



*European Economic and Social Committee*

**INT/214**

Brussels, 11 December 2003

## **OPINION**

of the European Economic and Social Committee

on the

**Commission Regulation relating to proceedings by the Commission pursuant to  
Articles 81 and 82 of the EC Treaty and on draft Commission Notices**

OJ C 243 of 10.10.2003, p. 3

and on the

**Draft Commission Notice on cooperation within the Network of Competition Authorities**  
OJ C 243 of 10.10.2003, p. 10

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On 26 September 2003, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

*Commission Regulation relating to proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty and on draft Commission Notices*  
[OJ C 243 of 10.10.2003, p. 3]

and on the

*Draft Commission Notice on cooperation within the Network of Competition Authorities*  
[OJ C 243 of 10.10.2003, p. 10]

The Section for the Single Market, Production and Consumption was responsible for the Committee's work on the subject.

Due to the urgency of the work, the European Economic and Social Committee, at its 404th plenary on 10 and 11 December 2003 (meeting of 11 December), appointed **Mr Metzler** as rapporteur-general and adopted the following opinion by 45 votes in favour with four abstentions.

## 1. Introduction

1.1 In accordance with Article 33 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 (hereinafter "R 1/2003"), the Commission is authorised to establish such rules as are relevant to the implementation of this Regulation. The above-mentioned drafts of the Commission Regulation (EC) relating to proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty and of Commission Notices refer to the new R 1/2003, the application of which they are intended to explain.

1.2 The Committee will base its comments on two premises, which are of decisive importance when assessing the package as a whole. Firstly, the modernisation package should make a significant contribution to clarifying what action is required of those affected by the various proposals, such that competition law can develop uniformly in the individual Member States, leading in the long term to a common competition culture without regional differences. Secondly, these principles should be put into practice without any loss of legal rights for undertakings affected by the proposed legislation. Simplification of proceedings must not lead to a substantive loss of businesses' legal rights.

1.3 There follows a brief overview of the main points of the draft Regulation relating to proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (hereinafter Proceedings Regulation) and of the six Notices.

## 2. Proceedings Regulation

### 2.1 Gist

2.1.1 The Proceedings Regulation regulates the initiation of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, gives more detailed information on investigations by the Commission and regulates the handling of complaints, for which a new Form C is to be introduced. It also sets out rules concerning the right of affected undertakings to be heard, access to information and the use of confidential information.

### 2.2 Comments

2.2.1 The Committee welcomes the Commission's proposal to subject itself to conditions protecting those being interviewed as part of an investigation by informing them of the purpose of the interview and of any record that is made, and by giving them – or, in the case of inspections, the undertaking – the opportunity to correct the records.

2.2.2 The Commission ought, however, further to amend Article 3 (Power to take statements) such that the Commission is also obliged to supply the person giving the statement with appropriate information about the voluntary nature of that statement, of their right to remain silent where applicable, and of the right to have a lawyer present. In addition, it should also give information about any sanctions that may be connected with the statement. Similar rules should apply to oral questions during inspections (Article 4). This is in line with the principles of due process. Care should also be taken to ensure that Article 4 does not contradict the second indent of Article 23(1)(d) of R1/2003, whereby representatives of an undertaking may rectify statements made by any member of staff. Article 4(2) should therefore make it clear that not only the statements of unauthorised members of staff (and company representatives), but also those of staff members and company representatives with the relevant authority may be corrected. In addition, company representatives and members of staff should themselves have the right to check their own statements.

2.2.3 According to the Commission's proposal, the right of undertakings to submit a defence should be limited to a certain time period following notification of the objections; once this time period has elapsed, any further submission is to be precluded (Article 10(2)). The Committee takes the view that this new arrangement goes unnecessarily far in curtailing undertakings' rights of defence; this is not in line with current practice. In addition, this will not allow facts that come to light after the deadline has expired to be taken into consideration. This would be unjust. Further recourse to the courts should not be ruled out either.

2.2.4 Article 15(1) states that access to the file shall only be granted after the notification of the statement of objections. In practice, however, experience has shown that it makes sense to allow access to the file even before the notification of the statement of objections, as long as this does not impede the investigation. The procedure could be tightened up in this way.

2.2.5 The Commission should also consider amending Article 18 (Time limits) to allow undertakings to apply for time limits to be extended on reasonable grounds.

### **3. Notice on Cooperation within the Network of Competition Authorities**

#### **3.1 Gist**

3.1.1 R1/2003 states the principle of parallel competence. Violations of competition law can be prosecuted either by the national competition authorities (NCA) or by the Commission. Cases should be dealt with by a "well-placed authority", i.e. one within whose jurisdiction the consequences of the infringement are felt, insofar as it is able to bring an end to the infringement and gather the necessary evidence. This may apply to several NCAs. If more than three NCAs are involved in (or have jurisdiction over) a particular case, the Commission is "particularly well placed". In addition, the Commission can also take on a case that has particular importance for the further development of competition policy; where this is necessary to ensure effective implementation of competition rules; or if the case is closely connected with other areas of Community law. For the purpose of allocating cases, the authorities should exchange information, either before or without delay after commencing the first formal investigative measure. Furthermore, Article 13 of R1/2003 gives a NCA the authority to suspend or abandon proceedings if another NCA is dealing with the case. However, no NCA is required to exercise that right.

3.1.2 The main purpose of the network is to facilitate the exchange of information. Therefore, every NCA should supply such material to other NCAs as is useful for applying EU competition rules. However, commercial confidentiality must be respected, and the information must only be used for a specific purpose. The rights of defence of natural persons must also be respected where information ends up in a country where infringements of competition law can lead to penalties under criminal law. In addition, any NCA can request assistance from another in gathering evidence needed to prosecute infringements of competition law. This also applies to relations between the Commission and the NCAs.

3.1.3 A request for treatment according to a leniency programme should be applied for with each authority that may have competence in the particular case individually and, where possible, simultaneously. Acceptance of such application by one authority does not imply acceptance by another. If other NCAs are informed of such an application, they are not permitted to use the enclosed information to begin proceedings of their own. Furthermore, evidence submitted by the applicant may only be passed on with his permission, unless the undertaking has also submitted a principal witness application to the receiving authority or the receiving authority undertakes not to use the information to impose sanctions on the applicant (or persons covered by the application).

#### **3.2 Comments**

3.2.1 The Committee approves of close cooperation between the Commission and the NCAs, as this will encourage consistent decisions in the individual Member States and could lead to a

uniform European competition culture. However, it would like to see the one-stop-shop principle more firmly established to exclude the possibility of companies being the subject of antitrust proceedings, and hence of multiple penalties, in more than one Member State at once. It is doubtful that, by merely calling for cases to be handled by one authority wherever possible, the Notice offers sufficient protection to companies. The Committee therefore recommends that detailed criteria for clear, unambiguous case allocation be drawn up.

3.2.2 The fact that a company's application for leniency in accordance with one country's arrangements is not considered to be an application for similar treatment under other countries' competition laws does not take sufficient account of companies' need for legal certainty. From the point of view of efficiency, one application within the network should be sufficient to fulfil the application requirements in all Member States. When companies are racing to be the first to "blow the whistle", making a later application in another Member State could have unfair consequences for the company. It would also make sense to list, in a footnote to the Notice, places where the rules of other NCAs covering leniency arrangements for principal witnesses can be found.

#### **4. Notice on the cooperation between the Commission and the courts of EU Member States in the application of Articles 81 and 82 of the EC Treaty**

##### **4.1 Gist**

4.1.1 The application of Articles 81 and 82 of the EC Treaty is not only incumbent on the Commission and the NCAs, but also – in particular with regard to civil claims for breach of contract and compensation (and often in cases of temporary legal protection) and in matters of enforcement – on national courts. According to the EC Treaty system, the interpretation of Articles 81 and 82 of the EC Treaty by the Commission does not as a rule take precedence over their interpretation by national courts; rather, both are competent to interpret Articles 81 and 82 of the EC Treaty; only the ECJ has the right to overrule either of them. The danger of divergent decisions resulting from parallel competence is addressed in Article 16(1) of R1/2003, which states that national courts cannot take decisions based on Treaty Articles 81 and 82 which run counter to a decision already adopted by the Commission, or contemplated by the Commission in proceedings it has initiated, in the same matter.

4.1.2 In order to a) enable national courts to comply with Article 16(1) of R1/2003, b) avoid divergences between the Commission and national courts even in cases where the Commission has not (yet) initiated proceedings, and c) to make best use of the Commission's expertise, Article 15 of R1/2003 provides for wide-ranging cooperation between national courts and the Commission. The Notice explains – after an introductory summary of the duties of national courts in applying Articles 81 and 82 of the EC Treaty as provided for by the jurisprudence of the ECJ and by Article 16(1) of R1/2003 – the cooperation between national courts and the Commission in accordance with Article 15 of R1/2003. As the Commission clearly states in Point 42 of the Notice, the latter is issued in order to assist national courts and is not binding upon them. In addition, the cooperation is to take place according to the procedural regulations of the Member State whose national court is involved in the particular case while nevertheless observing the basic legal principles laid down by the ECJ.

## 4.2 **Comments**

4.2.1 The Committee agrees with the aim of R 1/2003 to strengthen the ability of private individuals to enforce competition law through national courts. Local, case-by-case enforcement of competition law is in line with the free-market principles of the Common Market and is thus, alongside the administrative enforcement by the Commission and NCAs, indispensable. The Committee therefore welcomes the additional transparency that the Commission's Notice creates for national courts. The Committee hopes that the specific, case-by-case cooperation between the Commission and national courts provided for by Article 15 of R 1/2003 will help to bring about stronger, more effective legal protection of private individuals and businesses in the Member States. In particular, the Commission can provide valuable advice and assistance to the national courts of the accession countries, who are not yet entirely familiar with Community law.

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

### 5.1 **Gist**

5.1.1 R 1/2003 abolished the notification system so that the Commission can focus its enforcement policy on serious infringements of competition law. As a general rule, it is up to businesses to assess the legality of their practices or their behaviour for themselves. In the case of new or unresolved questions, they can ask the Commission for informal advice; however, they have no absolute right to such advice. They will then receive a guidance letter. The Commission emphasises that it will only issue such guidance insofar as this is compatible with its enforcement priorities. It "considers" whether it is "appropriate" to issue a guidance letter according to three criteria: the novel nature of the question; the usefulness of issuing a guidance letter; and the presence of sufficient information. Requests for guidance letters will not be considered where the questions are hypothetical or are pending before a national court or a NCA.

5.1.2 Guidance letters are not binding on national courts and NCAs. Similarly, the Commission is not bound, but is willing to "take" the letter "into account" when considering a complaint concerning the same facts.

### 5.2 **Comments**

5.2.1 The legal exception system relieves businesses of an unnecessary bureaucratic burden. However, the legal uncertainty for companies which nevertheless goes along with this change could be further mitigated in the Notice if businesses were given the right to apply for a reasoned opinion from the Commission in specific, difficult cases instead of leaving them to rely on informal advice which the Commission is not obliged to give out. The Commission should always be willing to give businesses a binding opinion on new questions of law and of fact; otherwise, it is not entirely clear what value a guidance letter would have. In the light of the further tightening of already severe

sanctions, information from the Commission that is purely advisory in nature does not give sufficient legal protection.

## **6. Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EU Treaty**

### **6.1 Gist**

6.1.1 First, the Notice explains that a complainant has the choice of going to a national court or to the Commission. The complaint is subject to the parallel competence of the Commission and the NCA. The Commission is entitled to give differing degrees of priority to the complaints brought before it, according to the degree to which the case affects the Community interest. In addition, the complaint must be submitted on Form C. The Commission then examines whether the complainant can show a legitimate interest.

6.1.2 The Commission will assess the Community interest required for an investigation by the Commission according to the following criteria: whether the complainant can pursue his claim before national courts; how significant the reported infringements are; what effect they have on competition within the Community as a whole; how strong the evidence is; and the scope of the investigation that will be required. It will also look at whether the conduct that is being complained about has, in the meantime, ceased and/or whether the undertaking being complained about is willing to change its conduct.

### **6.2 Comments**

6.2.1 With the directly applicable exception system now in force, agreements that infringe competition law are, in some cases, no longer so easy for the Commission or the NCAs to detect. Consequently, complaints have an important role to play in exposing infringements; the conditions for accepting them should not, therefore, be too stringent. However, because of the large degree of discretion the Commission has, it is not clear to the complainant at the outset whether the Commission will actually follow up a complaint. This could discourage potential complainants, for whom Form C means extra bureaucratic effort, from filing a complaint. Clearer rules, predictable in their application, on the Commission's discretionary powers to act would be desirable, as would an unambiguous definition of the Community interest requirement for handling of complaints by the Commission.

## **7. Guidelines on the effect on trade concept contained in Articles 81 and 82 of the EC Treaty**

### **7.1 Gist**

7.1.1 The guidelines contain a comprehensive summary of the principles that the Community courts have developed for the interpretation of the effect on trade concept contained in Articles 81 and 82 of the EC Treaty. They also contain a new rule drawn up by the Commission

(known as the NAAT rule) indicating when agreements in general are unlikely to be capable of appreciably affecting trade between Member States.

7.1.2 After setting out basic principles and explaining the individual parts of the effect on trade clause, the guidelines set out the NAAT rule from the point of view of appreciability. Under this rule, agreements should not generally come under the effect on trade clause if a) the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5% and b) the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed Euro 40 million. The guidelines then set out the application of these principles and of the NAAT rule to the most common types of agreements and abuses, namely import and export agreements; cartels; horizontal cooperation agreements; vertical agreements; and the abuse of dominant market positions in several Member States. In each case, a distinction is made between agreements and practices that affect several Member States and those that are limited to one Member State or part thereof.

## 7.2 **Comments**

7.2.1 The Committee welcomes the detailed description of the application of the effect on trade clause by the Commission, in particular the listing of particular types of cases, since the questions that are raised in each of these cases are quite different. However, the Committee questions whether the NAAT rule developed by the Commission can, in a mere Notice, create the intended legal certainty for the affected undertakings. Against the background of the traditionally broad interpretation of the effect on trade clause by the Community courts, the legal certainty would be increased if the Commission were to enshrine the rule in a Regulation.

7.2.2 In addition, the Committee wonders whether rolling back Community law in favour of national competition law, as is clearly intended by the introduction of the NAAT rule, is sensible. Since by now virtually all Member States have national competition laws, whose uniform interpretation in cases where the effect on trade clause does not apply can be ensured neither by the Commission nor by the Community courts, there is a risk, particularly in the case of cross-border agreements between SMEs, that several different pieces of legislation may apply, which may be interpreted more strictly than Community law.

## 8. **Guidelines on the application of EC Treaty Article 81(3)**

### 8.1 **Gist**

8.1.1 The move from the exemption system to a directly applicable exception system effected by R 1/2003 means that undertakings now not only have to check for themselves whether the conditions of Article 81(1) of the EC Treaty are fulfilled, but also whether the exception set out in Treaty Article 81(3) applies. In order to make this easier for undertakings, the Commission has set out guidelines on Article 81(3), which complement the existing guidelines on the applicability of

Article 81 of the EC Treaty to horizontal cooperation agreements (OJ 2001 C 3/2) and guidelines on vertical restraints (OJ 2000 C 291/1).

8.1.2 The guidelines first explain the general framework of Article 81 of the EC Treaty and, in particular, the application of Article 81(1), as Article 81(3) can only be meaningfully interpreted against this background. The guidelines then go into detail on each of the four conditions of Article 81(3). This consists mainly of a summary of the Commission's past practice in decision-making and the jurisprudence of the courts. However, there is some clear and detailed explanation of the criteria, clearly with the aim of achieving concrete econometric verifiability.

## 8.2 Comments

8.2.1 The Committee welcomes the Commission's efforts to make the wording of the criteria for the applicability of Article 81(3) EC clear. However, it is doubtful whether all the exemption rulings of the past would live up to this new, detailed, quantitative catalogue of requirements. In the opinion of the Committee, the reason for this is not that the quality of the Commission's past decisions was poor; rather, it lies in the fundamental methodological problem – also mentioned in the guidelines – of quantifying efficiency gains. Even in large companies with highly detailed accounting systems, investment decisions are not based purely on detailed forecasts, but also – indeed primarily – on the basis of "strategic vision", as forecast models cannot always predict exactly how all the relevant microeconomic factors will interact with market parameters.

8.2.2 The Committee is not calling into question the Commission's basic economic approach, but would call upon the Commission, when making judgements according to Treaty Article 81(3), to take into consideration the "good business sense" of a (real or hypothetical) entrepreneur in the relevant market. Article 81(3) should not apply only when it is almost certain that there is a net benefit to the consumer, but should come into play whenever the Commission can be sufficiently certain that the intention of the parties to an agreement is not to eliminate the competition, but rather to improve their own competitiveness. Only in this way can it be ensured that desirable, innovative competition does not fall foul of the antitrust rule of Article 81 of the EC Treaty.

Brussels, 11 December 2003.

The President  
of the  
European Economic and Social Committee

The Secretary-General  
of the  
European Economic and Social Committee

**Roger Briesch**

**Patrick Venturini**