation of cartel infringements. A number of Member States have also adopted leniency programmes⁽¹⁴⁾ relating to cartel investigations. The aim of these leniency programmes is to facilitate the detection by competition authorities of cartel activity and also thereby to act as a deterrent to participation in unlawful cartels.
38. In the absence of a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article 81 of the Treaty in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question⁽¹⁵⁾. In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to file leniency applications with the relevant authorities simultaneously. It is for the applicant to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.
39. As for all cases where Articles 81 and 82 of the Treaty are applied, where an NCA deals with a case which has been

initiated as a result of a leniency application, it must inform the Commission and may make the information available to other members of the network pursuant to Article 11(3) of the Council Regulation (cf. paragraphs 16 *et seq.*). The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. In such cases, however, information submitted to the network pursuant to Article 11 will not be used by other members of the network as the basis for starting an investigation on their own behalf whether under the competition rules of the Treaty or, in the case of NCAs, under their national competition law or other laws⁽¹⁶⁾. This is without prejudice to any power of the authority to open an investigation on the basis of information received from other sources or, subject to paragraphs 40 and 41 below, to request, be provided with and use information pursuant to Article 12 from any member of the network, including the network member to whom the leniency application was submitted.

40. Save as provided under paragraph 41, information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to another authority pursuant to Article 12 of the Council Regulation if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. The network members will encourage leniency applicants to give such consent, in particular as regards disclosure to authorities in respect of which it would be open to the applicant to obtain lenient treatment. Once the leniency applicant has given consent to the transmission of information to another authority, that consent may not be withdrawn. This paragraph is without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.
41. Notwithstanding the above, the consent of the applicant for the transmission of information to another authority pursuant to Article 12 of the Council Regulation is not required in any of the following circumstances:
1. No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority.

2. No consent is required where the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions:

- (a) on the leniency applicant;
- (b) on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme;
- (c) on any employee or former employee of any of the persons covered by (a) or (b).

A copy of the receiving authority's written commitment will be provided to the applicant.

3. In the case of information collected by a network member under Article 22(1) of the Council Regulation on behalf of and for the account of the network member to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the network member to whom the application was made.

42. Information relating to cases initiated as a result of a leniency application and which has been submitted to the Commission under Article 11(3) of the Council Regulation⁽¹⁷⁾ will only be made available to those NCAs that have committed themselves to respecting the principles set out above (see paragraph 72). The same principle applies where a case has been initiated by the Commission as a result of a leniency application made to the Commission. This does not affect the power of any authority to be provided with information under Article 12 of the Council Regulation, provided however that the provisions of paragraphs 40 and 41 are respected.

3. CONSISTENT APPLICATION OF EC COMPETITION RULES⁽¹⁸⁾

3.1. Mechanism of cooperation (Article 11(4) and 11(5) of the Council Regulation)

43. The Council Regulation pursues the objective that Articles 81 and 82 of the Treaty are applied in a consistent manner throughout the Community. In this respect NCAs will respect the convergence rule contained in Article 3(2) of the Council Regulation. In line with

Article 16(2) they cannot — when ruling on agreements, decisions and practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision — take decisions, which would run counter to the decisions adopted by the Commission. Within the network of competition authorities the Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law.

44. According to Article 11(4) of the Council Regulation, no later than 30 days before the adoption of a decision applying Articles 81 or 82 of the Treaty and requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block-exemption regulation, NCAs shall inform the Commission. They have to send to the Commission, at the latest 30 days before the adoption of the decision, a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action.

45. As under Article 11(3) of the Council Regulation, the obligation is to inform the Commission, but the information may be shared by the NCA informing the Commission with the other members of the network.

46. Where an NCA has informed the Commission pursuant to Article 11(4) of the Council Regulation and the 30 days deadline has expired, the decision can be adopted as long as the Commission has not initiated proceedings. The Commission may make written observations on the case before the adoption of the decision by the NCA. The NCA and the Commission will make the appropriate efforts to ensure the consistent application of Community law (cf. paragraph 3 above).

47. If special circumstances require that a national decision is taken in less than 30 days following the transmission of information pursuant to Article 11(4) of the Council Regulation, the NCA concerned may ask the Commission for a swifter reaction. The Commission will endeavour to react as quickly as possible.

48. Other types of decisions, i.e. decisions rejecting complaints, decisions closing an *ex-officio* procedure or decisions ordering interim measures, can also be important from a competition policy point of view, and the network members may have an interest in informing each other about them and possibly discussing them. NCAs can therefore on the basis of Article 11(5) of the Council Regulation inform the Commission and thereby inform the network of any other case in which EC competition law is applied.

49. All members of the network should inform each other about the closure of their procedures which have been notified to the network pursuant to Article 11(2) and (3) of the Council Regulation ⁽¹⁹⁾.

3.2. The initiation of proceedings by the Commission under Article 11(6) of the Council Regulation

50. According to the case law of the Court of Justice, the Commission, entrusted by Article 85(1) of the Treaty with the task of ensuring the application of the principles laid down in Articles 81 and 82 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy ⁽²⁰⁾. It can adopt individual decisions under Articles 81 and 82 of the Treaty at any time.

51. Article 11(6) of the Council Regulation states that the initiation by the Commission of proceedings for the adoption of a decision under the Council Regulation shall relieve all NCAs of their competence to apply Articles 81 and 82 of the Treaty. This means that once the Commission has opened proceedings, NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

52. The initiation of proceedings by the Commission is a formal act ⁽²¹⁾ by which the Commission indicates its intention to adopt a decision under Chapter III of the Council Regulation. It can occur at any stage of the investigation of the case by the Commission. The mere fact that the Commission has received a complaint is not in itself sufficient to relieve NCAs of their competence.

53. Two situations can arise. First, where the Commission is the first competition authority to initiate proceedings in a case for the adoption of a decision under the Council Regulation, national competition authorities may no longer deal with the case. Article 11(6) of the Council Regulation provides that once the Commission has initiated proceedings, the NCAs can no longer start their own procedure with a view to applying Articles 81 and 82 of the Treaty to the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

54. The second situation is where one or more NCAs have informed the network pursuant to Article 11(3) of the Council Regulation that they are acting on a given case.

During the initial allocation period (indicative time period of two months, see paragraph 18 above), the Commission can initiate proceedings with the effects of Article 11(6) of the Council Regulation after having consulted the authorities concerned. After the allocation phase, the Commission will in principle only apply Article 11(6) of the Council Regulation if one of the following situations arises:

(a) Network members envisage conflicting decisions in the same case.

(b) Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission;

(c) Network member(s) is (are) unduly drawing out proceedings in the case;

(d) There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement;

(e) The NCA(s) concerned do not object.

55. If an NCA is already acting on a case, the Commission will explain the reasons for the application of Article 11(6) of the Council Regulation in writing to the NCA concerned and to the other members of the Network ⁽²²⁾.

56. The Commission will announce to the network its intention of applying Article 11(6) of the Council Regulation in due time, so that Network members will have the possibility of asking for a meeting of the Advisory Committee on the matter before the Commission initiates proceedings.

57. The Commission will normally not — and to the extent that Community interest is not at stake — adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of the Council Regulation has taken place and the Commission has not made use of Article 11(6) of the Council Regulation.

4. THE ROLE AND THE FUNCTIONING OF THE ADVISORY COMMITTEE IN THE NEW SYSTEM

58. The Advisory Committee is the forum where experts from the various competition authorities discuss individual cases and general issues of Community competition law ⁽²³⁾.

4.1. Scope of the consultation

4.1.1. Decisions of the Commission

59. The Advisory Committee is consulted prior to the Commission taking any decision pursuant to Articles 7, 8, 9, 10, 23, 24(2) or 29(1) of the Council Regulation. The Commission must take the utmost account of the opinion of the Advisory Committee and inform the Committee of the manner in which its opinion has been taken into account.

60. For decisions adopting interim measures, the Advisory Committee is consulted following a swifter and lighter procedure, on the basis of a short explanatory note and the operative part of the decision.

4.1.2. Decisions of NCAs

61. It is in the interest of the network that important cases dealt with by NCAs under Articles 81 and 82 of the Treaty can be discussed in the Advisory Committee. The Council Regulation enables the Commission to put a given case being dealt with by an NCA on the agenda of the Advisory Committee. Discussion can be requested by the Commission or by any Member State. In either case, the Commission will put the case on the agenda after having informed the NCA(s) concerned. This discussion in the Advisory Committee will not lead to a formal opinion.

62. In important cases, the Advisory Committee could also serve as a forum for the discussion of case allocation. In particular, where the Commission intends to apply Article 11(6) of the Council Regulation after the initial allocation period, the case can be discussed in the Advisory Committee before the Commission initiates proceedings. The Advisory Committee may issue an informal statement on the matter.

4.1.3. Implementing measures, block-exemption regulations, guidelines and other notices (Article 33 of the Council Regulation)

63. The Advisory Committee will be consulted on draft Commission regulations as provided for in the relevant Council Regulations.

64. Beside regulations, the Commission may also adopt notices and guidelines. These more flexible tools are very useful for explaining and announcing the Commission's policy, and for explaining its interpretation of the competition rules. The Advisory Committee will also be consulted on these notices and guidelines.

4.2. Procedure

4.2.1. Normal procedure

65. For consultation on Commission draft decisions, the meeting of the Advisory Committee takes place at the earliest 14 days after the invitation to the meeting is sent by the Commission. The Commission attaches to the invitation a summary of the case, a list of the most important documents, i.e. the documents needed to assess the case, and a draft decision. The Advisory Committee gives an opinion on the Commission draft decision. At the request of one or several members, the opinion shall be reasoned.

66. The Council Regulation allows for the possibility of the Member States agreeing upon a shorter period of time between the sending of the invitation and the meeting.

4.2.2. Written procedure

67. The Council Regulation provides for the possibility of a written consultation procedure. If no Member State objects, the Commission can consult the Member States by sending the documents to them and setting a deadline within which they can comment on the draft. This deadline would not normally be shorter than 14 days, except for decisions on interim measures pursuant to Article 8 of the Council Regulation. Where a Member State requests that a meeting takes place, the Commission will arrange for such a meeting.

4.3. Publication of the opinion of the Advisory Committee

68. The Advisory Committee can recommend the publication of its opinion. In that event, the Commission will carry out such publication simultaneously with the decision, taking into account the legitimate interest of undertakings in the protection of their business secrets.

5. FINAL REMARKS

69. This Notice is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Court of First Instance and the Court of Justice.

70. This Notice will be the subject of periodic review carried out jointly by the NCAs and the Commission. On the basis of the experience acquired, it will be reviewed no later than at the end of the third year after its adoption.

71. This notice replaces the Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 81 and 82 of the Treaty published in 1997 ⁽²⁴⁾.

6. STATEMENT BY OTHER NETWORK MEMBERS

72. The principles set out in this notice will also be abided by those Member States' competition authorities which have signed a statement in the form of the Annex to this

Notice. In this statement they acknowledge the principles of this notice, including the principles relating to the protection of applicants claiming the benefit of a leniency programme ⁽²⁵⁾ and declare that they will abide by them. A list of these authorities is published on the website of the European Commission. It will be updated if appropriate.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

⁽²⁾ In this notice, the European Commission and the NCAs are collectively referred to as 'the competition authorities'.

⁽³⁾ Cf. ECJ case 68/88 — Commission v. Greece [1989] ECR 2965 (recitals 23 to 25)

⁽⁴⁾ See paragraph 8 of the Joint Statement of the Council and the Commission on the functioning of the network available from the Council register at <http://register.consilium.eu.int> (document No 15435/02 ADD 1).

⁽⁵⁾ In this Notice the term 'procedure' is used for investigations and/or formal proceedings for the adoption of a decision pursuant to the Council Regulation conducted by an NCA or the Commission, as the case may be.

⁽⁶⁾ See Recital 18 of the Council Regulation.

⁽⁷⁾ For cases initiated following a leniency application see paragraphs 37 *et subseq.*

⁽⁸⁾ The intention of making any information exchanged pursuant to Article 11 available and easily accessible to all network members is however expressed in the Joint Statement on the functioning of the network mentioned above in footnote 4.

⁽⁹⁾ See Commission notice on complaints.

⁽¹⁰⁾ See ECJ case 85/87 — Dow Benelux, [1989] ECR 3137 (recitals 17-20).

⁽¹¹⁾ See ECJ case 374/87 — Orkem [1989] ECR 3283 and CFI, case T-112/98 — Mannesmannröhren-Werke AG, [2001] ECR II-729.

⁽¹²⁾ Commission Regulation (EC) No 773/2004, OJ L 123, 27.4.2004.

⁽¹³⁾ OJ C 45, 19.2.2002, p. 3 at paragraph 3.

⁽¹⁴⁾ In this Notice, the term 'leniency programme' is used to describe all programmes (including the Commission's programme) which offer either full immunity or a significant reduction in the penalties which would otherwise have been imposed on a participant in a cartel, in exchange for the freely volunteered disclosure of information on the cartel which satisfies specific criteria prior to or during the investigative stage of the case. The term does not cover reductions in the penalty granted for other reasons. The Commission will publish on its website a list of those authorities that operate a leniency programme.

⁽¹⁵⁾ See paragraphs 8 to 15 above.

⁽¹⁶⁾ Similarly, information transmitted with a view to obtaining assistance from the receiving authority under Articles 20 or 21 of the Council Regulation or of carrying out an investigation or other fact-finding measure under Article 22 of the Council Regulation may only be used for the purpose of the application of the said Articles.

⁽¹⁷⁾ See paragraph 17.

⁽¹⁸⁾ Article 15 of the Council Regulation empowers NCAs and the Commission to submit written and, with the permission of the Court, oral submissions in court proceedings for the application of Articles 81 and 82 of the Treaty. This is a very important tool for ensuring consistent application of Community rules. In exercising this power NCAs and the Commission will cooperate closely.

⁽¹⁹⁾ See paragraph 24 of the Joint Statement on the functioning of the network mentioned above in footnote 4.

⁽²⁰⁾ See ECJ case C-344/98 — Masterfoods Ltd, [2000] ECR I-11369.

⁽²¹⁾ The ECJ has defined that concept in the case 48/72 — SA Brasserie de Haecht, [1973] ECR 77: 'the initiation of a procedure within the meaning of Article 9 of Regulation No 17 implies an authoritative act of the Commission, evidencing its intention of taking a decision.'

⁽²²⁾ See paragraph 22 of the Joint Statement mentioned above in footnote 4.

⁽²³⁾ In accordance with Article 14(2) of the Council Regulation, where horizontal issues such as block-exemption regulations and guidelines are being discussed, Member States can appoint an additional representative competent in competition matters and who does not necessarily belong to the competition authority.

⁽²⁴⁾ OJ C 313, 15.10.1997, p. 3.

⁽²⁵⁾ See paragraphs 37 *et subseq.*

ANNEX

STATEMENT REGARDING THE COMMISSION NOTICE ON COOPERATION WITHIN THE NETWORK OF COMPETITION AUTHORITIES

In order to cooperate closely with a view to protecting competition within the European Union in the interest of consumers, the undersigned competition authority:

1. Acknowledges the principles set out in the Commission Notice on Cooperation within the Network of Competition Authorities; and
2. Declares that it will abide by those principles, which include principles relating to the protection of applicants claiming the benefit of a leniency programme, in any case in which it is acting or may act and to which those principles apply.

.....
(place)

.....
(date)
